

## REVIVING THE ESSENTIAL PRACTICES DEBATE

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### ABSTRACT

*In the context of the Indian Constitution, the individual's fundamental freedom of conscience and religion epitomises the secular nature of the State. The Constitution also empowers the State to intervene in matters of religion pertaining to regressive social practices that the State endeavours to abolish. Keeping in mind the deep rooted nexus between religious and social life in the Indian social fabric, distinguishing a secular practice from a religious one is often a matter of fine margins. As the protector of the Fundamental Rights, the Supreme Court has often had to draw the line between religious freedom and state intervention by differentiating essentially religious practices from essentially secular ones. However the evolution of the apex court's jurisprudence has witnessed the development of the essential practices doctrine which entails a substantive inquiry into the significance of a religious practice before providing constitutional protection to the same. The application of this doctrine by the Rajasthan High Court, to outlaw the practice of Santhara has revived the debate regarding its suitability in a secular state. In this context, the paper seeks to explore the evolution of the essential practices doctrine and comment on its impact on the secular nature of the Indian State.*

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## I. INTRODUCTION

Reconciling the religious freedoms of the individual with the constitutional authority of the State to intervene in matters of religion has perhaps been one of the most contentious chapters in the development of Indian constitutional jurisprudence. The debate was once again revived in the public discourse as the Rajasthan High Court, in a widely criticized judgment, pronounced a religious practice of the Jain community as illegal, as in the opinion of the Bench it amounted to an act of self-destruction. The case, *Nikhil Soni vs. Union of India*<sup>1</sup>, examined the Jain practice of *Santhara* or *Sallekhana* which involves a fast until death, traditionally undertaken at a time when the body is unable to serve the purpose of life, (for instance during one's last years) in order to attain *Moksha* or salvation.

While most of the debate in the public domain has been focussed on the Court's alleged misinterpretation of the practice of *Santhara*, which caused it to equate the same with suicide as defined by the Indian Penal Code, the underlying and perhaps more significant concern is regarding the Court holding that, as the *Santhara* is not an *essential practice* of the Jain religion, it is not protected under the religious freedoms that the Constitution provides. This specific finding of the Court has reopened the debate on what is known as the 'essential practices doctrine', a crucial element of the Supreme Court's constitutional jurisprudence in the religious domain.

The essential practices test allows the Court to evaluate the importance of a religious practice irrespective of its religious significance to its followers. The fact that the Constitution does not discriminate between religious practices based on their significance, while providing the religious freedoms, forms the primary argument against the essential practices test. Further it has been argued that the test breaches the religious autonomy of the individual as it empowers the Court to decide what practices can and cannot be followed, therefore violating the principle of secularism embodied in the Constitution. In this context, this paper seeks to explore the origins and the development of the essential practices test since its genesis in the mid 1950's and through its analysis, elucidate the need to re-examine the apex court's application of the same.

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<sup>1</sup> W.P (Civil) No. 7414 of 2006, August 10, 2015.

## II. SEPARATING THE RELIGIOUS FROM THE SECULAR

When providing the religious freedoms, the Indian Constitution under Article 25<sup>2</sup> guarantees the individual the freedom of conscience and the right to profess practice and propagate the religion of one's choice. It however also allows the State to make legislation "*regulating or restricting any economic, financial, political or other secular activity which may be associated with religious practice.*" The phrase underlined above is key to understanding the debate on religious freedoms in the Indian context. As per Article 25, the state has the ability to intervene in *secular matters* which are associated with a religious practice. To fully appreciate the meaning of this phrase we must go back to the words of Dr. Ambedkar during the Constituent Assembly debates<sup>3</sup> where he commented,

*"The religious conceptions in this country are so vast that they cover every aspect of life, from birth to death. There is nothing which is not religion and if personal law is to be saved, I am sure about it that in social matters we will come to a standstill. I do not think it is possible to accept a position of that sort. 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 beliefs and such rituals as may be connected with ceremonials which are essentially religious. It is not necessary that the sort of laws, for instance, laws relating to tenancy or laws relating to succession should be governed by religion".*

Keeping in mind the deep rooted nexus between social and religious life in the Indian tradition, Dr. Ambedkar attempted to draw a line between practices which were *essentially religious* and those that were *essentially secular* practices governed by religious norms. It is in this context that the Constitution makers had provided for the State to regulate secular activities associated with religion without impinging on religious freedom.

