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DOCTRINE OF ESSENTIALITY UNDER ARTICLE 25 OF INDIAN CONSTITUTION

Introduction

Religious freedom in India has always been a controversial matter, despite the introduction of the term 'secularism'. Secularism was read into the Constitution of India long before it was inserted into the Preamble by the Constitution (Forty Second Amendment) Act, 1976. The principles of secularism had already been enshrined under Articles 25 and 26 of the Constitution. Article 25 protects an individual's freedom of religion and conscience, subject to public order, morality, health, and other people's fundamental rights while Article 26 extends this by protecting the rights of religious denominations to manage their own affairs, subject to public order, morality, and health. By guaranteeing individual's freedom of conscience and religion, and protecting the rights of religious denominations, the Constitution showed a secular philosophy from its very inception. Thus, the explicit addition of the word 'secularism' by way of the Constitution (Forty Second Amendment) Act, 1976, did not make it more secular however the explicit addition of the word 'secularism' into the Constitution was further strengthened by its inclusion as part of the Constitution's 'basic structure', inhibiting the State's power to act contrary to its spirit. The theory of secularism in India is rather unique and distinct from western tradition. This is because Indian secularism was to comprise three aspects:

- (i) As a non-discriminatory state, religion was to play no role in the relationship between the State and the individual. As such, the State was not to determine the rights of individuals on the basis of their religion;*
- (ii) The non-interventionist nature of the State was intended to allocate equal religious freedom to all by ensuring that the State played no role between an individual and his/her religion;*

(iii) State intervention was to redefine the scope of religion, whereas non-intervention on behalf of the State was to make religious organization free from State intervention.

State intervention was deemed necessary because religions covered within their fold the entire social behavior of the Indian people, as a result of which secularism could only exist when some line was drawn between what was religious and what was temporal. Such intervention was not merely negative in nature. Concurrently, the Supreme Court of India developed another important doctrine which determined the relationship between religion and the Constitution, and if a practice is essential to a particular religion, it cannot be regulated or restricted by the State. This proposition formed the root of what later evolved into the 'essential religious practice test'. This left two ways open to the courts – the first was where the religion itself determined what was or was not essential practice as per their religious texts and manuscripts. The second was for the courts to play social reformer and distinguish the religious aspects of life in India from the temporal.¹

WHAT IS ESSENTIAL UNDER ARTICLE 25?

Article 25 under Indian Constitution gives dual freedom to a person i.e., the freedom to conscience, and freedom to profess, practice and propagate religion. Here, the word 'practice' means a person's right or freedom to practice their religious duties, rites and rituals. And the word 'propagate' means to spread and publicize his/her religious views for the edification of others. Thus the protection under Article 25 is not just limited to the matters of doctrine of belief but it also extends to the act done in pursuance of the religion and, therefore, contains a guarantee for ceremonies and modes of worship, rituals and observances which are an integral part of a religion. What constitutes an essential part of religious practice has to be decided by the court with reference to a doctrine of a particular religion and includes the practices which a community considers as a part of its religion.

There are some restrictions or essences on the freedom of religion in the Indian Constitution:

1. Religious liberty subject to public order, morality and health: As per the Indian Constitution, no act can be done against the public order, morality and health of the public. Here, the term 'health' consists of both physical and mental health. For example, in the name of

¹ Akilesh Menezes & Priyanshi Vakharia, To Practice What is Preached: Constitutional Protection of Religious Practices vis-à-vis Reformatory Secularism, 7(1) NLUJ Law Review 211 (2020)

essential religious practices acts like untouchability, devdasi, sati pratha cannot be tolerated. Therefore, the freedom to practice religion cannot affect the exercise of other fundamental rights or freedom of the Indian Constitution.

2. Regulation of economic, financial, political and secular activities associated with religious practices: The freedom to practice extends only to those activities which are the essence of religion and the secular activities that do not form the essence of religion are not covered under it. However, it is tough to say that which activities fall under the religious practice or which are of secular, commercial or political nature associated with religious practice.

3. Social welfare and social reforms: Under Article 25 state has power to make laws for social welfare and social reforms. For example, in prohibition of bigamy, an Act which prohibited bigamy was held valid under Article 25, this is because Polygamy is not an essential part of the Hindu religion, and therefore it can be controlled by law.

