INTERPRETING GROUP-BASED RELIGIOUS FREEDOMS: SABARIMALA AND THE MOVEMENT FROM DEFINITIONS TO LIMITATIONS

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The question of balancing religious rights has long troubled Indian courts. The Supreme Court's approach towards dealing with such rights has (frequently) been to determine the 'essentiality' of the practice in question and/or the 'denomination' status of the religious group claiming the right. Through this approach, the Court effectively cements definitional barriers to the right itself and averts more contentious questions as to the permissible limitations to the exercise of the right. The opinions of Chandrachud J and Malhotra J in the recent decision of Indian Young Lawyers Association v. The State of Kerala ('Sabarimala') seem to move away from this definition-centric focus; while Chandrachud J advocates for an 'anti-exclusion' principle to thwart exclusionary religious practices, Malhotra J advocates for judicial deference in favour of religious freedom. In this essay, I examine the many errors and pitfalls inherent to the definition-centric approaches of determining 'denominations' and 'essential practices'. Subsequently, I use the different approaches offered in Sabarimala to explore alternative avenues of dealing with group-based religious rights. Finally, I offer an interpretational alternative which borrows from Malhotra J's approach of defining religious 'denominations' and 'essential practices' broadly, in favour of religious groups, while advocating for a broader scope of permissible limitations to these rights under Article 17, through the anti-exclusion principle offered by Chandrachud J.

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INTRODUCTION

In 2018, the Supreme Court of India in *Indian Young Lawyers Association v. The State of Kerala*[1] (hereinafter *'Sabarimala'*) decided that the practice of excluding menstruating women (aged between the ages of 10 to 50) from entering the Lord Ayyappa Temple in Sabarimala was not constitutionally permissible. The three majority opinions of the Court, endorsed by four out of the five judges on the bench, agreed that: (a) the devotees of Lord Ayyappa did not form a religious 'denomination' under Article 26; and (b) the practice of excluding menstruating women was not 'essential' to the denomination.[2] In addition to this,

[1] Indian Young Lawyers Association v. State of Kerala, (2019) 11 SCC 1 (hereinafter 'Sabarimala'). The paragraph numbers referred throughout the essay refer to the paragraph numbers in the SCC copy of the judgment.
[2] *Id.* at ¶¶ 192-193 (Misra and Khanwilkar JJ). Although Chandrachud J and Misra J specifically suggest that the practice of excluding women is not 'essential' to the devotees of Lord Ayyappa, Nariman J does not explicitly hold this. Instead, Nariman J assumes that the practice is essential to the respondents while rejecting their status as a denomination for the purposes of Article 26.

Chandrachud J's concurrent opinion separately held that the practice was abhorrent to 'constitutional morality'[3] and impermissible in light of the prohibition against untouchability in Article 17.[4] The sole dissenter, Malhotra J, denied jurisdiction to the petitioners[5] and further held that the practice fell within the definition of 'essential practices' and the petitioner's claim did not fall within the express limitations to Article 26.[6] The Court's decision led to fervent protests in the state of Kerala, with devotees of Lord Ayyappa demanding that their religious freedom be protected.[7] In November 2019, the Supreme Court ordered the constitution of a larger bench to decide on questions relating to the interplay of Articles 25, 26, 14, 15 and 17.[8] Subsequently, a nine-judge bench was constituted which has framed the legal questions it would be answering.[9]

This narrative of *Sabarimala* displays the delicate nature of the issues enmeshed with balancing religious freedoms. It is clear that both religious freedoms and the constitutional promise of equality are deeply entrenched in the Constitution, and therefore balancing the two becomes a complex task, given, particularly, that the Constitution is seemingly silent as to the method of such balancing. However, this delicate problem is exacerbated by the Supreme Court's approach in dealing with such questions. The Court's traditional approach so far has been to focus on narrow and definition-centric questions regarding the 'denomination' status and 'essential practices' of the religion, instead of dealing with the question of balancing religious freedoms against permissible limitations. There are many problems with using such an approach, primarily that these tests have no basis in the text of Articles 25 or 26 of the Constitution and that courts lack sufficient expertise to deal with theological questions as to the 'essentiality' of religious practices. Ultimately, through this approach, courts side-step the more complex and controversial questions regarding the permissible limitations to religious freedoms by replacing them with an enquiry into the 'essentiality' of the practice itself.

However, in *Sabarimala* there is a unique shift in approach in the opinions of Chandrachud J and Malhotra J, who seemingly move *away* from the traditional definition-centric approach. Although both judges arrive at diametrically opposite conclusions, their

[3] *Id*. at ¶ 301.
[4] *Id*. at ¶ 358.
[5] *Id*. at ¶ 447.
[6] *Id*. at ¶ 476.
[7] *Sabarimala: India's Kerala paralysed amid protests over temple entry*, BBC (Jun. 3, 2019), https://www.bbc.com/news/world-asia-india-46744142 (Last accessed 17 May 2020).
[8] Kantaru Rajeevaru v. Indian Young Lawyers Association, (2020) 2 SCC 1.
[9] Kantaru Rajeevaru v. Indian Young Lawyers Association, (2020) 3 SCC 52.

opinions allow us to examine alternative modes of interpreting religious freedoms (specifically those in Article 26), by engaging with the question of the permissibility of limitations to religious freedoms.

Given that the nine-judge bench of the Supreme Court shall, in the near future, rethink the existing doctrinal precedents on religious freedoms, this essay encourages the Court to think beyond the contours of the 'essential practices' test and offers interpretational alternatives to deal with questions similar to the one raised in *Sabarimala*. Therefore, by using *Sabarimala* and its opinions as anchors, I attempt to consolidate a set of interpretational alternatives and discuss the pitfalls and opportunities of each. Ultimately, I advocate for a limited scope of review at the definition stage of review (defining 'denomination' of the group and 'essentiality' of the practice involved) when dealing with claims of religious freedoms, and focus instead on the permissibility of the 'limitations' imposed on the said practice.

It is important to clarify that in advocating for a thin scope of review in the definition stage, I do not endorse a deferential attitude to interpreting Article 26 altogether. Ultimately, I endorse Chandrachud J's opinion which indicates that the anti-exclusion principle embedded into Article 17 may be employed to *limit* practices which are exclusionary in nature to the extent that they fall within the purview of Article 17. Nevertheless, the main thrust here is to highlight the need for courts to move past the definition-centric approach when dealing with religious rights, and recognize the possibility of adopting an anti-exclusion principle to limit religious freedoms.

The structure of this paper is as follows: Part I examines the nature of secularism contemplated by the drafters of the Indian Constitution and how religious freedoms fit into its broader vision and transformative ideals. Part II analyses the traditional definition-centric approach of the Court towards dealing with religious rights through an examination of the jurisprudence pertaining to religious 'dominations' and 'essential practices'. Part III presents an indicative list of pitfalls of the definition-centric approach discussed in the preceding section. In Part IV, I deal with the set of interpretational alternatives offered in *Sabarimala* and discuss their feasibility. Here, I look at the traditional approach of interpretation followed in the separate opinions of Misra J and Nariman J, and the unique approaches of Chandrachud J and Malhotra J separately. Finally, I conclude by offering a doctrinal formulation for interpreting Article 26 of the Constitution, drawing on alternatives to the definition-centric

approach traditionally adopted by the Court, while also providing an avenue to limit religious freedoms through Article 17 as adopted by Chandrachud J.

