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Role of Indian judiciary in the development of essential religious practices doctrine: An analysis

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Abstract
The Constitution of India guarantees to citizens the Right to freedom of religion which includes freedom to profess, practice and propagate religion with reasonable restrictions. The secular activities associated with freedom of religion are not protected from interference by the state. The judiciary has tested several customs and religious practices on the basis of theory of essential religious practice which it evolved in 1954 to determine whether a religious practice was protected under Article 25 and Article 26 of Indian Constitution. The judiciary made a distinction between practices essential and integral to a religion and the practices which are religious but not essential. The practices under this doctrine were tested by the courts on the basis of interpretation of particular religious texts and also by looking into the empirical evidences of the practice in question. This wearing of the theological mantle and inconsistent approach of the judiciary has led to severe criticism of the doctrine. Scholars are of the view that if the Courts started enquiring and deciding the rationality of a particular religious practice, then there might be confusion and the religious practice would become what the courts wishes the practice to be. Therefore, courts should decide the validity of any religious practice on the basis of Constitutional standards. Therefore, this paper aims to analyse the role of Foreign and Indian Courts in the development of Essentiality doctrine in the light of various judicial pronouncements.

Keywords: Constitution, doctrine of essential practices, Essentiality test, Hinduism, Islam, India, Supreme Court, religion, religious practices

Introduction

According to a former Chief Justice of India, "The fathers of the Constitution placed the individual at the center of the Constitutional scheme", though not without a debate [1]. As far as religion is concerned, the Preamble to the Constitution ensures all citizens the liberty of "thought, expression, belief, faith and worship"; and Article 25 (1) stipulates that:

"Subject to public order, morality and health and to the other provisions of this Part, all *persons* are equally entitled to freedom of conscience and the right freely to profess, practice and propagate religion." [2]

Article 25 of the Constitution of India not only guarantees the right to freely practice a religion but it also makes provision under Article 25(2) for intervention by state in secular matters which are associated with a religious practice [3].

Therefore, it has always been a very difficult task to decide if a particular issue falls under essential religious practice or if it is a secular activity only associated with religion. Here, it becomes important to go back to the words of Dr. Ambedkar commented in the Constituent Assembly debates,

"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" [4].

In India, the concepts of the welfare state, religion and secularism are all connected very closely. Even Indian Constitution acknowledges various religious as a source of law. Many times courts witnesses situation in which it has to distinguish between religious and secular practices. In those cases the Courts had to determine whether that practice was essentially religious or a secular practice with a religious colour and this led to the development of essential religious practice doctrine. According to Apex Court [5], to determine essential religious practice it has to be seen "if the taking away of that part or practice could result in a fundamental change in the character of that religion or in its behalf, then such part could be treated as an essential or integral part."

Judgments of foreign courts

The courts in various parts of the world have taken different views of the religious practices issues. In order to understand how far the foreign courts have accepted the diverse practices of various faiths, following cases gives an idea of their approach.

The High Court of Australia decided a case Adelaide Company of Jehovah's Witnesses Inc v Commonwealth [6] on 14th June 1943. The Government of Australia declared Jehovah's Witnesses to be "prejudicial to the defence of the Commonwealth" and to the "efficient prosecution of the war". Police occupied the premises of the organization and this was

challenged in the high court through a writ petition. The Jehovah's Witnesses contended that the regulations contravened the express constitutional protections for freedom from religious discrimination contained in section 116 of the Australian Constitution, which states:

"The Commonwealth shall not make any law for imposing any religious observance, or for prohibiting the free exercise of any religion, and no religious test shall be required as a qualification for any office or public trust under the Commonwealth."

The Court unanimously held that the government had exceeded the scope of the Commonwealth's "defense power" in section 51(vi) of the Constitution. Latham CJ held that the Constitution permitted the Court to "reconcile religious freedom with ordered government".

The Supreme Court of the United States in *Minersville School District v. Gobitis* [7], case related to saluting the U.S national flag. The court decided an issue involving the religious rights of public school students of Jehovah's Witnesses and held that saluting the flag being an essential gesture of national unity and that the legislation mandating the students to salute the flag did not infringe the right to freedom of religion."

Justice Harlan Stone wrote dissenting opinion that the "very essence of the liberty guaranteed by the Constitution is the freedom of the individual from compulsion as to what he shall think and what he shall say."

Stone's dissenting opinion soon became the majority opinion in West Virginia State Board of Education v. Barnette [8], which is a landmark decision by the United States Supreme Court holding that the Free Speech Clause of the First Amendment protects students from being forced to salute the American flag in public school.

The Court held "compelling students of a public school to a salute to the national flag infringes upon an individual's intellect and right to choose their own beliefs. Therefore, such action of the state would violate the liberty of religion".

The United States Supreme Court in the case of Jones v. City of Opelika [9] held a statute constitutional which prohibited the sale of religious books without a license as it only covered individuals engaged in a commercial activity rather than a religious one. It was also said that the law did not discriminate between religious and non-religious sellers of books so in this case there is no infringement of right to freedom of religion.

