Anthropology of Essential Religious Practice Doctrine

by

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ABSTRACT

Indian Civilisation has guaranteed religious tolerance since time immemorial, still, the malleability of such human values often becomes a tool for manipulation. Thus, the protection of such human values and beliefs becomes imperative. Unprecedented opinions of the Supreme Court led to the emergence of Essential Religious Doctrine in the Shirur Mutt case[1] deciding state intervention for religious endowments, and resurrection of the same was accorded in the Sabarimala case[2] regarding the practice of restricting women entry in the Sabarimala temple. Essential Religious Practice (ERP) Doctrine segmented religion into two parts: Essential and Non-Essential practices. ERP Doctrine only gives protection to essential religious practices. It redefines the scope of state intervention for performing a gatekeeping function[3] in the policies concerning religious matters by adding an extra restriction to Article 25 (Right to Religion)[4] which is already subjected to public order and morality[5]. The non-essential characters have been derived in both the above-mentioned practices for religious endowments, matrimonial affairs and restrictions on women entering the temple, etc.

[1] Commissioner, Hindu Religious Endowments, Madras v Lakshmindra Thirtha Swamiar of Sri Shirur Mutt [1954] AIR 282.
[2] Indian Young Lawyers Association v State of Kerala (2019) 11 SCC 1: [2018] 8 SCJ 609.
[3] Tarunabh Khaitan, 'The Essential Practices Test and Freedom of Religion – Notes on Sabarimala' (Indian Constitutional Law and Philosophy, 29 July 2018)
[4] Constitution of India 1950
[5] Aftab Alam, 'The Idea of Secularism and the Supreme Court of India' (2010) Pluralism Working Paper Series No. 5, 21-22

INTRODUCTION

Article 25 of the constitution states, *"Freedom of conscience and free profession practice and propaganda of religion…. Subject to public order, morality and health and to the other provisions of this part".* Such right has been anticipated as the fundamental right under part III of the constitution. Although, it is to be noted that Article 25 is not an absolute right. However, when Article 26 disposed of, "*Subject to the provisions of this part*", the redundancy seemed to be removed and the ethos of the law is completed to contrive essential religious doctrine.

Ambedkar remarked India is a country where social norms are interviewed with personal laws, if such religious matters are left out of the purview, then the legislation on social matters would become arduous which would again be interconnected with some religious affairs or beliefs.

> *"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".*[6]

While the essentiality of religion shields essential religious practices, it demolishes the so-called non-essential religious practices. It has been rightly observed by Justice Chandrachud in the *Sabrimala Case*[7],

> *"a practice claimed to be essential has been carried on since time immemorial or is grounded in religious texts, does not lend to it constitutional protection unless it passes the test of essentiality"*[8].

This judgment defines the very purpose for which this doctrine has been established at the first instance rather than categorizing essential and non-essential religious practice. The essentiality test must ponder upon how essential it is to observe such practice in the specific segment of the religion, rather than looking at the wider exposure and describing the essentiality through scriptures or the time of such practice for grant of title as an essential practice. What is important is to preserve individual rights and enumerate with the trinity of dignity, liberty, and

[6] Constitution Assemble Deb 2 December 1948, vol 48.
[7] Indian Young Lawyers Association v State of Kerala (2019) 11 SCC 1: [2018] 8 SCJ 609.
[8] Ibid

equality. The religious practices in an argument with the civil rights of an individual are well within the scope of judiciary and state for interference and regulation[9].

DEFINING RELIGIOUS DENOMINATION AND ESSENTIALITY

The divergence between Article 25(a) and the syndication of religious practices with secular, historical, social, financial, economic, and political activities originated the necessity for determination of the definition of 'Essential' religious practice regulated on the religious denominations and freedom of right to religion guaranteed under Indian constitution. The evolution and unfolding of the 'test of essentiality' made the pursuit of this refurbished doctrine with ease.