The early 1950s witnessed the Supreme Court having to distinguish between religious and secular practices in several notable judgements. In a landmark judgement, reflective of the jurisprudence of the times, the Court in *The Commissioner, Hindu Religious Endowments, Madras v. Sri Lakshmindra Thirtha Swamiyar of Sri Shirur Mutt*<sup>4</sup> extended the protection of Article 25 and 26 beyond mere doctrinal belief to also include practices and rituals that its

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<sup>2</sup> Art. 25, The Constitution of India 1950.

<sup>3</sup>Indian Parliament, *Constituent Assembly of India- Volume VII*, (30<sup>TH</sup> December 2015) <http://parliamentofindia.nic.in/ls/debates/vol7p18b.htm>.

<sup>4</sup> AIR 1954 SC 282.

adherents followed.<sup>5</sup> Broadening the scope of religion meant that, faced with an allegedly religious practice, the Court had to determine whether that practice was essentially religious or a secular practice with a religious tinge. For instance the Court found expenditure such as offering of food to the idols and employment of priests to be secular practices rather essentially religious ones, as long as the said activities are prescribed by the tenets of the religion.<sup>6</sup> In order to determine the secular or religious nature of the practice, the Supreme Court, like its colonial predecessor, was referring to the doctrines of the religion itself.<sup>7</sup> That very year in *Ratilal Panachand v. State of Bombay*<sup>8</sup>, Justice Mukherjee firmly held that religious groups under Article 26(b) had autonomy in matters of religion and that no secular authority had the right to declare a practice as not an essential part of religion.<sup>9</sup> Interestingly though, in 1953 i.e. prior to *Shirur Mutt* and *Ratilal*, the Court in *Saraswathi Ammal and Another v. Rajgopal Ammal, 1953*<sup>10</sup> made a starkly anachronistic comment worth quoting here in full:

*“To the extent that any purpose is claimed to be a valid one for perpetual dedication on the ground of religious merit though lacking in public benefit, it must be shown to have a Shastraic basis so far as Hindus are concerned. The heads of religious purposes determined by belief in acquisition of religious merit cannot be allowed to be widely enlarged consistently with public policy and needs of modern society.”*

At a time when judges sought to restrict the extent of their inquiry to merely determining whether the practice in question was essentially religious or secular, the observation of the Court hinted at the need to evaluate religious practices with the “needs of modern society” and “public policy”. Thus although the Supreme Court remained largely unwilling to engage with a religious practice at a substantive level, there remained the possibility of evolving a substantive test in years to come.

### III. DEVELOPING A SUBSTANTIVE TEST

The late 1950s saw two cases that were crucial to the development of the essential practices doctrine. In *Venkataramana Devaru v. State of Mysore, 1958*<sup>11</sup> the Supreme Court was

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<sup>5</sup> Ronojoy Sen, *The Indian Supreme Court and the quest for a 'rational' Hinduism*, 1 SOUTH ASIAN HISTORY AND CULTURE, 86-104 (2009).

<sup>6</sup> RONOJOY SEN, LEGALIZING RELIGION: THE INDIAN SUPREME COURT AND SECULARISM, (2007).

<sup>7</sup> *id.* at 13.

<sup>8</sup> AIR 1953 Bom. 242.

<sup>9</sup> *id.* at para 14.

<sup>10</sup> AIR 1953 SC 491.

<sup>11</sup> AIR 1958 SC 255.

required to assess the constitutionality of the *Madras Temple Entry Authorisation Act 1947* which aimed to reform the practice of religious exclusion of *Harijans* from a specific denominational temple founded by *the Gowda Saraswat Brahmins*.<sup>12</sup> The competing claims were, on one hand, the *Brahmins*' right to manage their own religious affairs under Article 26(b) and on the other, the State's constitutional mandate to throw open Hindu temples "to all classes and sections of Hindu's" under Article 25(2)(b). Curiously enough instead of adopting a modernist rhetoric, the Court delved into the traditional Hindu texts to find 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... are all matters of religion".<sup>13</sup> Having said so, the Court now faced, "two (constitutional) provisions of equal authority, neither of them being subject to the other."<sup>14</sup> To overcome this dilemma, the Court tactfully applied the rule of harmonious construction and pronounced that Article 26(b) was subject to 25(2)(b), in view of the broader scope of the latter. This, in the opinion of the Court, prevented either provision from being held entirely inoperative<sup>15</sup> and hence was the harmonious interpretation of the two.