I. INDIAN SECULARISM AND THE BASIS OF RELIGIOUS FREEDOMS

The broad project undertaken by the drafters of the Constitution was to create a Constitution which would eventually realise the goals of ensuring social justice.[10] Focal to this *transformative* goal of social justice was the role of the individual – who, Gautam Bhatia argues, necessarily needed to be freed from existing *substantive* structural inequalities.[11] The constitutional goal, therefore, was not to maintain the status quo but to radically transform Indian society to accommodate and expand individual freedoms.[12]

Secularism in the Indian constitutional context broadly implies two things: first, it implies the religion-neutrality of the state (i.e., that the state shall not assume a religious character or discriminate between individuals on the grounds of religion)[13]; and second, that the Constitution affords inclusive rights to religious groups and denominations, which allows individuals to express and practice their religion while also allowing religious groups to maintain their practices.[14] These two implications of secularism have been deeply embedded into the fundamental rights of the Indian Constitution.

There is, however, a seeming tension between this second prong of secularism and the broader project of 'transformation'. The drafters realised that a number of socially backward practices (which the transformative Constitution attempts to get rid of) stem from the internal religious tenets (which the Constitution simultaneously protects). This conflict brought forth several debates in the Constituent Assembly on the proper mode of balancing the two, a large part of which centred around the regulation of religious personal law.[15] There were some like K.M. Munshi who endorsed religion being completely relegated *solely* to the private domain

[10] Sudhir Choudhury, Madhav Khosla, Pratap Bhanu Mehta, *Locating Indian constitutionalism*, *in* OXFORD HANDBOOK OF THE INDIAN CONSTITUTION, 1-14 (S. Choudhry, M. Khosla and P.B. Mehta eds., OUP 2016).
[11] Gautam Bhatia, *Freedom from community: Individual rights, group life, state authority and religious freedom under the Indian Constitution* 5 Global constitutionalism 351, 371 (2016). *See also* MADHAV KHOSLA, INDIA'S FOUNDING MOMENT: THE CONSTITUTION OF A MOST SURPRISING DEMOCRACY, 111, (HUP 2020).
[12] *Id.*
[13] INDIAN CONST. art 14, 15, 27. Articles 14 and 15 prohibit the state from discriminating on the grounds of religion. Article 27 prohibits the state from compelling a citizen to pay taxes which shall be used for religious purposes.
[14] INDIAN CONST. art 25, 26.
[15] Hanna Lerner, *The Indian Founding: A Comparative Perspective*, *in* OXFORD HANDBOOK OF THE INDIAN CONSTITUTION, 55 (S. Choudhry, M. Khosla and P.B. Mehta eds., OUP 2016).

and prohibited in the public domain.[16] On the other hand were those like Naziruddin Ahmad who suggested that the process of regulating religion should be gradual and phased, and expressed displeasure over the excessive intrusion of the state into matters of religion.[17]

To resolve this, members of the Constituent Assembly seemingly agreed to interpret the limitations to religious freedom broadly. A debate relating to the ambit of the term 'propagate' in draft Article 19 (today Article 25) is telling in this regard. Member Lok Nath Mishra suggested that the term 'propagate' in draft Article 19 be removed given its hostile connotation, as he feared that the provision may also allow religions to expand their ambit which may potentially lead to the 'complete annihilation of Hindu culture'.[18] However, this suggestion was rejected by the Assembly. Mr. K. Santhanam's rebuttal to Mr. Mishra is perhaps indicative of the Assembly's approach:

> "*Hitherto it was thought in this country that anything in the name of religion must have the right to unrestricted practice and propagation. But we are now in the new Constitution restricting the right only to that right which is consistent with public order, morality and health. The full implications of this qualification are not easy to discover. Naturally, they will grow with the growing social and moral conscience of the people.*"[19] (emphasis supplied)

Although this expression cannot be attributed to the entirety of the Constituent Assembly (in any case, the precise scope of religious freedoms was not taken up by the Assembly in detail), it could indicate that the framers' vision was to recognise the authority of the state to regulate matters of religion in the interest of social transformation. In this sense, the Constitution seemed to tip the balance in favour of the state's authority to undertake social reform. This was explicit in many debates of the Assembly and seems truer to the transformative goals of social justice envisioned by the Constitution.[20]

However, by acknowledging religious freedoms, the Constitution also admits their significance. Moreover, it has been argued that religious presence is key to achieving the

[16] *Id.*
[17] *Id.*
[18] *Constituent Assembly of India Debates* (*Proceedings) - Vol. VII*, LOK SABHA, http://164.100.47.194/loksabha/writereaddata/cadebatefiles/C06121948.html (Last accessed 17 May 2020).
[19] *Id.*
[20] Khosla, *supra* note 11, 111.The author writes 'in the case of religion, the effort was to shift from fixed identities based on community membership to decisional ones that emerged from choices structured around democratic individualism.'.

transformational goals of social justice, given that in absence of an organic and gradual process of reform, the very purpose of transformation might be defeated.[21]

In light of this, it can be said that the Constitution recognises a fine balance between religious freedoms and the state's authority to curtail them. To achieve this balance, the text of the Constitution points to the legitimate *limitations* of the right – which also seems consistent with the intention of the drafters to read the limitations broadly (as is evident from Mr. Santhanam's exposition extracted above). Ultimately, the Constitution seems to tip this balance in favour of the state's constitutional obligation to transform religion in the interest of social justice. However, the focus of the Constitution remains on the breadth of the *limitations to the right* and not *the narrowness of the right's ambit*.

Contrary to this, the approach of constitutional courts has been to narrow the ambit of the right itself by placing strict definitional limits on the exercise of these freedoms. This approach does not conform to the broader constitutional project, which envisions transformation by relying on valid limitations to the right. By limiting the ambit of the religious right of expression, courts avoid offering a constitutional justification to limiting religious freedoms. Moreover, such an approach potentially denies the right of religious freedom altogether by not recognising valid claims of exercise of the right.

II. THE TRADITIONAL APPROACH OF THE COURT IN DEALING WITH RELIGIOUS FREEDOMS

Article 26 has three broad constitutive elements: (1) Is the right bearer a religious 'denomination' or 'sect' capable of bearing the rights under Article 26?; (2) Is the freedom being claimed a part of the group's *religious* affairs? (This is where the 'essential practices' doctrine is invoked); (3) Are the limitations to the freedom valid on the grounds of public order, morality or health?

In this part, I argue that over the course of a trajectory of Indian cases, the focus seems to be on the first two questions (relating to denomination and the nature of the practice in question) and not the question of the validity of the limitation.

A. The 'Denomination' Question

[21] Faizan Mustafa, Jagteshwar Singh Sohi, *Freedom of Religion in India: Current Issues and Supreme Court Acting as Clergy,* 4 BYU L. REV 915, 922 (2017).

This first prong deals with whether the group in question is a 'denomination' which can be a legitimate right bearer under Article 26. The Supreme Court in *The Commissioner, Hindu Religious Endowments v. Lakshmindra Thirtha Swamiar* (hereinafter '*Shirur Mutt'*) defined a 'denomination' as being "a religious sect or body having a *common faith and organisation* and designated by a *distinctive name*."[22] (emphasis supplied) The Court in *S.P. Mittal v. Union of India* (hereinafter '*S.P. Mittal'*) separated this into three distinct requirements: (i) common organisation; (ii) common faith; and (iii) designation by a distinctive name.[23] These requirements essentially focus on the fact that the members of the religion have some commonality which justifies them being called a 'denomination' for the purposes of Article 26.