Over the years the definition of essential religious practice has seen drastic but evident change. It has been noted by Mr. Gautam Bhatia;

> "*It has moved from identifying practices which are essential religious to determining practices essential to religion, and, from qualifying the nature of practice from secular or religious to qualifying the importance within the religion*"[10].

JUDICIAL DELIBERATION: DECIDING THE FACETS OF RELIGIOUS BELIEFS

Indian Courts have extensively worked for the predicament in classifying and deriving the definition of essential religious practice. Such can be perceived from the case of cow slaughter[11], where the court ruled that, since cow slaughter during Bakrid is not obligatory, it is not an essential religious practice[12]. This is to say that the courts scrutinize every matter as per their understanding, instead of inculcating the role of the theologian[13] to entail substantial interpretation of the doctrine, which is yet to evolve, permitting courts absolute flexibility. The most prominent and celebrated precedent is the *Shayara Bano case*[14], where the constitutional validity of triple talaq was in question. Justice Kurian Joseph analyzed that such practice is non-essential to Islamic jurisprudence. Similarly, the practice of untouchability is non-essential

[9] Sardar Syedna Taher Saifuddin Saheb v s The State Of Bombay 1962 SCR Supl. (2) 496 (Justice Sinha Judgement)
[10] Gautam Bhatia, "'Essential Religious Practices" and the Rajasthan High Court"s Santhara Judgment: Tracking the History of a Phrase' (Indian Constitutional Law and Philosophy, 19 August 2015)
[11] Hanif Quareshi v State of Bihar AIR 1958 SC 731: [1959] SCR 629.
[12] Mohammad Hanif Qureshi v. State of Bihar AIR 1958 SC 731: 1959 SCR 62non
[13] Elizabeth Seshadri, 'The Sabarimala Judgment: Reformative and Disruptive' (The Hindu Centre for Politics and Public Policy, 5 October 2018) accessed 13 August 2021.
[14] Shayara Bano v Union of India (2017) 9 SCC 1.

to the Hindu religion[15] and thus is not guaranteed under the right to religion, rationalization of such category of superstition exhibited in the *Durgah Committee case*[16]. This doctrine felicitated that even non-brahmins could be designated as Priests in the temple[17]. Similarly, the priest and archakas were held to be the servants of the court, and thus their emoluments, benefits, and appointment were embraced in the secular activities for the state to interfere, rather than encouraging the continuance of hereditary principle[18].

The state interference could be further elucidated from the *case of Jagannath Temple*, where it was argued that The Sri Jagannath Temple Act, 1954 violates the freedom to manage own religious affairs, however, the court held that benefaction and donation of material in sevapuja is a secular activity[19]. Similarly, the apex court held that the administrative functions of the temple could be given to trustees instead of pundas[20], as such functions are secular affairs rather than essential religious practices.

The variation in the decision of courts from bursting crackers on Diwali to reading namaz in mosques and matrimonial ritualistic practices of marriage and divorce, the doctrine has been given wide significance and details. But, the wider facet of the argumentation upon the doctrine discourse around narrowing down to recognize practices of a particular religious segment as essential too. Courts take cognizance of nurturing equilibrium between personal and codified state laws through stabilizing egalitarian approach.[21] ERP Doctrine reformed religious applications varying from declaring if a Parsi woman marries a Hindu does not essentially mean that she renounce her father's religion, through special leave petition[22] under Article 136 to holding mandatory female clitoral hood mutilation of 6-7-year-old girls in Dawoodi Bohra community unconstitutional under Article 21 through writ petition[23] under Article 32.