Indian Position

In India, there are number of cases in which the essential religious practice test was applied by the Supreme Court. For example, to regulate noise pollution levels, the issue of *Azaan* from loudspeaker in masjid or bursting of crackers during Diwali festival etc. were considered by the Court. Similarly, in the matters of the ban on animal sacrifice for religious festivals, regulating the formation of pyramids during Janmashtami etc., there was consistent application of the principle called the Essential Religious Practices test in which it was considered by the court that whether a particular is an essential religious practice or not. To understand as how this doctrine developed over the years in India, it is important to discuss a few cases in which it has been implemented. The doctrine of "essentiality" was invented by the seven judges bench of the Supreme Court in the Shirur Mutt case [10] in 1954. The court held that the term "religion" will cover all rituals and practices "integral" to a religion, and decided to interpret the essential and non-essential practices of a religion [11]. In the same case court chose a very safe route stating that what constitutes the essential part of a religion is to be ascertained with reference to the doctrines of that religion itself [12].

"…what constitutes the essential part of a religion is primarily to be ascertained with reference to the doctrines of that religion itself. If the tenets of any religious sect of the Hindus prescribe that offerings of food should be given to the idol at particular hours of the day, that periodical ceremonies should be performed in a certain way at certain periods of the year or that there should be daily recital of sacred texts or ablations to the sacred fire, all these would be regarded as parts of religion and the mere fact that they involve expenditure of money or employment of priests and servants or the use of marketable commodities would not make them secular activities partaking of a commercial or economic character; all of them are religious practices and should be regarded as matters of religion within the meaning of Article 26(b)*."*

Interestingly, in 1953 i.e. prior to Shirur Mutt, the Court in Saraswathi Ammal and Another v. Rajgopal Ammal [13], held that "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." The observation of the Court hinted at the need to evaluate religious practices with the "needs of modern society and public policy".

However, many subsequent cases where the doctrine was used by the court to decide what is "essential" to religion and what is not saw many contradictory opinions by the same court.

In Mohd. Hanif Quareshi v. State of Bihar [14], the Supreme Court looked at the religious text of the Muslims i.e. the Quran, and held that Cow sacrifice on Eid ul Azha was not an essential practice in Islam and prohibiting the cow sacrifice did not violate the freedom of religion of Muslims.

In The Durgah Committee, Ajmer & Anr. v. Syed Hussain Ali & Ors. [15], the court held that, "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……Even practices though religious, may have sprung from merely superstitious beliefs and may in that sense be extraneous and unessential accretions to religion itself."

Through this judgment the Supreme Court tried to judge customs of Dargah Ajmer as essential or non-essential pats of Islam.

In Sastri Yagnapurushdasji & Ors. v. Muldas Bhuradas Vaishya & Anr., [16] the Supreme Court after looking into Hindu scriptures held that non-satsangi Harijans are Hindus and the Act which allowed the entry of untouchables into temples is constitutional as it aimed to social equality.

The same position was confirmed in the case of A. S. Narayana Deekshitulu v. state of Andhra Pradesh & Ors. [17], where the Court held that performance of religious service is an integral part of the religion, but the service of the priest as well as his person are secular activities.

In Mohammed Fasi v. Superintendent of Police and Ors [18], the Kerala High Court rejected the request of petitioner a Muslim policeman for keeping beard. In this case Court did not look at sources of Islamic law to find that keeping beard is essential part of Islam or not? Instead of looking at the question of essentiality of beard in Islam, the court relied its decision on the fact that

certain Muslim dignitaries do not have beards, and even the petitioner did not sport a beard in his previous years of service. In this case the court should have looked at the religious texts rather than basing its decision on irrelevant fact.

In Commissioner Of Police & Ors v. Acharya J. Avadhuta and Anr [19], the Supreme Court held tandava dance not an essential practice of the Ananda Margi faith. It held that

"Ananda Marga as a religious order is of recent origin and Tandava dance as a part of religious rites of that order is still more recent. It is doubtful as to whether in such circumstances Tandava dance can be taken as an essential religious rite of the Ananda Margis''. Justice AR Lakshmanan, in his dissenting opinion held that the

"…essential practices are those that are accepted by the followers as a method of achieving their spiritual upliftment and the fact that such a practice was recently introduced cannot make it any less a matter of religion".

In Indian Young Lawyers Association v. The State of Kerala [20] (popularly known as Sabrimala case) Chandrachud J.'s judgment has a section titled "The engagement of essential religious practices with constitutional values." At the threshold, Chandrachud J. finds that "the respondents have failed to establish that the exclusion of women from Sabarimala is either an obligatory part of religion, or has been consistently practiced over the years. The evidence, at best, demonstrates the celibate nature of Lord Ayappa, but this in itself does not establish that exclusion of women is part of Essential Religious Practices." [21] According to him "The test should be whether a practice subscribes to the Constitution irrespective of whether it is essential or not". In Dr. M. Ismail Faruqui v. Union of India [22] the SC, without looking at Islamic sources, decided that unless a mosque has peculiar significance, it is not essential part of Islam. It laid down that "A mosque is not an essential part of the practice of the religion of Islam and *namaz* (prayer) by Muslims can be offered anywhere even in open."

