

SECULARISM UNDER INDIAN CONSTITUTION VIS-À-VIS RIGHT TO RELIGION-AN OVERVIEW

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ABSTRACT

Often times, religious practices and traditions stagnate the development and overall progress of the society. This has led to the state intervening in matters of religion so as to prevent the gross miscarriage of justice and violation of human rights. A number of cases based on such human rights violations and mass discrimination are filed before the Courts, leaving judges perplexed and incapable of balancing religious rights and the fundamental rights of people in the backdrop of social reform. Subsequently, this led to the development of the 'essential practices test' to determine the scope of State's intervention in the arena of religious practices in question. Though, this doctrine has helped in remedying several social evils and practices, several critics have criticised it as excess Court intervention. Therefore, it is essential to develop an alternative to the essential practices test that maintains the secular fabric of the country as well as protects religious freedom.

Part I of this paper will give an overview of the concept of secularism in India leading up to the doctrine of essential religious practice. Part II of this will state the evolution of the doctrine through various case laws and the inherent inconsistencies therein. Part III of the paper will compare the essential practices test with the doctrine of margin of appreciation followed by the European Court of Human Rights.

Keywords: Essential Religious Practice, Secular, Doctrine of Margin of Appreciation, Judiciary, Article 25, Constitutional Morality.

INTRODUCTION

"At the stroke of the midnight hour, when the world sleeps, India will awake to life and freedom..." These were the words that formed part of one of the greatest speeches of the 21st century called "Tryst with Destiny" delivered by Jawaharlal Nehru, the first Prime Minister of Independent India on the eve of India's Independence.¹ As drums rolled and conches blew, this speech marked the birth of an Independent nation, free from the shackles of the British colonial rule. However, with the dawn on independence, India was split up into two nations in the name of religion with Hinduism and Islam being the dominant ones. When the wounds of partition were still afresh and raw, Nehru envisioned free India to be a secular country, true to its pluralistic nature and contrary to the stance taken by Pakistan. Mahatma Gandhi also emphasized that India will be a democratic secular country where

¹University of Cambridge, https://www.cam.ac.uk/tryst_with_destiny (last visited Mar. 1, 2021).

every person irrespective of their religion will be treated with equality and dignity. He stated that the secular fabric of the nation was a basis of our constitution and that India will be regarded as a home to a plural and diverse group of people. The drafters of the Constitution were also guided by these principles and values, thereby entitling every citizen equal rights and equal protection under the law.

The secular form of democracy further strengthened the constitutional principles of equality, liberty and fraternity which thus led to the 42nd amendment whereby the word "secular" was added in the preamble to read that India was a sovereign, socialist, secular and democratic republic.² However, even after the addition of the word "Secularism" through the amendment, the freedom of religion has always been a matter of debate. Even before the said amendment, the principle of secularism was already construed through Article 25 and Article 26 of the Constitution which guarantees the freedom of religion to the citizens as well as religious denominations in the country subject to the reasonable restrictions of public order, morality and health and the rights under Part III. Nevertheless, the explicit mention of the word

'secular' in the preamble has cemented the vision of our founding fathers. Moreover, it being a part of the preamble has become an essential ingredient of the basic structure of our constitution, thereby preventing the State from violating the secular fabric of the country.

India's secularism principle is rather unique in nature and differs from the rest of the world. Unlike the American doctrine of the "wall of separation" whereby the state practices a non-interventionist approach in the matters of religion or the European model which retains a state religion but allows people to follow their own beliefs or the French model which allows religion to be practiced only in private spaces, Indian secularism not only provides for the fundamental right to practice, profess and propagate religion but also allows the state to intervene in the guise of social reform.³ The recent Sabrimala judgment is one such instance wherein the discriminatory religious practice of preventing menstruating women from entering temples was abolished by the Court.⁴ Secularism in India can be summarised as follows:-

1. As India will have no official state religion, religion will have no impact on the relationship between the State and the citizens. Therefore, the rights of the citizens will not be determined by the religious beliefs;
2. The State will not intervene between a person and his religion and equal freedom will be given to all citizens irrespective of their religious beliefs.
3. The State shall maintain a non-interventionist position in matters of religion unless it is necessary to intervene for the purposes of social welfare and reform.