In *S.P. Mittal,* the Supreme Court declined granting the status of denomination to the Aurobindo ashram in Pondicherry on the grounds that the commonality in its members stemmed from a common *philosophical tradition* which could not be considered a commonality of 'faith'.[24] It was later held in *Nallor Marthandam Vellalar v. Commissioner* that the cohesion between the individuals must stem from *religious commonality* and not commonalities based on caste or other secular factors.[25]

It is apparent that the requirements spelled out in *S.P. Mittal* have little basis in the text of Article 26, which in fact contemplates a broader inclusion of right bearers (given that the right bearer of Article 26 is a 'denomination' *or section thereof*').[26] Keeping this in mind, Chinappa J's dissenting opinion in *S.P. Mittal* held that these three requirements were not to be read narrowly, instead a *purposive* satisfaction of the requirements should be enough to qualify a group to be a 'denomination'.[27]

Despite calls for flexibility in the definition, there has been little consistency in the Court's approach in this regard. Although the question of defining 'denomination' does not take the forefront in most cases, it can potentially become important in denying the Article 26 right to the group in question. This becomes evident in *Sabarimala* where the majority held

[22] The Commissioner, Hindu Religious Endowments v. Lakshmindra Thirtha Swamiar, 1954 SCR 1005 9 (hereinafter Shirur Mutt).
[23] S.P. Mittal v. Union of India, 1983 SCR (1) 729 (hereinafter 'S.P. Mittal').
[24] *Id.*
[25] Nallor Marthandam Vellalar v. Commissioner, Hindu Religions and Charitable Endowments, (2003) 10 SCC 712.
[26] INDIAN CONST. art. 26.
[27] S.P. Mittal, *supra* note 23.

that the devotees of Lord Ayyappa did not constitute a religious denomination when rejecting their claim under Article 26.[28]

B. The 'Essential Practices' Test

The second prong of Article 26 examines whether the practice being protected is validly 'religious' and whether the practice is 'essential' to the denomination in question. The textual purpose of such a review seems to be to examine whether the claim being purported to be protected under the cover of religious rights is bona fide. However, over the course of several precedents of the Supreme Court, this doctrine has been significantly broadened to include several external elements of review, altogether making it very complicated.[29]

The 'essential practices' test was first invoked by the Supreme Court in *Shirur Mutt* where the test examined the narrow question of what the religious group *subjectively* considers to be essential to it, according to its internal tenets.[30] Therefore, to establish that the religious practice in question is constitutionally protected (under Article 25 or 26), it emerged that the Court must: (a) examine whether the practice in question is *religious* in character (as opposed to being *secular*); and (b) look into the religious texts and tenets of the religion itself to satisfy to themselves the bona fides of the essentiality of the practice claimed to be religious.[31]

However, in later judgments this approach was largely whittled down. Over time, the Court infused this seemingly narrow question with a host of external elements of review. For instance, in *Durgah Committee Ajmer v. Syed Hussain Ali*, the Supreme Court developed a standard of weeding out practices of 'superstitious' nature from the cover of essentiality (and thereby of Article 26).[32] In *N Adithayan v. Travancore Devaswom Board*, the Supreme Court linked the essentiality of the religious practice claimed to its broader constitutional compliance. The Court held that a practice demanding the cover of religious freedoms must comply with the "specific mandate of the Constitution". Here, the Court included within the specific

[28] Sabarimala, *supra* note 1. This included the opinions of Misra, J (writing for himself and Khanwilkar J); Nariman, J and Chandrachud, J who in their opinions denied the temple and its devotees the status of 'denomination'.
[29] Bhatia, *supra* note 11, 357-363, 364. Bhatia shows that there has been a movement in the Court's approach from examining the 'essentiality' of religious practices solely from the internal standpoint of the denomination involved to an approach where the essentiality test subsumes a review of how 'socially progressive' the Court considers the practice to be. Resultantly, Bhatia acknowledges that 'the Court has failed to develop a rigorous methodology for determining the content of 'essential' religious practices''.
[30] Shirur Mutt, *supra* note 22, ¶ 20.
[31] Bhatia, *supra* note 11, 361.
[32] Durgah Committee Ajmer v. Syed Hussain Ali, (1962) 1 SCR 383.

mandate of the Constitution the constitutional promises of equality and dignity while holding that essential practices must not be "opposed to public policy or social decency". [33]

There is little consistency in the considerations applied by courts in determining the 'essentiality' of a religious practice. Nevertheless, Dhavan and Nariman consolidated these rulings to arrive at a 'three-step test' to determine the three constitutive elements of essential practices test: (a) whether the practice in question is *religious* as opposed to being *secular*; (b) whether the practice is *essential* to the faith of the religion; and (c) whether the practice is consistent with the reformist goals of the Constitution.[34]

Through the trajectory of precedents, we can see that there has been a movement towards 'rationalisation' in the approach of the Court (ever since *Shirur Mutt*).[35] In subsequent judgments, the Court attempted to rid religions of 'superstitious' and 'unconstitutional' practices by refusing to recognise their essentiality.[36] Bhatia terms this to be the movement of the test from an 'essentially' religious standard (where the Court is only examining the 'religious' nature of the practice - as opposed to it being 'secular') to an 'essential to the religion' standard (where the Court is examining the essentiality of the practice from an external standpoint).[37] As we shall see in a later stage of this essay, this movement has even seeped into parts of the majority decision in *Sabarimala.*

III. FALLOUTS OF THE DEFINITION-CENTRIC APPROACH

I have, so far, pointed out the Supreme Court's obsessive focus on two definitional prongs which are interpreted very narrowly while the question of permissible limitations is largely ignored. Now, I shall examine some of the major pitfalls of such a model of dealing with religious rights:

First, these tests have little basis in the text of the Constitution.[38] The considerations of 'superstition' and 'constitutional conformity' are entirely extraneous to Article 26. In fact, it

[33] N Adithayan v. Travancore Devaswom Board, (2002) 8 SCC 106.
[34] Rajeev Dhavan, Fali Nariman, *The Supreme Court and Group Life, in* SUPREME BUT NOT INFALLIBLE: ESSAYS IN HONOUR OF THE SUPREME COURT OF INDIA, 256–87, 260 (BN Kirpal et al. eds., OUP 2000). as *cited in* Bhatia, *supra* note 11, at 355.
[35] *See generally* Ronojoy Sen, *The Indian Supreme Court and the quest for a 'rational' Hinduism,* 1 86 South Asian History and Culture (2009).
[36] *See, e.g.*, Durgah Committee Ajmer v. Syed Hussain Ali, (1962) 1 SCR 383, N Adithayan v. Travancore Devaswom Board, (2002) 8 SCC 106.
[37] Bhatia, *supra* note 11, 360.
[38] *Id*. at 358-359, 364. Bhatia argues that the question of essentiality contemplated by the drafters of the Constitution was largely limited to the distinction between 'religious' and 'secular' elements of religious practices

can be argued that the Court's approach in defining 'denominations' narrowly goes *expressly against* the intention of the drafters. This is fairly clear from a bare reading of Article 26 which, instead of qualifying the right-holder of Article 26 to be a narrowly defined denomination, confers the right on any 'denomination *or section thereof*' - indicating the broad set of possible right bearers.