In 2018, SC declined to refer Ismail Faruqui case verdict to a larger bench and refused to revisit 'essentiality doctrine' and left seeming inconsistency because it referred questions related to the banning of female genital mutilation (in Sunita Tiwari v Union of India & Ors on September 24, 2018) and polygamy (in Sameena Begum v Union of India & Ors on March 26, 2018) for consideration by a larger Bench [23].

Analysis of the Essentiality Doctrine

Freedom of religion was meant to guarantee freedom to practice one's beliefs based on the concept of "inward association" of man with God. The Supreme Court in Ratilal Panachand Gandhi v. The State of Bombay and Ors [24] accepted that "every person has a fundamental right to entertain such religious beliefs as may be approved by his judgment or conscience". The framers of the Constitution wanted to give this autonomy to each individual. The essentiality test invades on this autonomy [25].

Justice P. N. Bhagwati [26], once stated, "It was necessary to bring about social reforms with a view to lifting India out of medievalism, obscurantism, blind superstition and anti-social practices." For this, "the secular State had to perform this historic function of confining religion to its essential sphere and the Indian Constitution had, therefore, to accord to the state power to interfere with freedom of religion." [27] But while doing so, a balance has to be maintained between the right to worship and ways of worshipping. Courts protect the right to worship as a civil right and the freedom to do so according to one's own belief; however, such worship should not affect the right of other persons and has to be *bona fide*.

For example, the Allahabad High Court ruled in Syed Farzand Ali v. Nasir Beg & Ors. [28] that Muslims of the Ahl-i-Hadith tradition had the right to speak the word 'Aameen' aloud in response to the prayer leader in mosques. This was a long-standing conflict and judgments to decide the same question already existed by the end of the nineteenth century (Queen Empress v. Ramzan) [28]. This ruling was confirmed by the Allahabad High Court in Ataullah v. Azim Ullah. [29] Justice Mahmood held that "the word 'Aameen' should be pronounced at the end of the prayer ending with Sure-i-Fateha. I hold also that there is a difference of the exact note in which it should be pronounced and I hold that there is no authority to say at what note of the vocal octave the voice should emanate. But if the pronouncement of the word 'Aameen' results in the disturbance of peace, that of course will have to be dealt with under the Criminal Law."

The Courts under this doctrine have acquired freedom to judge a practice as ''not essentially religious'', rather than to decide constitutionality of the practice on the ground of public order, morality. The Courts have basically changed itself into a religious authority, infringing its role as a constitutional authority. Also, by developing these tests, it has taken away from various religions the opportunity to change themselves if they so wish [30]. Religion is very personal thing of people. The fact that a very important right of citizens right to freedom of religion is being treated by the top court with such interfering attitude, is both unacceptable and dangerous [31].

Justice B.P. Banerjee in one of the decision, [32] made a very powerful criticism of the essential religious practices doctrine by observing *"If courts started enquiring and deciding the rationality of a particular religious practice, then there might be confusion and the religious practice would become what the Courts wished the religious practice to be."* [33]

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. The test violates the religious independence of the person and gave powers to the Court to judge what practices will be followed; therefore it clearly violates the principle of natural justice and secularism enshrined in the Constitution.

In Sabrimala case, Justice Chandrachud has called essentiality test a problem with our jurisprudence. He said, *"There is a problem with our jurisprudence. Essentiality aspect has taken charge of Article 25 but it should not be so. Because if something is essential it becomes inviolable."* [34] Further, he stated, *"Due to this essentiality doctrine, Judges including Supreme Court judges are now assuming a theological mantle which we are not expected to do."* And he also gave a solution by giving an alternative to the essentiality test- *"The test should be whether a practice subscribes to the Constitution irrespective of whether it is essential or not"* [35].

Conclusion

After going through the above cases and opinions of jurists, it can be concluded that the doctrine of Essential Religious Practices is

not supported by the Constitution and can be said as judicial overreach. The main question is how the courts will determine what constitute integral part of a religion? Essential Religious Practices test in India has added an ambiguity to the interpretation of freedom of religion and reflects an interfering attitude of courts.

The way Essentiality test has been applied by the Indian judiciary to test a religious practice shows the ambiguities of this test. Sometimes, the Courts relied on religious texts, in some cases it looked at the behavior of the followers of a particular religion, in some cases it looked as whether the practice existed at the time when religion came into existence. All this highlights the inconsistent approach of the Courts. The courts should test religious practices on the basis of Constitutional morality i.e. public order, health and morality rather than on the touchstone of essential religious practices doctrine.

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