² INDIA CONST. Preamble, amended by The Constitution (Forty-Second Amendment) Act, 1976.

³ Ronojoy Sen, *Articles of Faith: Religion, Secularism, and the Indian Supreme Court xvii-xx* (New Delhi: Oxford University Press, 2010).

⁴ *Indian Young Lawyer Association & ors. v. State of Kerala & ors.*, 2018 SCC Online SC 1690.

Unlike the European or the French model, state intervention to a certain limit was deemed necessary as religion in India plays a very big role in developing the social behaviour of a community. India being a deeply religious country, the primary source of discrimination is often on the grounds of religion. Often times, religious practices and traditions stagnate the development and overall progress of the society. This has led to the state intervening in matters of religion so as to prevent the gross miscarriage of justice and violation of human rights. A number of cases based on such human rights violations and mass discrimination are filed before the Courts, leaving judges perplexed and incapable of balancing religious rights and the fundamental rights of people in the backdrop of social reform. Subsequently, this led to the development of the 'essential practices test' to determine the scope of State's intervention in the arena of religious practices in question. Keeping in mind the profound role played by religion in people's lives, the Courts under the said doctrine started inquiring into what were the essential tenets of a religion and whether the impugned practice formed part of it or not. A two-fold approach was developed in this regard- one where the religion itself determines what is essential and what is not and other where the court decides. This has led to a lot of confusion with the courts often fluctuating between the two approaches. The judiciary has also been overburdened with the responsibility of interpreting religious texts to identify the essential tenets which exceed their field of expertise.

The Courts through this doctrine have encroached upon the matters of religion and have become a seat of theological authority. Therefore, the Courts have undergone a transformation from being a guardian of fundamental rights to now acting as a custodian of religion. Though, this doctrine has helped in remedying several social evils and practices, several critics have criticised it as excess court intervention. Thus, it is essential to develop an alternative to the essential practices test that maintains the secular fabric of the country as well as protects religious freedom.

THE DOCTRINE OF ESSENTIAL RELIGIOUS PRACTICES IN INDIA

Even though the idea of secularism is ingrained in our Constitution, religion often stands as a hindrance in the path of attaining social justice. The framers of our Constitution were well aware of the religious differences and the backward discriminatory practices that were deeply entrenched in the Indian society. Thus, in addition to providing religious freedom within the framework of the Constitution, the framers were also conscious of permitting the State to intervene in the interest of social reform. This led to development of a concept of reformative secularism in India,⁵ whereby the State could strike a balance between the need for social upliftment and the religious rights of the diverse groups in the country.

⁵ Gary Jeffrey Jacobsohn, *The Wheel of Law 104* (Princeton University Press, New Jersey, 2003) ⁶ Constituent Assembly Debates, December 02, 1948 speech by DR. B.R. AMBEDKAR, <http://parliamentofindia.nic.in/ls/debates/vol7p18b.htm> (Last visited on Mar. 25, 2021).

It was because of this unique model of secularism that discriminatory and inhuman practices such as Sati and child marriage in India were abolished. However, due to the ambiguous framework of religious freedom and rights in the Constitution, the Courts in India were often faced with the impediment of determining what practices were to be given constitutional protection and what practices would have to be struck down in the name of social reform. The provisions under Article 25 and 26 failed to determine to extent to which the State or the judiciary could encroach upon the arena of religious freedom or override religious rights in the course of determining social reform.

This led to the evolution of the essential religious practices doctrine wherein the Court assumed the role of an interpreter to determine the essential tenets of a religion so as to enable itself to strike down those tenets which were not essential and were in consonance with the Constitution. This test was primarily developed by the Apex Court for addressing the persisting discrimination against the lower castes and the indigenous tribes. One cannot disagree the reality that owing to this test the Supreme Court was enabled to reform discriminatory practices such as abolishing untouchability and bring about social transformation in line with the constitutional principles. The basis of this test was inspired by the words of Dr. B. R. Ambedkar who while framing the provisions of freedom of religion said "... there is nothing extraordinary in saying that we ought to strive hereafter to limit the definition of religion in such a manner that we shall not extend beyond the beliefs and such rituals as may be connected with ceremonials which are essentially religious."⁶ However, the test is not uniform in its implementation by the Court and is often applied differently in different case purely according to the Court's interpretation. Though the test was first crystalized in the year 1954, bits and pieces of the test was developed through a number of judicial cases.

