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Supreme Court on Religious Practices

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This article is based on **“Fraught course”, “Explained: The three cases SC wants clubbed with Sabarimala review”, “Sabarimala order: What is the ‘essentiality’ test in religious practice?”**, which were published in The Indian Express on 16/11/2019. It talks about Indian judiciary’s intervention in religious matters, mainly concerning women and their rights.

The **Supreme Court’s five-judge constitution bench** has decided to **refer the Sabarimala temple case**, clubbed with other 3 pending cases broadly related to the rights of women in the sphere of religion, to a **larger 7-judge Bench**. This leads the apex court into potentially dangerous and conflicting territories.

The new bench has been tasked with finding the balance between the **Right to Freedom of Religion** and **other constitutionally-guaranteed rights**, especially the **Right to Equality (Article 14: The State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India)**, defining **“essential religious practice”** and **“constitutional morality”**.

Context

Entry of women into the Sabarimala temple

- On 28th September **2018, SC lifted the ban** that prevented women and girls between the age of 10 and 50 (mainly menstruating women) from **entering the famous Ayyappa shrine** in Kerala by a majority verdict of 4:1.
- It held that the centuries-old Hindu religious practice was **illegal and unconstitutional (Article 14 and 25)**.
- Temple custodians argue that women of menstrual age are prohibited from offering prayers as the deity there, Ayyappa, is a celibate.

Muslim women’s entry into mosques

- In April **2019**, the SC was moved to seek directions **for allowing Muslim women to enter mosques through the main door**, and to have the “Islamic right to visual and auditory access to the **‘musalla’** (main prayer area)”.
- The petition said that “this **act of prohibition is void and unconstitutional** as such practices are not only repugnant to the basic dignity of a woman as an individual but also violative of the fundamental rights guaranteed under **Articles 14, 15, 21 and 25** of the Constitution”.
- The matter was last heard on November 5, 2019, by a Bench comprising CJI-designate Justice S A Bobde and Justices S Abdul Nazeer and Krishna Murari.

Female genital mutilation among Dawoodi Bohras

- On September 24, **2018**, a Bench of SC referred the matter in **‘Sunita Tiwari vs Union of India and Ors’** to a larger Bench of the Supreme Court.
- The petition, filed under **Article 32** of the Constitution, had questioned the constitutionality of the practice of **Female Genital Mutilation (FGM)** or **‘khatna’**, or **Female Circumcision (FC)** or **‘khafd’**, which the petitioner said was carried out on every girl child in the Dawoodi Bohra community.
- The petition relied on the **UN Convention on the Rights of the Child** and the **Universal Declaration of Human Rights** and urged that the practice is violative of **Article 21 (right to life and personal liberty)**.
- The Bench submitted that the matter should be referred to a larger Bench, which the SC accepted.

Entry of Parsi women married to non-Parsis in the Agyari

- The **Special Leave Petition** in **‘Goolrukh Gupta vs Burjur Pardiwala’** arose out of a judgment passed by the Gujarat High Court in **2012**.
- The petitioner, Goolrukh Contractor Gupta, moved the High Court in 2010 after her friend who too, like her, was a Parsi married to a Hindu, was **denied entry to the Tower of Silence** during her mother’s last rites some years before.
- In the court, Goolrukh Gupta’s counsel, argued that the question was, “in the case of marriage between a Hindu and Parsi, does it result in automatic conversion of religion?” The matter hence **raised issues of gender justice**.
- In **December 2017**, a **Constitution Bench observed** that “DNA does not evaporate” after marrying outside one’s religion”, and that **by marrying outside her religion, a woman does not “surrender her affection to her father”**.

The Doctrine of Essentiality

- The doctrine of “essentiality” was invented by a seven-judge Bench of the Supreme Court in the ‘**Shirur Mutt’ case in 1954**. The court held that the term “religion” will cover all rituals and practices “integral” to a religion, and took upon itself the responsibility of determining the essential and non-essential practices of a religion.
- Essential religious practice test is a contentious doctrine evolved by the court to protect only such religious practices which were essential and integral to the religion.

Constitutional Morality

- Constitutional morality provides a principled understanding for unfolding the work of governance. It specifies norms for institutions to survive and an expectation of behaviour that will meet not just the text but the soul of the Constitution. It also makes the governing institutions and representatives accountable.
- Constitutional morality has been used to emancipatory effect in past cases by the apex court. One of the examples is **decriminalising homosexuality**.

Concerns

- Review parameters usually permit a narrow reconsideration in case of an error in the verdict or discovery of new evidence but **passing on to larger bench could open up new questions**, instead of settling the old ones.
- There are concerns within the court itself about **clubbing these four issues** together because this will lead to a situation where not everyone is equally content and a uniform verdict **can give rise to religious conflicts**.
- The inability to solve issues like this and passing on to the larger benches **narrows down the scope for justice** and for courts as well.
- In setting itself the task of **defining this constitutional morality**, the court will now have to go into the question of its limits and boundaries, of its possible clash with religious beliefs and faith.
- The **essentiality test impinges on the autonomy and freedom of religion** which was meant to guarantee freedom to practice one’s beliefs based on the concept of “inward association” of man with God.
- The Court is **creating problems for itself** as well as **circumscribing individual freedoms and treading into the clergy’s domain**.

Way Forward

- Each of these issues must be considered on their own ground with **different redressal mechanisms**. On essential religious practice, SC should go case by case rather than aim for a grand unified theory.
- The court has been inconsistent in applying the essential religious practice doctrine and maybe it should be left like that only to avoid further tensions.

- Court's push for expanding its remit and for hard clarity on complex questions will prove difficult and maybe counterproductive so it **should not dwell deeper into the religious matter after a certain point.**
- The court upheld ideas of freedom and equality and the constitutional promise of a pluralistic and inclusive society while redressing an injustice which should be **upheld as a beacon of hope for a just and equal society.**

Drishti Mains Question

Objectives of gender justice go beyond the boundaries of the courts.

Comment.