Second, this approach throttles the right of religious groups to self-define themselves.[39] This is especially true for the narrow definitions of 'denomination'. This is a particularly inappropriate approach in the Indian context where extremely unique and distinct denominations are made to fall under the broader umbrella of Hinduism (which itself is extremely fluid). Most denominations which fall under Hinduism do not have common theistic concepts or rituals - in fact, members can very well belong to different religious denominations at the same time. The fluidity is so extreme that denominations even blur the lines distinguishing the broader umbrella of Hinduism and other religions (this can be seen in the fact that devotees can cross-cut different religions to follow a particular religious leader or deity – for instance, a Hindu deity like Lord Ayyappa has devotees which include Muslims and Buddhists[40]). This inherent fluidity has, in fact, been acknowledged by the Supreme Court.[41] In light of this, it seems absurd to have strict definitional contours to the commonality of faith and organisation, where the basis of the religion itself is loosely defined. In the specific facts of *Sabarimala*, the mere fact of the devotees pledging themselves to a common spiritual figure (be that a theistic God or a spiritual leader), should ideally be enough to satisfy the requirement of 'denomination'.

Third, the elements of the test ultimately turn on an authoritative interpretation of religious texts, the interpretation of which clearly lies beyond the expertise of a secular court.[42] The Court often chooses to examine the essentiality of a practice according to the religious

which was ultimately broadened to take shape in the form of the 'three-step test' formulated by Dhavan and Palkhivala. Bhatia argues that the broader formulation of the question of essentiality has no basis in the text of the Constitution.

[39] Jaclyn L. Neo, *Definitional imbroglios: A critique of the definition of religion and essential practice tests in religious freedom adjudication*, 16 International Journal of constitutional Law, 574, 576 (2018).

[40] Sabarimala, *supra* note 1, ¶192. (Misra and Khanwilkar JJ)

[41] *See* Sastri Yagnapurushadji v. Muldas Brudardas Vaishya, (1966) 3 SCR 242, ¶29 (Gajendragadkar J). "When we think of the Hindu religion, we find it difficult, if not impossible, to define Hindu religion or even adequately describe it. Unlike other religions in the world, the Hindu religion does not claim any one prophet; it does not worship any one God; it does not subscribe to any one dogma; it does not believe in any one philosophic concept; it does not follow any one set of religious rites or performances; in fact, it does not appear to satisfy the narrow traditional features of any religion or creed."

[42] Jaclyn Neo, *supra* note 39, 589.

tenets and texts (as suggested in *Shirur Mutt)*. Such interpretations involve a multitude of theological considerations which make the use of traditional tools of legal interpretation fundamentally unfair.[43] Given the assumed centrality of the test, the outcome of many cases turn on an authoritative interpretation of the religion by the court. For instance, Jaclyn Neo points to instances in foreign jurisdictions where appellate courts have reversed lower court decisions solely on grounds of a disagreement over the interpretation of religious texts.[44] Given the Court's lack of interpretational guidance or expertise, its decisions on the essentiality of practices becomes fundamentally misguided.

Fourth, the approach of the Court appears to be inconsistent and arbitrary in application.[45] This is fairly apparent from the trajectory of cases relating to the essential religious practices doctrine which shows a series of alternative tests employed by the court. The test affords wide latitude to judges to manoeuvre a convenient doctrinal formulation of the 'essential practices' test. Even the synthesised 'three-step test' is extremely broad and still leaves room for significant discretion.[46] Without adequate anchors to guide judicial decisions in this area, there is little predictability in the decisions of the court.

Fifth, the project of defining 'essential practices' in itself seems futile. I have so far addressed how the Court's decisions on the 'essential practices' test appears inconsistent and arbitrary. In addition to this, I would also suggest that some of the arbitrariness is a product of the test itself. Firstly, a doctrinal, legal definition of 'religion' is impossible to arrive at. The Supreme Court has admitted the futility of such an exercise.[47] Secondly, the element of essentiality depends on a metric of judging internal religious tenets of a religion which is beyond the expertise of the court[48] (as has been discussed earlier). Given these reasons, a

[43] *Id.*
[44] *Id.* at 585.
[45] *See* Section 3 of the essay.
[46] Bhatia, *supra* note 11, 364.
[47] Shirur Mutt, *supra* note 22, ¶ 17 (Mukherjea J). "The word 'religion' has not been defined in the Constitution and it is a term which is hardly susceptible of any rigid definition. […] Religion is certainly a matter of faith with individuals or communities and it is not necessarily theistic. There are well known religions in India like Buddhism and Jainism which do not believe in God or in any Intelligent First Cause. A religion undoubtedly has its basis in a system of beliefs or doctrines which are regarded by those who profess that religion as conducive to their spiritual well-being, but it would not be correct to say that religion is nothing else but a doctrine or belief. A religion may not only lay down a code of ethical rules for its followers to accept, it might prescribe rituals and observances, ceremonies and modes of worship which are regarded as integral parts of religion, and these forms and observances might extend even to matters of food and dress."
[48] Jaclyn Neo, *supra* note 39.

detailed and proper application of the doctrine of 'essential practices' is impossible to arrive at, unless the review is reconsidered altogether to give it a narrower form.

Sixth, Jaclyn Neo argues that this definition-centric approach often leads to the majority sect's interpretation of religious tenets overriding those of the minority sects.[49] Given that religious doctrines are often fluid in terms of their content, interpreting a text authoritatively (as courts do) leads to the rejection of alternative interpretations of the same text by minority denominations. There may be different sects and sub-sects within a religion which rely on a common set of religious tenets which act as an overarching umbrella to categorise them into a definitional 'religion'. However, to authoritatively decide on the 'essential practice' of a broader religion implies that narrower sects are robbed of their subjective interpretation.[50] This is more pertinent in the Indian scenario where the narrow definition of 'denomination' and 'essential practices' work hand in glove to favour interpretations of a broadly constructed religious groups (rather than allow smaller sects to exercise their subjectivity). A case in point here is Misra J's opinion in *Sabarimala* where he holds that Lord Ayyappa's devotees fall under the broader denomination of Hindus and subsequently suggests that the practice of excluding women from temples is inessential to Hindu temples (given the inconsistency in application of the practice amongst Hindus generally).[51]

IV. ALTERNATIVE INTERPRETATIONS OF RELIGIOUS RIGHTS THROUGH THE LENS OF THE SABARIMALA JUDGMENT

Having understood the dominant definition-centric approach of the courts and its fallouts, I shall discuss the Supreme Court's decision in *Sabarimala* in order to excavate alternative modes of interpretation. While the opinions of Mishra J and Nariman J offer a reiteration of the traditional approach, the opinions of Chandrachud J and Malhotra J offer interesting alternatives to interpreting Article 26.

The Lord Ayyappa temple in Sabarimala of Kerala claimed to have a long-standing religious practice of excluding women aged between 10 to 50 from entering the temple. The rationale of the practice was rooted in the celibacy of the deity - Lord Ayyappa. Additionally, the devotees of the temple often undertake a 41 day 'Vratham' where the devotees themselves are expected to practice celibacy. The dominant rationale for the exclusion of women aged

[49] *Id*. at 578.
[50] *Id*. at 589.
[51] Sabarimala, *supra* note 1, ¶¶ 122-123 (Misra and Khanwilkar JJ).

between 10 to 50 is to suggest that menstruating women can possibly 'distract' the celibate deity and other devotees who have committed themselves to undertake 'Vratham'.

The practice was institutionalised through a notification issued by the Travancore Devaswom Board, issued under the authority of the Travancore-Cochin Hindu Religious Institutions Act, 1950. This notification was challenged before the Kerala High Court in *S. Mahendran v. Travancore Devaswom Board,* and the Court held in favour of its validity.[52] Later, Young India Lawyers Association (a public interest body) filed a public interest litigation application under Article 32 to challenge the validity of the notification, leading to the present case.

