"Matters of religion"

What are matters of religion? Who should decide whether a particular practice is a matter of religion and an essential part of it? These questions have figured frequently in cases relating to freedom of religion before the Supreme Court of India. *Shri Govindlalji* v. *State of Rajasthan*[1] is the latest case in this area. It is interesting to note that the Court was unanimous in most of these cases. The two questions relating to matters of religion arise out of Art. 26(b) of the Constitution which reads: "Subject to public order, morality and health, every religious denomination or any section thereof shall have the right to manage its own affairs in *matters of religion*". "In matters of religion" is an expression not used either in the American Bill of Rights or in the Australian Constitution; not even in the Irish Constitution which seems to hold the nearest parallel. Section 44(2) of the Constitution of Ireland lays down "Every religious denomination shall have the right to manage its own affairs.....". There are two points of difference between the Irish and the Indian provisions. First, the right given under the Indian Constitution is wider in its ambit because it is available not only to every religious denomination but even to "any section thereof". Secondly, the Indian Constitution contains the additional words "in *matters of religion*" which indicate that other matters stand outside the purview of this fundamental right. Constitutional declaration of justiciable fundamental rights, in a satisfactory manner, is considered to be a highly difficult venture.[2] Of the rights which are usually regarded as 'fundamental' those relating to religious beliefs and practices by their very nature pose a peculiarly delicate and difficult problem, particularly, when they are sought to be fitted into the frame-work of a secular Constitution.

The Supreme Court first discussed in 1954 the questions relating to matters of religion in two important cases.[3] & [4] In the first case

1. A.I.R. 1963 S.C. 1638.
2. K. C. Wheare, *Modern Constitutions*, 1956 pp. 56-57.
3. *Commissioner, H. R. E.* v. *L. T. Swamiar*, A.I.R. 1954 S.C. 282.
4. *Ratilal* v. *State of Bombay*, A.I.R. 1954 S.C. 388.

the validity of the Madras Hindu Religious and Charitable Endowments Act, 1951, was impugned. The case related to the right of a religious denomination under Art. 26(d). The second case involved the question of validity of the Bombay Public Trusts Act, 1950, in the context of Art. 26(d). The late Justice Mukherjea delivered the judgment of the Court in both cases. In *Commissioner, H. R. E.* v. *L. T. Swamiar* he observed that religion is certainly a matter of faith and it is not necessarily theistic. Though a religion undoubtedly has its basis in a system of beliefs or doctrines it would not be correct to say that religion is nothing else but a doctrine or belief. Besides laying down a code of ethical rules for its followers to accept, a religion might prescribe rituals and observances, ceremonies and modes of worship which are regarded as integral parts of religion and these might extend even to matters of food and dress. In short, religion, as explained by the Court includes not only ethical rules and beliefs but practices as well. Further "what constitutes the essential part of a religion is primarily to be ascertained with reference to the doctrines of that religion itself".[5] In that very judgment Justice Mukherjea declared in unmistakable terms: "Under Art. 26(b), therefore, a religious denomination or organisation enjoys complete autonomy in the matter of deciding as to what rites and ceremonies are essential according to the tenets of the religion they hold and *no outside authority has any jurisdiction to interfere with their decision in such matters*"[6] (emphasis added).

The language of Art. 26(d) (which gives to every religious denomination or any section thereof the right to administer its property in accordance with law) and the expression "in matters of religion" used in Art. 26(b) suggest two things clearly. In the first place, the protection of Art. 26(b) is confined only to matters of religion, as distinguished from secular activities. In the second place, administration of religious property is a secular—not a religious—matter. It is often difficult to decide whether a given practice is a matter of religion or one of secular administration for, as Justice Mukherjea said in the *Ratilal* case,[7] the distinction between the two at times might appear to be a thin one. The learned Judge, therefore, did not attempt to formulate an unfailing test. Endorsing the view of Latham, C.J., in

5. A.I.R. 1954 S.C. 282 at 290.
6. *Ibid.*, at 291.
7. A.I.R. 1954 S.C. 388 at 392.

the famous Australian case on the freedom of religion [8] he suggested [9] that the Court in cases of doubt, should take a commonsense view and be actuated by considerations of practical necessity. He illustrated his view in these words: "If the tenets of the Jain or Parsi religion lay down that certain rites and ceremonies are to be performed at certain times and in a particular manner, it cannot be said that these are secular activities partaking of commercial or economic character simply because they involve expenditure of money or employment of priests or the use of marketable commodities. 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". The view that matters of religion in Art. 26(b) include even practices which are regarded by a community as a part of its religion was again reiterated in *Venkataramana Devaru* v. *State of Mysore*.[10] There the Court held that under the ceremonial law pertaining to temples who are entitled to enter into them for worship and where they are entitled to stand and worship and how the worship is to be conducted are all matters of religion. Again in *Sarup Singh* v. *State of Punjab* [11] S. K. Das, J., who delivered the judgment of the Court reaffirmed the earlier view when he said: "Under Art. 26(b) a religious denomination or organisation enjoys complete autonomy in the matter of deciding as to what rites and ceremonies are essential according to the tenets of the religion they hold". (He laid particular emphasis on the word "essential").