[15] Sastri Yagnapurushadji v Muldas Brudardas Vaishya [1966] AIR 1119.
[16] Durgah Committee, Ajmer v Syed Hussain Ali [1961] AIR 1402.
[17] A. S. Narayana Deekshitulu v. State of A. P. AIR 1996 SC 1765. Also see Ramesh Sharma v State of H.P. 2014 SCC OnLine HP 4679.
[18] Seshammal v. State of T.N AIR 1972 SC 1586
[19] Bira Kishore Deb v. State of Orissa AIR 1964 SC 1501
[20] Sri Adi Visheshwara of Kasji Vishwanath Temple v. State of U.P. (1997) 4 SCC 606.
[21] Zoya Hasan, 'Diversity and Democracy in India' (India-EU Round table, London, December 2004) https://www.eesc.europa.eu/en/documents/discussion-paper-diversity-and-democracy-india-professor-zoya-hasan-rapporteur, last accessed 15 August 2021.
[22] Goolrokh M. Gupta v Mr. Burjor Pardiwala SLP(C) 18889/2012
[23] Sunita Tiwari v Union of India 2018 WP(C)No.286/17

India faces a juristic dilemma[24] where there are contradictions among normative orders[25] that are legally recognized. The discourse of ERP might render desirable outcomes in certain cases, but it lacks the definitive approach of defining the essential religious practice, undermining normative pluralism. Religion is dynamic, and the court's intervention in defining the dominant cultural assumptions about religion makes it static and impedes the state's authority to appreciate certain minor religious communities. The courts henceforth also disregard the significance of religious beliefs proving some practices to be secular rather than religious to the extent that the religious institutions weren't allowed to administer themselves as held in the *case of Pannalal Bansilal Patil*[26].

To effectively categorize religion, an insider-outsider approach is a sine qua non coined by Moody Adams[27]. Explaining the said approach, Sarkar, regarding the abolition of Sati, observed[28] that Roy, a brahmin, was accustomed to the Hindu scriptures and had not disassociated with his community. Additionally, he was a social critic and analyzed atrocities. Thus, he could faultlessly actualize the dynamic capacity of religion.

On the contrary, Courts are strangers and correspond their decisions on their cultural sensibilities with little to no knowledge of cultural denominations[29]. For instance, Court appreciated the intervention of police in the public procession by Ananda Margi's faith comprising the Tandava dance, addressing it as non-essential, since their faith came into existence in 1955 and the Tandava dance in their community embarked in 1966[30]. In this case, it can be observed that the court failed to take into account that beliefs need not have temporal continuity and it appeared to identify religious practice essential only if it existed when the community was founded, completely ignoring the dynamic nature of the practice which an insider-outsider person would have been privy to. Similarly, live cobras are worshipped during Nag Panchami. Although the believers advanced their opinions by quoting the texts from

[24] Daniela Berti and Gilles Tarabout, 'Criminal Proceedings in India and the Question of Culture: an Anthropological Perspective' (HAL, 2013) https://halshs.archives-ouvertes.fr/hal-shs-00870593/document, Last accessed 15 August 2021.
[25] The relationship between 'local law' and 'state law' can be imagined as a continuum, ranging from rapprochement to distancing. See Keebet von Benda-Beckmann and Bertram Turner, 'Legal Pluralism, Social Theory and the State' (2018) 50 The Journal of Legal Pluralism and Unofficial Law 255.
[26] Pannalal Bansilal Pitti & Ors. Etc v State of Andhra Pradesh & Anr 1996 SCC (2) 498
[27] Michele Moody-Adams, Fieldwork in Familiar Places: Morality, Culture, and Philosophy (HUP 1997).
[28] Tanika Sarkar, 'How to think Universalism from Colonial and Post-Colonial Locations: Some Indian Efforts' in Peter Korkman and Virpi Mäkinen (eds), Universalism in International Law and Political Philosophy (Helsinki Collegium for Advanced Studies 2008).
[29] James A Banks, 'The Lives and Values of Researchers: Implications for Educating Citizens in a Multicultural Society' (1998) 27 Educational Researcher 4.
[30] Commissioner of Police v Acharya Jagadishwarananda Avadhuta (2004) 12 SCC 770.

Shrinath Lilamrut, the court preferred to rely upon Dharma Shastras which is common to all Hindus, and declared it to be non-essential, presuming Hindus to be a homogeneous community and disregarding the dynamic and exhaustive list of specific religious essential practices of cultural variations within the religion.