Thus, it can be said that the Court has the power to constitute or differentiate the essential or non-essential religious practice. However, the question is that when does the court has the power to decide it?²

ESSENTIAL RELIGIOUS PRACTICE TEST (ERP TEST)

The Hon'ble Supreme Court of India formulated this "essential religious practice test" to recognize which it deems essential to the religion for the purpose of constitutional protection. This is also in the eye of current situation whether court is deciding several Essential Practice Test cases. Therefore, if we want to determine what is essential religious practice then we can say that it depends on background, history and tenets of the religion.³

This doctrine was formulated by the Supreme Court in the most famous Shirur Mutt case wherein 7-judge bench of Supreme Court held that the term "religion" covers all the rituals and practices which are "integral" to a religion, and took upon itself the responsibility of determining essential and non essential practices of a religion.⁴ Further, Justice P B Gajendragadkar added

²Admin, What Constitutes an Essential Religious Practice?, 18 December 2020, <https://www.legallyflawless.in/2020/12/what-constitutes-essential-religious.html?m=1>

³ ibid.

⁴ The Commissioner, Hindu Religious Endowments, Madras v. Sri Lakshmindra Thirtha Swamiar of Shri Shirur Mutt, (1954) SCR 1005

the ‘secular’ requirement of rationality to the essentiality test in the Durgah Committee case⁵ However, the court is still inconsistent on the question of “what constitutes essential and non-essential religious practices” as it believes that one element or practice of religion is independent of other elements or practices and therefore in some cases court relies upon religious texts to determine essentiality while in others it relies upon the empirical behavior of followers and in some cases court relied upon the fact that whether the practice existed at the time religion originated. Here are the landmark judgments in this regard:

1. **The Durgah Committee, Ajmer and Anr v. Syed Hussain Ali and Ors-** In this case. Durgah Committee denied the validity to “practices which although religious may have originated from merely superstitious beliefs and may in that sense are extraneous and unessential accretions to religion itself”.⁶
2. **Ismail Faruqui case-** In this case the apex court, without looking at Islamic sources, decided that unless a mosque has peculiar significance, it is not essential. The main question of law before the court was that “whether the state had the power to acquire a mosque”. The Court instead of settling the issue in favour of the state by relying on the principle of eminent domain (under which the government can acquire any land) chose to go into the question of whether praying in a mosque is an essential practice of Islam and held that while offering of prayers is an essential practice, the offering of such prayers in the mosque is not an essential practice unless the place has a particular religious significance in itself.⁷
3. **The First Ananda Margi case-** In this case the apex court relied on the doctrine of precedent to hold that tandava dance was not an essential practice of the Ananda Margi faith. It also contended that the practice came into existence many years after the origin of faith and therefore the practice could not be accepted as an essential practice of the faith.⁸
4. **Shayara Bano v. Union of India-** In this case, the 5-Judge Bench of the Supreme Court after relying upon the essential religious practice test held that the triple talaq or Talaq-e-

⁵ Durgah Committee, Ajmer v. Syed Hussain Ali, (1962) 1 SCR 383

⁶ Ibid.

⁷ Dr. M. Ismail Faruqui v. Union of India, (1994) 6 SCC 360

⁸ Acharya Jagdishwaranand Avadhuta and Ors. v. Comm of Police Calcutta and Ors., (1983) 4 SCC 522

Biddat was not an essential practice and cannot be offered constitutional protection under Article 25 of the Indian Constitution. The Court further contended that this practice is against the basic tenets of the Indian Constitution as well as the Quran and thus violation of the Shariat. A practice which is merely permitted or not prohibited by religion cannot be considered as an essential or positive tenet sanctioned by that particular religion.⁹

5. **The Indian Young Lawyers Association & Ors. v. The State of Kerala and Ors. (the Sabarimala Judgment)**- In this case a PIL was filed on the issue that whether the complete exclusion of women (aged 10-50) based on a biological phenomenon from the temple, set up an essential part of a religion or as in this case, Hinduism. The Court held that there's no scriptural or textual evidence that supports this discriminatory practice. Therefore, the practice of prohibiting women from entering into the temple cannot be given the called as an essential religious practice of Hinduism. Further, it is an essential aspect of Hinduism to allow Hindu women as a devotee and followers of Hinduism to enter a temple and pray for the deity.¹⁰

CONCLUSION

Thus, it can be concluded that India is a secular country where all the citizens and non-citizens have the right to freedom of religion under Article 25 of the Indian Constitution. But at the same time all the practices or rituals whether they are an integral part of the religion or not, have to pass the 'Essential Religious Practices' test. When the question arises on this, the Supreme Court has the power to check the essentiality of these questionable rituals or practices with the doctrine of 'Essential Religious Practices'. However, many times the question arises regarding the position of the Supreme Court for the matter which is beyond its power like the Essential Religious Practices test for religious rituals, also sometimes the questions are asked by several religious committees on the intention of Supreme Court judges. But these questions are senseless because the court is Supreme and a neutral body and has the power to decide all the matters that affects the Indian citizens.

⁹ Shayara Bano v. Union of India, (2017) 9 SCC 1

¹⁰ Indian Young Lawyers Association v. State of Kerala, (2019) 11 SCC 1