It might appear, therefore, that the Court had taken a consistent stand on what are matters of religion and who should decide them. But the subsequent cases reveal that the Court is still reflecting on these questions and re-examining them. For in *Durgah Committee* v. *Hussain Ali* [12] where the validity of the Durgah Khawaja Saheb Act, 1955, was challenged on the ground that it violated several fundamental rights including Art. 26(b), (c), (d) of the Constitution, the Court struck 'a note of caution' observing "that in order that the

8. *Adelaide Co., etc.* v. *The Commonwealth* (67 C.L.R. 116 at 129). (This leading case on the freedom of religion arose out of Section 116 of the Constitution of the Australian Commonwealth).
9. *Ratilal* v. *State of Bombay*, A.I.R. 1954 S.C. 388 at 392.
10. A.I.R. 1958 S.C. 255 at 264.
11. A.I.R. 1959 S.C. 860 at 865.
12. A.I.R. 1961 S.C. 1402 at 1415.

practices in question should be treated as a part of religion they must be regarded by the said religion as its essential and integral part; otherwise even purely secular practices which are not an essential or an integral part of religion are apt to be clothed with a religious form and may make a claim for being treated as religious practices within the meaning of Art. 26. Similarly even *practices though religious may have sprung from merely superstitious beliefs and may in that sense be extraneous and unessential accretions to religion itself. Unless such practices are found to constitute an essential and integral part of a religion their claim for the protection under Art. 26 may have to be carefully scrutinised...*" (emphasis added). In the light of this caution the position appears to be as follows: First, matters of religion would be distinguished from secular practices. (This is more easily said than done). Secondly, unless a practice is considered by the religious community concerned as an essential and an integral part of it, it would not be considered "a matter of religion". Thirdly, even if a religion regards a particular practice as an essential and integral part of it, it would not be automatically deemed "a matter of religion" if it is found, for instance, to have sprung from superstitious beliefs. Fourthly, in any event the Court will carefully scrutinise the claims of religious practices for the protection of Art. 26(b). Thus, in effect, what was all along regarded by the Court as a question to be primarily decided by the religion itself now seems to be a subject for the close scrutiny of the Court. The Supreme Court has once again discussed the matter in *Govindlalji* v. *State of Rajasthan* [13] and pointed out a difficulty which led to the caution given in *Durgah Committee* case. The Court said that sometimes a religious community may not speak with one voice as regards a particular matter and then it would be necessary for the Court to decide whether the practice in question is a matter of religion. By way of illustration the Court observed: "Take the case of a practice in relation to food or dress. If in a given proceeding one section of the community claims that while performing certain rites white dress is an integral part of the religion itself, whereas another section contends that yellow dress and not the white dress is the essential part of the religion, how is the Court going to decide the question". The two decisions last mentioned seem to imply a significant shift in the stand of the Supreme Court on "matters of religion".

In so far as the authority of the Court to interpret the Constitution and the necessity of excluding secular practices from the purview

13. A.I.R. 1963 S.C. 1638.

of Art. 26(b) are concerned there can be no two opinions. In a secular State which guarantees constitutional protection to religious freedom, secular matters should not be allowed to get mixed up with matters of religion as far as possible. Where the nature of a given practice is clearly secular, there is no difficulty. In doubtful, border-line cases, it is respectfully submitted, if a religious denomination or a section thereof is found to consider it a matter of religion, it stands to reason, religion being a matter of faith with individuals or communities,[14] to accept the claim of the community as conclusive and extend the protection of Art. 26(b) to such a practice. On the other hand, if, in spite of the claim of the community concerned that a practice is an essential and an integral part of the religion, the Court treats it as a fit subject-matter for close scrutiny the right guaranteed in Art. 26(b) would be weakened. Further, the view of the Court that practices which have sprung from superstitious beliefs, though religious, are extraneous and unnecessary accretions to religion itself and, therefore, are not "matters of religion" within the meaning of Art. 26(b) seems to strike hard at the very foundation of the freedom of religion, because as observed by Latham, C.J. "What is religion to one is superstition to another".[15] The scissors of 'superstition' may not be a safe and reliable instrument to cut short the difficulty in deciding what are "matters of religion". In cases where a religious denomination speaks with two or more voices as regards a particular practice, it is necessary first of all to see whether the different voices represent different sections of the community or the denomination, each capable of exercising the rights given in Art. 26. If there are two or more such recognised sections of a denomination each following its own set of practices distinct from the others, then, in view of the language of Art. 26, every one of those sections would be entitled to the right given in Art. 26(b). Where there are no such recognised sections of a particular denomination and yet different voices speak about a particular matter, then it becomes a question of fact to be objectively ascertained on the basis of evidence and not an issue to be decided on the basis of subjective notions like 'superstition'.

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14. *Commissioner, H. R. E.* v. *L. T. Swamiar*, A.I.R. 1954 S.C. 282 at 291.
15. *Adelaide Co. etc.* v. *The Commonwelth* 67 C.L.R. 116 at 123.

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