The practices by minor religious denominations are never considered to be essential religious practices. The insinuated interpretations flowing through the court's self-bestowed authority abandoned regressive practices, proclaiming them superstitious or unessential. For instance, when the Satsangi group following the teachings of Swaminarayan petitioned[31] for an independent denomination, they were rejected by alluding that such teachings might be superstition to others. Similarly, since the teachings of Aurobindo only represent his philosophies, they were never regarded as independent denominations and were never given protection under Article 25[32].

The contentions made above justifiably raise unrest. As demonstrated mostly in the conformation of interim orders, judge-centric submission to justice is deprived of pertinent first principle and iota of consistency. The most prominent among them is the apparent epistemological incommensurability between the disciplines of law and anthropology.[33]

CONCEPTUAL FOUNDATION EVOLVING CONSTITUTIONAL MORALITY

The indelibly intertwined religious system can be utilized to amplify constitutional reforms. Courts in their judgments (Supra) preserve individual rights are promote the notion of morality and human rights to determine the essential practice and justify state legislation through the constitution's ideals of justice, equality, liberty, and dignity envisaged under preamble. Although such constitutional ideals are implemented within the society through judicial pronouncements. For instance, in the cases of divorce through triple talaq or restriction of women to enter into the temple, the court anticipated equality as stated in the constitution. Similarly, while there was deliberation upon Sallekhana (Jain Practice), the court relied upon the right to life to warrant state intervention.

For the development of the jurisprudence of essential practices, the courts have integrated human rights principles to devise the fundamental nature of religion and formulate public

[31] Sastri Yagnapurushadji v Muldas Brudardas Vaishya 1966 SCR (3) 242
[32] S.P. Mittal Etc. Etc v Union of India & Others 1 1983 SCR (1) 729
[33] Randy Frances Kandel, 'Six Differences in Assumptions and Outlook between Anthropologists and Attorneys' in Randy Frances (ed), Double Vision: Anthropologists at Law (American Anthropological Association 1992) 1-4.

morality for India, both have been diffused together. Such human rights principles have been absorbed into the constitutional legal order. A successful diffusion bridges the gap between state legal order based on the constitution and various other legal orders paramount to homogeneity to the principles of their respective state-enforced governance[34]. Theory of postulation asserts that human rights constitute postulation values that accentuate definite types of religious laws which are in everyday practice[35].

CONCLUSION AND REMEDIES

The state regulates the religious societies, but it is imperative to understand that these inscribe beliefs that are beyond human control in some cosmic form of power and order manifested in the form of rituals and practices. Such religious rituals and practice would, therefore, imply the regulation of everyday practices perceived to be related to the pursuit of different religions to invoke sacred presence. Thus, regulation of such practices is looking for '*lived religion'* that happens "*beyond the bounds and often without the approval of religious authorities*" on the boundaries of "*orthodox religion and innovative experiences*".[36] It exhibits the personified and vital aspects of religion in daily lifestyle.

Kerry[37] perceived that contemplating ethnohistorical data when convened through legal disputes is improbable to meet professional standards. To conclude, the most effective approach to support judicial matters for analyzing religious affairs would be the socially correct interpretation through the establishment of a dialogical relationship between anthropology and law[38] to combat the challenges of ERP Doctrine.

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[34] Masaji Chiba's (1986)
[35] Kalindi Kokal, state law, dispute processing and legal pluralism: unspoken dialogues from rural India (Routledge 2019).
[36] Nancy T. Ammerman, Finding Religion in Everyday Life, 75(2) SOCIOLOGY OF RELIGION 189–207 (2014).
[37] Kerry D Feldman, 'Ethnohistory and the Anthropologist as Expert Witness in Legal Disputes: A Southwestern Alaska Case' (1980) 36 Journal of Anthropological Research 245, 253.
[38] Mary Kavita Dominic, 'Essential Religious Practices' Doctrine as a Cautionary Tale: Adopting Efficient Modalities of Socio-Cultural Fact-Finding' (2021) Vol: 16 /Issue:1