Religion to decide the essentiality of a religious practice

The doctrine of essential religious practices was first cemented in the case of *Commr., Hindu Religious Endowments Madras v. SriLakshmindraTirthaSwamiar of Sri Shirur Mutt*⁶. A 7judge bench of the Apex Court held that essential tenets of a religion must be determined in respect of the religious doctrines itself. In this case the Madras Hindu Religious and Charitable Endowments Act, 1951 was challenged. Under the said Act, a statutory commissioner was empowered to frame and settle a scheme in case there was a reason to believe that the said religious institution was misappropriating funds.

The Petitioner submitted that the said provision was violates of his right to manage his religious institution under Article 26 (b) of the Constitution. This gave rise to the question as to what constitutes essential tenets of a religion. The Court opined that Article 25 of the Constitution does not only guarantee the freedom to choose a religious belief but also all

⁶ The Commissioner, Hindu Religious Endowments, Madras v. SriLakshmindarThirthaSwamiyar of ShriShirur Mutt, (1954) SCR 1005. ⁸ Ibid.

acts done in pursuance of such belief. In such a case while ascertaining whether a particular practice is essential or not, the Court must look into the doctrines of the religion alone.⁸

Further, if religious ceremonies or traditions involve monetary expenditure or employments of priests or servants, the same would not be regarded as a commercial activity for the state to intervene but are within the arena of religious practices within the meaning of Article 26(b). The restrictions set out under Article 25(2)(a) which allows states to regulate or restrict any economic, financial or secular activity in association with religious practices does not entail the freedom of religion as such. Such a freedom can only be restricted when they are inconsistent with the public order, morality or health.

Similarly, following the precedent laid down by the Court in the Shirur Mutt case⁷, the Court in the *Sardar Syedna Taher Saifuddin Saheb vs. State of Bombay*¹⁰, wherein the Court applied the doctrine of essential religious practices to determine if the fundamental rights under Article 25 and 26 of the Dawoodi Bohra community was violated due to the provisions under the Bombay Prevention of Ex-communication Act, 1949. It was submitted that the powers of the Head Priest of the community including that of excommunication were an integral part of the religious beliefs of the Dawoodi Bohra community. The Court upholding the same stated that the essential tenets of a religion must be ascertained through the religious texts and scriptures

Opinions of the religious community will not determine essentiality

Contrary to the Shirur Mutt case¹¹, the Court in the following cases did away with the ability of the religion to determine if the impugned practice was essential and formed part of the religion. For instance, in the case of *Sri Venkataramana Devaru v. State of Mysore*,¹² Dalits were prevented from entering a Hindu temple which was established for the Gowda Saraswath Brahmins citing that the practice was an integral part of the Hindu religion. The Court itself took over the role of determining the practice within the contours of the doctrine of essential religious practices. The Court stated that the view of the religious community would be taken into consideration, however such views will merely guide the Courts in determining essentiality but would not itself ascertain the same. In this case the Courts adopted a rather progressive approach to the test of essentiality so as to bring about social reform.

Similarly, in the case of *Tilkayat Shri Govindlalji Maharaj v. State of Rajasthan & Ors*¹⁰, the Court stated that the issue of determining whether an impugned practice is an essential attribute of a religion or not will be settled by the Court itself. This change in view from the

⁷ Supra note 7.

⁸ AIR 853.¹¹

Supra note 7.

⁹ AIR 255.

¹⁰ *Tilkayat Shri Govindlalji Maharaj v. State of Rajasthan and Ors.*, AIR 1963 SC 1638.