In doing so the Court was setting a crucial precedent. In keeping with its past judgements, the Supreme Court had refrained from adopting a modernist, reformative position on a religious practice, instead restricted its inquiry to the scriptures. However, through its interpretation of the Constitution, the Supreme Court sacrificed the religious autonomy enshrined in *Shirur Mutt* to promote the State's attempt to reform religion. Perhaps what *Devaru* elucidated was a Court hesitant to take a bold stance, yet aware of the need to reform traditional practices in keeping with modern society. However a curious development in the Allahabad High Court a year prior to *Devaru*, was perhaps a starker indicator of the shifting judicial trend. In *Ram Prasad Seth v. State of UP and Others 1957*<sup>16</sup> the Bench ruled against the practice of bigamy within the Hindu tradition. The petitioner had claimed that since certain rituals meant for the attainment of religious salvation could only be performed by a son, he had a right to a second marriage if his first wife failed to bear a male child. Having perused the scriptures however, the High Court dismissed the claim as it was not satisfied that polygamy could be considered an essential part of the Hindu religion. Note the usage of the word 'essential' by the High Court. Previously the Courts were using the word

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<sup>12</sup> See Ronojoy Sen, *Supra* note 6, at 16.

<sup>13</sup> AIR 1958 SC 255.

<sup>14</sup> *Id.* at para 29.

<sup>15</sup> Harmonious construction broadly maintained the right to manage religious affairs with the exception of Art. 25(2)(b). Holding the denomination's freedom as superior would, according to the Court, nullify Art. 25(2)(b) and hence was sought to be avoided.

<sup>16</sup> AIR 1957 All 411.

essential to determine the *nature* of the practice, whether secular or religious, to ascertain the limits of State intervention. However the High Court's usage changed the dimensions of the word, which now qualified the *importance* of the belief to the religion. This minor shift in usage radically transformed the essential practices test, which now gave the Court the power to determine what religious practices could be followed and what could not, based on the Court's interpretation of its *essentiality to the religion* in question.

In 1958, the Supreme Court in *Hanif Qureshi and Others v. The State of Bihar*<sup>17</sup> used the same interpretation when faced with the question of cow slaughter on Id. The Court held that cow slaughter did not constitute an *essential practice* of Islam and hence dismissed the claims of the petitioners. The secular or religious nature of the practice no longer remained an important question. Four years later in *Sardar Syedna Taber Saifuddin Saheb v. The State of Bombay*<sup>18</sup> the Court struck down a law against religious excommunications. Delivering the majority judgement, Justice Das Gupta stated, "*what constitutes an essential part of a religion or religious practice has to be decided by the courts with reference to the doctrine of a particular religion*". In his concurring opinion, Justice Ayyangar held that Article 25(1) protected the *essential and integral practices* of the religion, which were not subject to law providing social welfare under 25(2)(b).

Clearly, determining what constituted an essential part of a religion was central to the Supreme Court's analysis of religious practices. The role of the judiciary in the interpretation of religion was greatly expanded in *Durgah Committee, Ajmer And Another v. Syed Hussain Ali And Others*<sup>19</sup>, by Justice Gajendragadkar who having stated, "*in order that the 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*"<sup>20</sup> proceeded to distinguish between religious and superstitious practices, "*even practices though religious, may have sprung from merely superstitious beliefs and may in that sense be extraneous and unessential accretions to religion itself*"<sup>21</sup> suggesting that, in addition to identifying what practices qualified as religion, the Supreme Court was also "*taking up the role of sifting superstition from 'real religion'*".<sup>22</sup> This bold assertion of the Court's active role in reforming religion clearly elucidated the fundamental change in the Court's approach towards matters regarding the same.

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<sup>17</sup> AIR 1958 SC 731.

<sup>18</sup> AIR 1962 SC 853.

<sup>19</sup> AIR 1961 SC 1402.

<sup>20</sup> *id.* at paragraph 34.

<sup>21</sup> *Id.*

<sup>22</sup> See Ronojoy Sen, *Supra* note 6, at 19.

#### IV. IDENTIFYING THE ESSENCE OF RELIGION

The increasingly active role of the Supreme Court in determining what was essential to religion and what was not raised several questions as to the precise understanding of religious freedom under the secular Constitution. In the 1990s this question was deeply explored in two landmark judgements. The *SR.Bomma*<sup>23</sup> judgement was perhaps the most authoritative articulation of the Court's interpretation of Secularism and religious freedoms in the Indian context. Seven out of the nine Judge Bench voiced their opinions, which contained ideas key to the present discussion. The majority Bench sought to distinguish a normative understanding of religion, or what religion ought to be, from what it is in practice. There was also a suggestion that the essence of religion which the Court sought to protect was largely spiritual in nature, "*the freedom and tolerance of religion is only to the extent of permitting pursuit of spiritual life*"<sup>24</sup>.

