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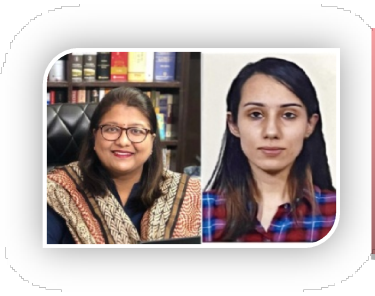

COURT OBSERVING UNCONSTITUTIONALITY IN RELIGIOUS MATTERS *VS* THE DOCTRINE OF ESSENTIAL PRACTICE

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Abstract

The onset of festive season brings with it various practices which then become the ground for debate across several religious and social groups. The evolution of religious festivities and the practices that each group associates with the same in these contemporary times raises the question: what constitutes an essential practice? With different religious groups questioning one another about the same, and raising issues of social concern society waits for clarity on the subject. Who decides what religious celebration or practice is harmful to society, is it society itself? Where does one find the balance between enjoying the freedom to practice one's religion and being respectful and considering the societal impact that the same may have? In a secular democracy, the practice of judicial activism in India is one of the ways in which the judiciary gets empowered and dispenses justice. This is one of the integral features of the democracy which keeps its courts strong and helps the people, it gives the Supreme Court considerable autonomy in acting as a policy reformer while acting as the supreme adjudicating body. Like all common law systems, our Apex Court is responsible for interpreting and preserving the constitution and its ideas. However, there are matters where the court in its functioning reaches an intersection between preserving constitutionality or preserving the interests of the people. This paper will aim at exploring how the judiciary responds to matters of social justice *vis-a-vis* protection of personal laws.

I. INTRODUCTION

The Constitution of India, via Article 25 guarantees the freedom to practice, profess and propagate religion to all persons; Article 26 extends this freedom to religious denominations and groups to manage their religious affairs; but, this freedom can be regulated or restricted on the grounds of public order, morality and health.[1]We explicitly declared ourselves to be a secular nation vide the constitutional 42nd amendment in the year 1976.[2] Thus, despite having an overwhelming majority of Hindu population, India does not have any state religion. By adopting a non-patronizing approach towards any particular religion, India has ensured a neutral and impartial approach towards religious matters.

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[1]The Constitution of India.
[2]Forty-second Amendment Act 1976.

Our Judiciary is of the belief that there lacks a demarcation between what the matters of religion are and what not. Religion isn't defined in the Constitution and cannot be given one rigid definition.[3] It is still interesting to note that in whatever scope possible, without limiting the definition of religion, the Supreme Court defines it as a matter of faith where having belief in God is not mandatory to constitute religion.[4] It is a code of ethical rules for its followers to abide by and observe ceremonies which are regarded as an integral part to it.[5] It is the matters that fall out of essentiality in a religion that are secularized and legalized.

India, being home to a multitude of religions and our socio-cultural norms has, to a great extent, been influenced and reinforced by our religious beliefs. In such a scenario, it becomes extremely difficult to segregate religious and social or cultural practices. There are several instances when these practices are not based on religious belief or faith alone and then it becomes problematic to categorize it as an essential religious practice. Objections to their continuity merit state intervention and if the contentious religious practice is exclusionary i.e. if it is discriminatory, oppressive or violative of human dignity, then the court may apply the 'anti-exclusionary principle'[6]. This principle is utilized to resolve conflicts wherein claims to autonomy in religious matters threaten the constitutional principle of equality.

Humans are mortal beings with limited knowledge and there are multitude of matters in this infinite universe which are beyond human comprehension. Religion is a matter of faith, and not everything that is believed in, is capable of being calculated with mathematical precision or provable with scientific observation. By attempting to define faith with logic, Judges are venturing into territory that is uncharted for judicial acumen and trying to indulge in judicial adventurism of sorts.

Contextualizing the 'Harm Principle'[7]with religious practices, one can safely deduce that religious practices should not be subjected to judicial circumspection unless they there is a resultant harm to someone else. Under our constitution, any religious practice that goes against the constitution can be restricted. It is perfectly justified for the judiciary to delve into

[3]*The Commissioner, Hindu Religious Endowments, Madras* v. *Shri LakshmindarTirthaSwamiyar of Shri Shirur Mutt* [1954] SCJ 335.
[4]*S.P. Mittal* v. *Union of India* [1983] SCR (1) 729.
[5]*Ibid.*
[6]The "Anti-exclusionary principle" was set forth by the Supreme Court in the *Sabarimala case*, [2018] SC 1690.
[7] The harm principle, a basic tenet of Liberalism was given by an English philosopher, John Stuart Mill who said that, people should be free to act however they wish unless their actions cause harm to somebody else.

matters concerning perceptible threats to the constitutional guarantees of equality, freedom and non-discrimination.