Shirur Mutt case¹¹ was justified by the Court stating that if different sections of the same religious community differed in their opinions then in such a case the Court cannot leave the issue of determining essentiality on such a religious community.¹²

The Test of Superstition

Further encroaching upon the domain of religious freedom, the Court attempts at distinguishing superstitions from religious beliefs. In the case of *Durgah Committee v. Syed Hussain Ali*¹³, the court opined that "that the religious practices, which might have sprung from superstitious beliefs that are extraneous and unessential assertions to the religion, would naturally have no immunity against state intervention"¹⁴ Therefore, it was asserted by the Court that in addition to determining whether a practice is essential or not, the Court will further probe into whether such a practice stems from a superstition. Such a determination would solely lie on the Court. However, the Court failed to take into account that what is superstitious to one might be a religious belief to another.

The Test of Optionality

The essentiality test further evolved into determining if there was an alternative to the religious practice called in question. The Court opined that if an alternative exists then such a practice does not form an integral part of the religion. In the case of *Hanif Quareshi v. State of Bihar*¹⁵, the ban of cow slaughter was challenged on the grounds that it violated rights of the Muslim community as cows are often sacrificed during the festival of Bakri Eid. The Court while applying the test of essential religious practices, looked into the religious scriptures of Islam and observed that the religious texts offer for an alternative where instead of a cow, a goat or a camel could be sacrificed and thus it was not mandatory for the sacrifice of cows alone.¹⁶ In other words, the cow sacrifice was held to be not an integral part of the Muslim religion and thus the ban on cow slaughter did not violate the rights of the Muslim community.

A similar view was taken by the Court in the case of *Dr. M. Ismail Faruqui v. Union of India*¹⁷, wherein the Apex Court held that praying in a mosque did not constitute an essential part of the Muslim religion. The Court while looking into the religious texts interpreted that while offering Namaz i.e. prayers was an essential tenet of the Muslim religion, the location of offering the prayers was irrelevant. This evolution of the test of optionality in addition the test of essentiality has no merit. A lot essential practices followed by religious communities often have alternative modes of conducting the said tradition. If the test of

¹¹ Supra note 7.

¹² Supra note 13.

¹³ AIR 1961 SC 1402.

¹⁴ *Id* at 33.

¹⁵ *Hanif Quareshi v. State of Bihar*, (1959) 1 SCR 629 (India).

¹⁶ *Id.* at 13.

¹⁷ *Dr. M. Ismail Faruqui v. Union of India*, (1994) 6 SCC 360 (India).

optionality had to be applied across all religious beliefs, then no practice would stand through the test.¹⁸

The Test of Recency

The ambiguity surrounding the essential religious practices test has led to the test of recency, wherein the Court will now look into the recency of a religious practice to determine its essentiality. This was seen in the case of *Acharya Jagdishwaranand Avadhuta and Ors. v.*

*Comm. Of Police Calcutta and Ors*¹⁹, the Court held that the 'Tandava' dance as an essential religious rite for the Ananda Margis community as the said practice was introduced in 1966 whereas the community was established in 1955. Therefore, the Courts have introduced a novel method of determining essentiality in terms of how recent is the practice. The said inclusion of recency in the ambit of the doctrine of essential practices was criticised on the ground that only because a practice was introduced at a later stage does not mean that it fails to form part of the essential fabric of the religion.²⁰ Many critics have also voiced their dissent by stating that evolution of such additional tests to the doctrine of essentiality has concentrated undue powers in the hands of the judiciary.

Contrary to the opinion of the Court in the abovementioned case, in the case of *Shayara Bano v. Union of India*²¹, the Court while holding that the practice of triple talaq does not form an integral part of Islam stated that the sole fact that a practice has been in existence for a long time does not make the said practice valid. The case in hand was in regard to the maintenance to be given to divorced Muslim women under the Muslim Personal (Shariat) Application Act, 1937.²² The Court looked into the interpretation of the Quran to base its findings that the Muslim personal law was not in conflict with the statutory provisions for maintenance. It was further held that the freedom of religion guaranteed under the Constitution is absolute subject to the restrictions mentioned therein.²⁶

This reveals the contrasting opinions of the judiciary in the Avadhuta case and the Shayara Bano case where in the former case the judiciary struck down the practice of "Tandava dance" stating that the said practice evolved too recently whereas in the latter the triple talaq practice was outlawed for being in existence for too long. The dissenting judgement of Chief Justice Khehar uphold the practice of triple talaq stating that personal laws occupy the same position as that of a fundamental right. While applying the test of

¹⁸Abhinav Chandrachud, Republic of Religion: The Rise And Fall Of Colonial Secularism 21 (Penguin Viking, 2020)

¹⁹*Acharya Jagdishwaranand Avadhuta and Ors. v. Comm of Police Calcutta and ors.*, (1983) 4 SCC 522.