A unique aspect of this case was that it did not involve a conflict between the state and a religious institution. Most adjudications relating to religious freedoms in Article 26 are framed in terms of state regulation curtailing religious rights. That is, the state wishes to regulate a religion or institution which the latter resists. Uniquely, in *Sabarimala,* the state *sided with* the claim of the religion which was, in turn, opposed to allowing a class of individuals to enter into the temple. This shall become important in understanding Malhotra J's opinion which advocates judicial deference in such cases. Since the notification was published under a legislation, it satisfied the requirements of being 'law' under Article 13.[53] Additionally, an argument was raised by the petitioners suggesting that the Board satisfied the requirements of being 'state' for the purposes of Article 12[54] - although this argument was not specifically addressed by the Court in much detail.

In the subsequent sub-parts of this section, I shall discuss the four different approaches adopted by the judges of the Court in resolving religious freedoms. Misra J and Nariman J largely reiterate the traditional definition-centric approach of dealing with religious freedoms. Chandrachud J offers two alternative models of interpreting Article 26 alongside other Articles of the Constitution, one of which appears to be an alternative variant of the 'essential practices' test while the other is a limitation-centric approach justified through Article 17. On the other hand, Malhotra J in her dissenting opinion, offers a free hand to the religious denomination in defining themselves, however, restricts the powers of courts in effectively limiting the right.

[52] S. Mahendran v. The Secretary, Travancore Devaswom Board, AIR 1993 Ker 42.
[53] Sabarimala, *supra* note 1, ¶538 (Malhotra J).
[54] *Id*. at ¶ 59 (Misra and Khanwilkar JJ).

A. Reiteration of the Definition-Centric Approach (Misra J and Nariman J)

Misra J (who writes for himself and Khanwilkar J) and Nariman J write separate opinions although their approaches are similar in that they are largely definition-oriented. The decision on Article 26 was broadly grounded in two findings: (a) that the devotees of Lord Ayyappa and the temple do not constitute a 'denomination' for the purposes of Article 26[55]; and (b) that the practice of excluding women aged between 10-50 from the temple is *inessential* and therefore not protected under Article 26.[56]

Misra J holds that the devotees of Lord Ayyappa and the temple do not constitute a denomination. The key reason for this is that the devotees do not share "common religious tenets peculiar to themselves, which they regard as conducive to their spiritual well-being, other than those which are common to the Hindu religion".[57] Therefore, he concludes that the Lord Ayyappa devotees of Sabarimala have not adequately distinguished themselves from the broader umbrella of Hinduism for them to seek their separate denominational right under Article 26.[58]

After having deemed the religious denomination in question to be Hinduism (and not recognising Lord Ayyappa's devotees as a separate denomination), Misra J goes on to analyse the practice of exclusion of women on the anvil of its essentiality in *Hinduism*.[59] He suggests that exclusion of menstruating women is not essential to Hinduism (since there is no consistency in such a practice among Hindus) and thereby excludes the practice from the purview of the Article 26 right.[60] Additionally, Misra J also suggests that the practice of excluding menstruating women from a temple would be inconsistent with constitutional morality and thus would fail the 'essential practices' test.[61]

Nariman J, on the other hand, does not authoritatively rule on the essential practices test. While discussing the test, he appears to favour the standard in *Shirur Mutt* where the role of the court extends to determining the religious nature of the practice and its essentiality based

[55] *Id*. at ¶144.1 (Misra and Khanwilkar JJ), ¶ 193 (Nariman J).
[56] *Id*. at ¶122 (Misra and Khanwilkar JJ). Nariman J does not hold that the practice of excluding women is in-essential to the Lord Ayyappa dovotees but nevertheless rejects their claim of being a 'religious denomination' *See Id*. at ¶191(Nariman J).
[57] *Id*. at ¶ 144.1(Misra and Khanwilkar JJ).
[58] *Id*. at ¶ 112 (Misra and Khanwilkar JJ).
[59] *Id*. at ¶ 112 (Misra and Khanwilkar JJ).
[60] *Id*. at ¶ 123 (Misra and Khanwilkar JJ).
[61] *Id*. at ¶ 111 (Misra and Khanwilkar JJ).

on internal tenets of the religion.[62] For the majority of his opinion, however, Nariman J assumes that the practice of excluding women aged between 10 and 50 from the temple is essential to the religion.[63]

Nariman J denies the right under Article 26 to the respondent temple on grounds that Lord Ayyappa's devotees do not constitute a separate 'denomination'.[64] The reason he gives for this are two-fold: (i) he notes that there is no 'common faith' between the members of the group given that the devotees of the temple cut across religions beyond Hinduism[65]; and (ii) he notes that the devotees do not share a 'distinct name' which would allow them to be considered a denomination.[66]

These approaches reflect the many hues of the traditional definition-centric model of dealing with religious rights. The concerns and fallouts of such an approach have already been mentioned and apply equally to these opinions. Misra J's opinion is most telling of the manner in which the two tests work *together* to erode subjective denominational rights. Nariman J's approach, though seemingly flexible at the stage of defining essential practices, is inflexible in conferring the respondents the status of 'denomination'.

Denying the right under Article 26 to the devotees of Lord Ayyappa on grounds of not having a 'distinct name' is odd given that the requirement has no basis in the text of Article 26 nor does it have any rational nexus to the right being protected. The additional rationale of a lack of 'commonality of faith' given that the attendees of the Temple cut across many religions is also equally flawed as: (a) the mere fact of attendance in a temple should not imply membership in the denomination; and (b) such a requirement ignores the fluidity inherent to indigenous religions in India.

B. An Alternate Definition-Centric Approach Anchored on Constitutional Morality (Chandrachud J)

Before dealing with the alternative rationale(s) in Chandrachud J's opinion, it is important to note that Chandrachud J's opinion also exhibits some hues of the definition-centric

[62] *Id*. at ¶ 176.6 (Nariman J).
[63] *Id*. at ¶ 191 (Nariman J).
[64] *Id*. at ¶ 192 (Nariman J).
[65] *Id*. at ¶ 192 (Nariman J).
[66] *Id*. at ¶ 192 (Nariman J).

approach (in holding that the Ayyappans do not constitute a religious denomination[67] and that the practice of excluding menstruating women from the temple is inessential to the religion[68]). Interestingly, he criticises this very approach which focuses on the 'essential practices' test in the last section of his judgment, suggesting that courts should gradually move beyond it.[69] Ultimately, Chandrachud J offers two key alternative approaches: (a) an alternative reformulation of the essential practices test (which shall be discussed here); and (b) the anti-exclusion principle (which shall be discussed in the next part of this section).

Chandrachud J begins his opinion by focussing on the transformative role of the Constitution to arrive at a formulation of 'constitutional morality' which would include the preambular precepts of 'justice', 'liberty', 'equality', 'fraternity' (and 'secularism').[70] Interestingly, Chandrachud J uses this formulation to infuse the limitation of 'morality' in Article 26 (i.e. to imply 'constitutional morality').[71] However, it is important to note here that this does not mean that constitutional morality is contemplated to be an independent substantive limitation to Article 26. Instead, the aim here is to illustrate the fact that fundamental rights must be interpreted *in light of* the other rights in part III of the Constitution.