This sentiment was articulated more explicitly by Justice Ramaswamy in *A.S. Narayana Deekshbitulu v. State Of Andhra Pradesh And Ors*<sup>25</sup>, where he linked the essence of a religion or its core to the concept of *dharma*. He interpreted *Dharma* as, "*that which approves oneself or good consciousness or springs from due deliberation of one's own happiness and also for the welfare of all beings...*"<sup>26</sup> Writing a separate judgement, Justice Hansaria, suggested that religion as commonly understood, included dogma, and blind faith<sup>27</sup> in contrast with *dharma* that entailed the attainment of "*spiritual glory*".<sup>28</sup> What the above examples elucidate is that the Court, over the course of its evolving jurisprudence, had significantly narrowed the scope of religion. The expansive interpretation of religious freedoms articulated by Justice Mukherjee in *Shirur Mutt* had been deconstructed to extend Constitutional protection to only the spiritual core of a religion.

#### V. THE QUESTION OF SANTHARA

In light of the above historical narrative, the employment of the essential practices test, by the Rajasthan High Court, to rule against the practice of *Santhara* is hardly a surprise.

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<sup>23</sup> S.R. Bommai v. Union of India, AIR 1994 SC 1918.

<sup>24</sup> *id.* at para 88.

<sup>25</sup> AIR 1996 SC 1765.

<sup>26</sup> *id.* at para 79.

<sup>27</sup> *id.* at para 152.

<sup>28</sup> *Id.*

However it has several significant implications worthy of debate in the public domain. The primary concern regarding the essential practices test is that the doctrine is founded on an interpretative mistake. The genesis of the doctrine in its contemporary form lies in the misinterpretation Ambedkar and the early judgements of the Supreme Court in the 1950s. And this has allowed the Court to construct religion as it deems appropriate, by distinguishing between essential and non-essential practices. Interestingly the Calcutta High Court in 1990 had warned against the doctrine being violative of religious autonomy, “*If the Courts started enquiring and deciding the rationality of a particular religious practice... the religious practice would become what the Courts wish the practice to be,*”<sup>29</sup> an apprehension clearly validated by the *Santhara* judgement. By stating that, as *Santhara* is not the only means of attaining moksha and thus not an essential practice, the Court has essentially dictated to the community what the appropriate means to attain spiritual salvation should be. By extension it implies that a person who, in good conscience, seeks *Moksha* through *Santhara* is barred from doing so as the Court opines that there exist better alternatives.

It is true that use of the essential practices test has facilitated the remedying of several social evils hence promoting the interests of justice at large. Yet it raises certain concerns. In what manner, if at all, is the Supreme Court, a secular authority of the State, qualified to interpret religious doctrines and rule conclusively on their interpretation of the same? Does not the inquiry into essentiality of a religious practice involve a moral judgement of the same? The very notion of a traditional religious practice entails a certain adherence to a historical past.

Whether the process of secularisation can take place without impinging on this traditional normative order is a contentious proposition. And if not, whether matters of ethical choice fall within the domain of the judiciary is perhaps more disputed still.

## VI. CONCLUSION

The essential practices test today has become the cornerstone of the Supreme Court’s well established jurisprudence on religious freedom and state intervention. Despite its highly contentious nature, the doctrine itself has never been debated in Court and receives little attention in public discourse. In the words of legal scholar Dr. Ronojoy Sen, “*the role of the Court in determining what constitutes religion and essential religious practice has remained undiminished*

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<sup>29</sup> Acharya Jagadishwaranada v. Commissioner Of Police, Calcutta, AIR 1990 Cal 336.

*since the formative years of this doctrine. Subsequent rulings have built on case law but hardly ever reconsidered the doctrine of essential practices*".<sup>30</sup> In this context, the judgement in Nikhil Soni vs. The State of Rajasthan has provided a much needed opportunity to revive the issue in contemporary legal discourse. When the Supreme Court sits over the *Santhara* ruling, it ought to revisit the essential practices doctrine rather than simply test the practice of *Santhara* against its understanding of the 'essence' of Jainism. To do so would be to ignore pertinent concerns of religious freedom from state intervention that would undermine principle of secularism embodied in the Constitution.

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<sup>30</sup> See Ronojoy Sen, *Supra* note 6, at 23.