²⁰*Ibid.*

²¹(2017) 9 SCC 1

²²Muslim Personal (Shariat) Application Act, 1937, Acts of Parliament, 1937 (India). ²⁶*Supra* note 24 at 53.

essential religious practices, Justice Khehar stated that said practice was deemed essential as it was sanctioned by the religion. This was another deviation from the previous applications of the test wherein the consideration of the Court was required to test the essentiality and not because the impugned practice was merely permitted under the religion.²³

CONCLUSION

India being a deeply religious country, the primary source of discrimination is often on the grounds of religion. Often times, religious practices and traditions stagnate the development and overall progress of the society. This has led to the state intervening in matters of religion so as to prevent the gross miscarriage of justice and violation of human rights. A number of cases based on such human rights violations and mass discrimination are filed before the Courts, leaving judges perplexed and incapable of balancing religious rights and the fundamental rights of people in the backdrop of social reform. Subsequently, this led to the development of the 'essential practices test' to determine the scope of State's intervention in the arena of religious practices in question. Keeping in mind the profound role played by religion in people's lives, the Courts under the said doctrine started inquiring into what were the essential tenets of a religion and whether the impugned practice formed part of it or not. A two-fold approach was developed in this regard- one where the religion itself determines what is essential and what is not and other where the court decides. This has led to a lot of confusion with the courts often fluctuating between the two approaches. The judiciary has also been overburdened with the responsibility of interpreting religious texts to identify the essential tenets which exceed their field of expertise. The Courts through this doctrine have encroached upon the matters of religion and have become a seat of theological authority. Therefore, the Courts have undergone a transformation from being a guardian of fundamental rights to now acting as a custodian of religion. Though, this doctrine has helped in remedying several social evils and practices, several critics have criticised it as excess court intervention. Thus, it is essential to develop an alternative to the essential practices test that maintains the secular fabric of the country as well as protects religious freedom.

The researcher's line of reasoning is in consonance with the view of Justice Chandarchud in this regard. The researcher fails to understand the need for a doctrine of essentiality when a literal interpretation of the text in Article 25 itself filters out those religious practices that do not fulfil the test under the said provisions through the restrictions. Instead of assuming itself as a theological authority and interpreting religious texts and tenets of religion, the Court must strengthen the doctrine of constitutional morality and must test religious practices on this doctrine alone. Further, the test of anti-exclusion propounded by him is a step in the right direction.

²³Supra note 22; Supra note

24. ²³Supra note 22 at para 8.

LITERATURE REVIEW

1. **Constitutional Law of India: A Critical Commentary.** By H. M. Seervai: A detailed study into the fundamental rights enshrined under the Constitution, emphasizing greatly on Article 25 and 26 and its interpretation by the courts.
2. Article titled "*To Practice What is Preached: Constitutional Protection of Religious Practices Vis-À-Vis Reformatory Secularism*" written by Akilesh Menezes & Priyanshi Vakharia published by NLUJ Law Review- The article interprets the essentiality test in the light of transformative constitutionalism and suggests an alternative test.
3. Book titled "*Transformative Constitution- A Radical Biography in Nine Acts*" written by Gautam Bhatia- The book looks into the pre-independence history of India and states that the intention of the Constitution was not merely to guarantee the status of a citizen to Indians but also the social relationships. He proposes a novel vision of the Constitution and its interpretation so as to achieve social transformation.
4. Article titled "*An Equal Right to Freedom of Religion: A Reading of the Supreme Court's Judgment in Sabarimala*" written by Suhrith Parthasarathy published in the *Oxfords Human Rights Hub*- The Article focuses on the anti-exclusion test propounded by Justice Chandarchud in the Sabarimala verdict as an alternative to the essentiality test.

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