Having held 'constitutional morality' to be all pervasive, Chandrachud J argues that fundamental rights should be read as a *'cluster of rights'* and not in isolation.[72] Therefore, he uses constitutional provisions relating to equality as well as the preambular precepts therein to weed out inessential practices which offend constitutional morality.[73] In this sense, the formulation of the essential practices is more limited. Essentially, the court can weed out religious practices from the cover of Article 26 on grounds of their non-conformity with 'constitutional morality' (specifically if it impairs individual human dignity).[74]

[67] *Id*. at ¶ 319 (Chandrachud J).
[68] *Id*. at ¶ 292 (Chandrachud J).
[69] *Id*. at ¶¶ 406-415 (Chandrachud J). Chandrachud J offers a critique of the essential religious practices test in the last section of his judgment titled 'Roadmap for the future'. Here he favorably cites Bhatia and Neo's objections against the test and suggests that the adoption of the anti-exclusion principle to limit religious rights is the most appropriate manner or deferring to religious rights.
[70] *Id*. at ¶¶ 201-205, 215 (Chandrachud J).
[71] *Id*. at ¶¶ 214-215 (Chandrachud J).
[72] *Id*. at ¶ 216 (Chandrachud J).
[73] *Id*. at ¶ 216 (Chandrachud J).
[74] *Id*. at ¶219 (Chandrachud J). "Dignity of the individual is the unwavering premise of the fundamental rights. Autonomy nourishes dignity by allowing each individual to make critical choices for the exercise of liberty. A liberal Constitution such as ours recognises a wide range of rights to inhere in each individual. Without freedom, the individual would be bereft of her individuality. Anything that is destructive of individual dignity is anachronistic to our constitutional ethos."

In applying this metric, Chandrachud J holds that the practice of excluding women is unconstitutional on the ground that it offends constitutional morality (being offensive to the dignity of women).[75] He holds, accordingly: "To exclude from worship, is to deny one of the most basic postulates of human dignity to women. *Neither can the Constitution countenance such an exclusion nor can a free society accept it under the veneer of religious beliefs*."[76] (emphasis supplied)

Although this is well-meant and backed by constitutional value-based justifications, there are several problems in adopting such an approach.

First, it opens a can of worms given the ambiguity in the content of 'constitutional morality'. Preambular precepts lack substantive content and doctrinal formulations, making them as ambiguous as the 'essential practices' test (if not more so). Importantly, equality rights in their doctrinal contents of Article 14 and 15 cannot (arguably) apply as limitations to Article 26 according to this formulation - as Chandrachud J himself admits, other freedoms do not *trump* religious freedoms although they must be interpreted harmoniously.[77] All of this gives judges significant discretion to deny religious freedoms without offering convincing reasons.

Second, Chandrachud J's conception of 'constitutional morality' seems conveniently contrived for the facts of this case. Malhotra J, in her dissent, also points to this critique by suggesting that religious freedoms are also necessarily a part of constitutional morality.[78]

Third, this formulation is not entirely impervious to the fallouts of the definition-centric approach mentioned earlier in the essay. Chandrachud J infuses limitations into the content of Article 26 itself. This is problematic since it makes the *existence* of religious rights contingent

[75] *Id*. at ¶ 301 (Chandrachud J).
[76] *Id*. at ¶ 219 (Chandrachud J).
[77] *Id*. at ¶ 216 (Chandrachud J). "But does that by itself lend credence to the theory that the right of a religious denomination to manage its affairs is a standalone right uncontrolled or unaffected by the other fundamental freedoms? The answer to this must lie in the negative. *It is one thing to say that Article 26 is not subordinate to (not "subject to") other freedoms in Part III. But it is quite another thing to assume that Article 26 has no connect with other freedoms or that the right of religious denominations is unconcerned with them.*" (emphasis supplied) There seems to be an implicit concession here that the formulation still does fit Article 26 rights as being 'subject to' other fundamental rights – but only establishes their 'connect'. If Article 26 is not subject to other fundamental rights, it would not be correct to read the doctrinal or textual connotations of the rights in part III as limitations to Article 26. Nevertheless, Chandrachud J's judgment does in parts indicate that interests of equality do *trump* religious freedoms, as he suggests: "Where a conflict arises, the quest for human dignity, liberty and equality must prevail. These, above everything else, are matters on which the Constitution has willed that its values must reign supreme." *Id*. at ¶ 215 (Chandrachud J). Nevertheless, the content of these trumping 'values' is still clouded by significant ambiguity.
[78] *Id*. at ¶ 481 (Malhotra J).

upon their constitutional justification. Instead, a more acceptable formulation would be as follows: *despite being a valid exercise of the right under Article 26, this claim of religious freedom can be restricted for hurting the individual dignity of women.* This formulation is better reflected in Chandrachud J's alternative route of finding limitations in Article 17 of the Constitution (as shall be discussed).

C. Article 17 and Anti-Exclusion (Chandrachud J)

Chandrachud J offers another alternative to interpreting religious freedoms, which focuses on the anti-exclusion principle in Article 17 of the Constitution. Article 17 prohibits 'untouchability in any form'.[79] Chandrachud J traces the history of the Constituent Assembly debates to suggest that the drafters intended to broaden the definition of 'untouchability' beyond caste-based stigmatisations.[80]

However, every discrimination cannot be termed 'untouchability'.[81] Here Chandrachud J suggests that any form of stigmatisation which leads to social exclusion and is violative of human dignity would satisfy the definitional burden of Article 17.[82] To further explicate this understanding of stigmatisation, he invokes the concepts of 'purity' and 'pollution', central to the definition of caste-centric untouchability, to define 'untouchability'.[83] He holds that disallowing menstruating women from entering temples falls within the construct of 'purity' and 'pollution' which causes women inordinate humiliation and violates their dignity.[84]

Importantly, this approach is impervious to definition-centric questions. The scope of review pertains to the limitations of the practice based on another constitutional provision (i.e., Article 17).[85] A denomination being conferred the status of 'denomination' and its practice

[79] INDIAN CONST. ART. 17; 'Untouchability is abolished and its practice in any form is forbidden. The enforcement of any disability arising out of Untouchability shall be an offence punishable in accordance with law'.
[80] Sabarimala, *supra* note 1, ¶¶ 325-332, 344, 358 (Chandrachud J).
[81] Gautam Bhatia, *The Sabarimala Judgment – III: Justice Chandrachud and Radical Equality*, INDIAN CONSTITUTIONAL LAW AND PHILOSOPHY BLOG (Sept. 29, 2018), https://indconlawphil.wordpress.com/2018/09/29/the-sabarimala-judgment-iii-justice-chandrachud-and-radical-equality/ (last accessed 17 May 2020).
[82] Sabarimala, *supra* note 1, ¶342 (Chandrachud J).
[83] *Id*. at ¶ 343 (Chandrachud J).
[84] *Id*. at ¶ 357-8 (Chandrachud J).
[85] It is important to note here that Chandrachud J does not restrict the interpretation of an anti-exclusion principle solely to Article 17. He holds specifically that Article 17 "will not exhaust the guarantee against other forms of social exclusion. The guarantee against social exclusion would emanate from other provisions of Part III, including Articles 15(2) and 21." *Id*. at ¶ 357 (Chandrachud J). Surith Parthasarathy challenges this suggesting that it would be textually and doctrinally difficult to accept a formulation of an anti-exclusion principle against religious practices through Article 15. On reading the judgment, narrowly, therefore Article 17 seems to be the central expression of the anti-exclusion principle understood by the Court. *See* Surith Parthasarathy, *An Equal*

being deemed 'essential' would not, in any manner, affect this thread of argumentation. Therefore, it is largely impervious to the critiques to the definition-centric approach discussed in earlier sections of the essay.

There are two reasons as to why this approach is doctrinally most appropriate in dealing with this case. First, Article 17 itself trumps other provisions of the Constitution. Chandrachud J hints at this by stressing on the wording of Article 17 which prohibits untouchability *'in any form'* while also reiterating the vertical and horizontal applicability of the prohibition.[86] It cannot be said, therefore, that Article 26 can potentially override Article 17, given that the latter was specifically created keeping in mind caste-based exclusions in religious institutions.[87] In light of this, it seems clear enough that Article 17 should ordinarily trump the guarantee of freedom in Article 26.

Second, such an approach is more appropriate given that the provision equally applies regardless of horizontal and vertical application. One could say that what is being challenged in *Sabarimala* is *the state's endorsement* of the exclusion of women from the Sabarimala temple, thus making discrimination the focal point of the issue at hand. Alternatively, one can negate the role of the state's involvement altogether and consider this to be a constitutional limitation of the group's right to manage its affairs freely. In either case, Article 17 operates horizontally as well as vertically,[88] thus making it the appropriate method of regulating the actions of the religious institution (even if the state's role is negated altogether).

Here, it is also important to briefly engage with Malhotra J's scepticism in invoking Article 17 in this manner, given that the provision was introduced to correct a very specific form of caste-based injustice.[89] She points to instances in the Constituent Assembly debates where speakers had rooted their understanding of untouchability in caste-based stigmatisation.[90] She also favourably cites Seervai's commentary on the provision which suggests that the definition of 'untouchability' in Article 17 must be found in the

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[86] Sabarimala, *supra* note 1, ¶ 322-323 (Chandrachud J).

[87] *Id.* at ¶ 352 (Chandrachud J).

[88] *Id*. at ¶ 323 (Chandrachud J); Bhatia, *supra* note 11, 371.

[89] Sabarimala, *supra* note 1, ¶ 523 (Malhotra J).

[90] *Id*. at ¶525-526 (Malhotra J).

Untouchability (Offences) Act, 1955 (which defines untouchability narrowly in terms of caste-based atrocities).[91]

The concern here is that the broad reading of Article 17 (beyond caste-based stigmatisation) may be unjustified considering the specific historical context in which the provision came into existence. However, this concern can be addressed.

First, Chandrachud J holds that the intention of the drafters was not to formally define the term 'untouchability' in Article 17 only to the extent of prohibiting caste-based atrocities. He backs this claim by showing that the many attempts to define the term to that effect were rejected by the Assembly.[92] Moreover, he suggests that Article 17 is worded broadly enough; by abolishing untouchability *'in any form'*, the drafters did not intend the provision to be read narrowly.[93]

Second, the justification offered by Chandrachud J is not purely textual but is also anchored to ideals central to the Constitution's framing. Chandrachud J prefaces his judgment by discussing the transformative aspect of the Constitution which places the individual at the heart of its ideals and makes human dignity central to its vision. This he later links to the broader purpose being served by Article 17. [94] Therefore, Chandrachud J culls out the *broader principle* of the injustice being corrected through Article 17 from the *specific instantiation* of it in caste-based untouchability. Resultantly, Parthasarathy argues that Chandrachud J's judgment demonstrates a 'fidelity to the history of the framing' of the Constitution since the interpretation is rooted in the values which form the bedrock of the constitutional framing.[95]

Third, if the use of an anti-exclusion principle is seen to be desirable in light of the transformative goals of the Constitution and to protect the basic inherent dignity of individuals, Article 17 offers the best route to achieving this end. Parthasarathy points out that extracting an expansive anti-exclusion principle from Article 15(2) (which Chandrachud J alternatively hints at[96]) might have to contend with textual difficulties – particularly, as Article 15(2) does

[91] *Id.* at ¶527 (Malhotra J).
[92] *Id.* at ¶¶ 325-332 (Chandrachud J).
[93] *Id.* at ¶¶347-348 (Chandrachud J).
[94] *Id*. at ¶322 (Chandrachud J). "Article 17 abolished the age-old practice of "untouchability", by forbidding its practice "in any form". By abolishing "untouchability", the Constitution attempts to *transform and replace the traditional and hierarchical social order*." (emphasis supplied)
[95] Parthasarathy, *supra* note 85, 138.
[96] Sabarimala, *supra* note 1, ¶ 357 (Chandrachud J).

not specifically include places of religious worship. [97] He argues, therefore, that Article 17 offers a more accurate textual expression for the anti-exclusion principle.[98]

Therefore, I find that Chandrachud J's opinion offers a sound approach of dealing with religious freedoms through the mechanism of anti-exclusion which deftly averts the many pitfalls of a definition-centric approach while also offering a narrow avenue to limit religious practices when they impair a person's dignity.

D. Judicial Deference (Malhotra J)

Malhotra J, in her sole dissent, holds that the Supreme Court lacks adequate jurisdiction to entertain the petition.[99] She holds that the petitioners claiming the 'right to worship' under Article 25 were not worshipers of Lord Ayyappa. Additionally, since public interest litigations are inappropriate means to challenge religious practices,[100] she holds the petition to be altogether wanting of jurisdiction. Despite having rejected the petition for lacking jurisdiction, she examines its merits.

Malhotra J prefaces her opinion by highlighting the importance of religious freedoms to the constitutional guarantee of religious plurality.[101] She suggests that the Constitution grants powers of self-definition to the many diverse faiths and religions in India equally, to offer them accommodation – which in itself forms a part of constitutional morality.[102] According to her, this self-definitional subjectivity is fundamental to the rationale underlying religious freedoms in Article 25 and 26 of the Constitution.[103] Having settled on the broader ethical anchor to her opinion, she goes on to determine the doctrinal aspects of Article 26.

First, Malhotra J holds that the Lord Ayyappa devotees constitute a 'denomination' for the purposes of Article 26 of the Constitution.[104] She holds that the three-step test of determining whether or not the body in question is a denomination should be read flexibly, holding further that the test "is not a straitjacket formula, but a working formula".[105] She further alludes to Chinnappa Reddy J's dissenting opinion in *S.P. Mittal* to suggest that "the judicial

[97] Parthasarathy, *supra* note 85, 142.
[98] *Id*. at 139-140.
[99] Sabarimala, *supra* note 1, ¶ 447 (Malhotra J).
[100] *Id*. at ¶ 451.6 (Malhotra J).
[101] *Id*. at ¶¶ 480-481 (Malhotra J).
[102] *Id*. at ¶ 481 (Malhotra J).
[103] *Id*. at ¶ 480 (Malhotra J).
[104] *Id*. at ¶ 495 (Malhotra J).
[105] *Id*. at ¶ 493 (Malhotra J).

definition of a religious denomination laid down by this Court is, unlike a statutory definition, a mere explanation".[106] Having decided in favour of a flexible approach in defining 'religious denomination', she holds that the Lord Ayyappa devotees successfully satisfy the definitional requirements under Article 26.[107]

Second, with respect to the essentiality of the practice of excluding women from the temple, Malhotra J holds that the practice falls clearly within the cover of Article 26. She holds that the scope of review with respect to religious freedoms under Article 26 includes narrow questions as to: (a) the religious nature of the practice (as opposed to it being secular); and (b) its essentiality with respect to the internal tenets of the religion.[108] Malhotra J examines the history of the temple and concludes that the practice of excluding women has been practiced continuously by the group and forms part of their beliefs, thus satisfying the requirement of 'essentiality'.[109] Here we can see that Malhotra J has relaxed the requirements of Article 26 in favour of the religious denomination. This is a clear shift away from the definition-centric approach.

Finally, she briefly engages with the more contentious issue of limitations. She expressly rejects Chandrachud J's broad formulation of constitutional morality[110] and the expansive reading of Article 17[111]. Most importantly, she emphasises the need for exercising judicial deference in dealing with issues of religious freedoms. She refers to Article 25(2)(b) which says: "Nothing in [Article 25] shall affect the operation of any existing law or prevent the State from making any law [...] 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".[112] This, she holds, is a clear indication that the legislature has been afforded the express authority to 'throw open' religious institutions to the public, which necessarily implies that the judiciary does not have that power.[113] Therefore, only the legislature (and not the

[106] *Id*. at ¶ 494 (Malhotra J).
[107] *Id*. at ¶ 495 (Malhotra J).
[108] *Id*. at ¶ 505 (Malhotra J).
[109] *Id*. at ¶¶ 520-521 (Malhotra J).
[110] *Id*. at ¶ 481 (Malhotra J).
[111] *Id.* at 528 (Malhotra J).
[112] INDIAN CONST. art 25.
[113] Sabarimala, *supra* note 1, ¶ 472 (Malhotra J). "The Constitution lays emphasis on social justice and equality. It has specifically provided for social welfare and reform, and throwing open of Hindu religious institutions of a public character to all classes and sections of Hindus through the process of legislation in Article 25(2)(b) of the Constitution. Article 25(2)(b) is an enabling provision which permits the State to redress social inequalities and injustices by framing legislation. It is, therefore, difficult to accept the contention that Article 25(2)(b) is capable of application without reference to an actual legislation. What is permitted by Article 25(2) is State-made law on the grounds specified therein, and not judicial intervention."

judiciary) can 'throw open' the Lord Ayyappa temple to menstruating women in the interests of social justice.[114]

Although this is a very plausible interpretational alternative which also stays true to the text of the Constitution, unlimited judicial deference in favour of the legislature or state could potentially render individual dignity subservient to religious freedoms. In this sense, to leave the entirety of the question of balancing to the state can potentially cause severe injustice. Malhotra J realises this, and therefore falls short of advocating for absolute deference. She opines, instead: "It is not for the courts to determine which of these practises of a faith are to be struck down, *except if they are pernicious, oppressive, or a social evil, like Sati* (emphasis supplied)." [115] Therefore, Malhotra J acknowledges a thin scope of judicial review over religious practices that are 'pernicious, oppressive, or a social evil', which is not completely deferential to the legislature's inaction in prohibiting discriminatory religious practices.

However, Malhotra J's opinion does not offer clear reasons for her deference in the present case. Why is the practice of excluding menstruating women from entering a temple not 'pernicious, oppressive, or a social evil'? The purport of this phrase is left unexplained in her opinion. Chandrachud J's approach can be borrowed here to shed some light, to the extent that Article 17 might give specific meaning to this phrase. If an action falls foul of Article 17, then the action can be said to be 'pernicious, oppressive, or a social evil'. This seems consistent because any form of 'stigmatisation' which impairs individual dignity (in the manner that Article 17 is expansively defined by Chandrachud J) shall ordinarily be considered to be 'pernicious, oppressive, or a social evil'.

In this sense, the approaches of Malhotra J and Chandrachud J are not entirely incompatible. On the contrary, their approaches are fairly similar in that they attempt to move away from a definition-centric approach and look at a narrow scope of limitation to religious freedoms - while Malhotra J makes the scope of review extremely narrow (and significantly unclear), Chandrachud J expands it to limit exclusions under Article 17.

CONCLUSION: AN ALTERNATIVE MODEL

Having analysed the traditional definition-centric approach of Indian courts in dealing with religious freedoms along with its pitfalls, I shall now discuss a preferred interpretational

[114] *Id*. at ¶ 476 (Malhotra J).
[115] *Id*. at ¶ 453 (Malhotra J).

alternative in light of the alternatives examined. The model can be broken down into three parts:

First, while defining religious 'denominations', a fluid approach should be adopted by courts in allowing groups to be so defined under Article 26 with relative flexibility. Malhotra J suggests that the constitutive elements of this definition (common organisation, common faith and distinct name) should not be read narrowly.[116] The bare meaning of a denomination only demands commonality of faith, and, therefore, a liberal construction should be given to that element of the definition. The mere fact of a group of individuals *commonly* believing in a particular religious figure (be that a deity or spiritual leader) should satiate the requirements of it constituting a denomination - despite the lack of a specific unique name.

Second, the scope of review in determining the 'essential practices' of the denomination should be narrowed down significantly. Here, Malhotra J suggests that the court should not look beyond the internal consistency or subjective belief in the tenets of the religion.[117] While this is true, I would go a step further to endorse Jaclyn Neo's formulation of the test to make the scope of this test narrower still. Neo suggests that the court should only be able to invalidate a religious practice from the cover of the right on grounds of: 'sincerity', 'fraud' or 'ulterior motive'.[118] This is very similar to the US Supreme Court's approach of weeding out 'insincerity' claims of free exercise.[119]

Third, with regard to the permissible limitations to the religious freedoms, the Court should stick true to the text of the Constitution in determining an appropriate balance. First, the legislature should have a free hand in 'throwing open' religious institutions (which is evident

[116] *Id*. at ¶ 492 (Malhotra J). "The meaning ascribed to religious denomination by this Court in Commr., Hindu Religious Endowments case, and subsequent cases is not a straitjacket formula, but a working formula. It provides guidance to ascertain whether a group would fall within a religious denomination or not."
[117] *Id*. at ¶ 505 (Malhotra J).
[118] To reiterate the objection against the Court looking into the tenets of the religion to determine the essentiality of a practice, Neo suggests that secular courts are incapable of interpreting theistic documents. Often, the Court employs legal interpretive methods to interpret religious documents and tenets. She uses this to show the absurdity of cases where the appellate courts and lower courts disagree only to the extent of their interpretations of a religious text. *See* Jaclyn Neo, *supra* note 39.
[119] *See* State of Vermont v. Rocheleau, 451 A.2d 1144 (Vt. 1982). Here the Supreme Court of Vermont was examining the religious claim of a tantric Buddhist to be able to carry marijuana. The Court considered the fact that the accused in question was found in possession of the drugs at a nightclub (where he was unlikely to be practicing his religious beliefs) to be clinching proof of his in-sincerity. This is not an impermissible inquiry (since it is clearly within the ken of the Courts to deal with it) and nor is it a movement back to the definition-centric model. It only attempts to narrowly scrutinise the genuineness of the beliefs of those claiming religious protection. *Also See* Ben Adams & Cynthia Barmore, *Questioning Sincerity: The Role of the Courts After Hobby Lobby*, 67 59 STANFORD LAW REVIEW ONLINE (2014).

from Article 25(2)(b) of the Constitution). Second, apart from the throwing open of religious institutions, the limitations of free exercise should stand true to the express limitations in Article 25 and 26 (depending upon the right being invoked). Third, and most importantly, the Court should employ Article 17 to restrict the rights in Article 26 - even if the state, either expressly or impliedly, endorses the patent discrimination in question. Nevertheless, Article 17 should be invoked cautiously. Chandrachud J carefully formulates a definition to ensure that every case of discrimination does not amount to 'untouchability'. Therefore, the Court must examine the reason behind the exclusionary practice and examine if it stigmatises and impairs the dignity of the individuals affected.

These three prongs offer an interpretational alternative which, I feel, would be useful in steering clear of the definition-centric approach of the Court, while also leaving room enough to weed out practices which are patently *exclusionary* to the point that they harm the dignity of those it excludes. This strikes a nuanced balance for the scope of judicial review, by averting the many pitfalls of the definition-centric model, while also providing the Court (and the state) some teeth to weed out patently discriminatory practices.