II. DECLARING UNCONSTITUTIONALITY

Observing the growing legitimacy and influence of the courts, scholars have started referring to the India as a *juristocracy*,[8] or even a *judicial dictatorship*,[9] in some cases.The power of the Indian Supreme Court and High Courts to declare unconstitutionality is beyond question.[10]Though courts subordinate to the High Court cannot decide upon matters questioning constitutional validity they can challenge it.[11]As a starting point in all cases an assumption of matter on hand being constitutionally valid is made.[12] And where the Court sees multiple interpretations possible, the one that complies with the constitutional mandate is the one that is adopted.[13]The Court, in cases, often leans towards the interpretation that preserves constitutional elements. The problems in interpretation begin to arise when there isn't a clarity seen with the matter and constitutional remedies. In such cases it is up to the Court to decide the level of acceptability in the issue and if there is a breach of fundamental rights there is no hesitation seen on the Court's side to declare said activity as unconstitutional.[14]

Establishing the Essential Practice Test

When it came to deciding which religious matters were entitled to constitutional protection, the *assertion test*, in which one could simply assert that the practice in question is a religious practice, was rejected by the Court.[15] Justice Mukerjea pointed out that the Court would have to assess and examine the practice 'asserted' and that the Court's view would have to be formed as a result of a far ranging inquiry into the same, which could not be practically possible and so the *essential practice test* was recommended wherein the court would see whether the practice in question exists or not and then see if it is essential to the

[8] Sanjay Ruparelia, 'A Progressive Juristocracy? The Unexpected Social Activism of India's Supreme Court' (2013) 33 Helen Kellogg Institute for International Studies.
[9]Arundhati Roy, 'Scandal in the Palace', Outlook India (1 October 2007).
[10]ChintanChandrachud, 'Declarations of Unconstitutionality in India and the UK'(2015) 43 Georgia Journal of International and Comparative Law.
[11]Code of Civil Procedure 1908, section 113; Code of Criminal Procedure 1973, section 395.
[12]*State of Kerala* v. *NM Thomas* [1976] SC 490.
[13]*Sunil Batra*v.*Delhi Administration* [1978] SC 1675.
[14]*Supra*, note 10.
[15]*Supra*, note 3.

religion.[16]This judgment was satisfactory to both the traditionalists and modernists as it south to devise a way in which a balance between religious sentiments and practicality could be created.

Even so, as professor Galanter points out, how is the court to determine exactly what an essential practice is? There are various issues that are raised in this regard, such as: relying on religious leaders, the Court conducting its own inquiry, should interpretation be done in a common law way? And how that would address the social discontent that came along with it.[17]As in any case, when the constitutionality of an essential practice is judged, some societal backlash is to be expected, though the Court aims at creating a balance and benefiting all people, constitutionality does take precedence over preserving certain essential practices that may not comply with it as that is done keeping in consideration the larger good.

Justice Ganjendragadkar in the *Durgah Committee* case,[18] denied validity to "practices which, though religious, may have sprung from superstitious and unessential accretions to religion itself" adding the secular requirement of rationality in the essential practice test where now, not only does the practice need to be essential to a religious but also devoid of superstitious beliefs.[19]

The Constitution has provided the judiciary withsufficient textual justification to serve social reform and override religious practices that interfere with others constitutional rights. However, it is not possible without the cooperation of India's religious groups as the Constitution alone cannot overcome the implications that the society faces.[20]

III. CHANGES OBSERVED IN RELIGIOUS PRACTICES

Considering at some of the following judgments it can be observed that the judiciary certainly holds the power, via processes like judicial review, to alter significant parts of religious practices when they fail to comply with the Constitutional mandate.

[16]*Ibid.*
[17]Marc Galanter, 'Hinduism, Secularism and the Indian Judiciary' (1971) 21 Philosophy East and West 482-83.
[18]*Durgah Committee* v. *Hussain Ali* [1962] SC 1402.
[19]*Ibid.*
[20]Rajeev Dhavan, 'Religious Freedom in India' (1987) 35 American Journal of Comparative Law 209-254.

In the case of *Sri VenkataramanaDevaru and others* v. *The State of Mysore and others*,[21]'matters of religion' was held to be a term inclusive of practices regarded as integral to the religion and its associated ceremonies by the community.

In the case popularly known as the *Tandava Dance case*[22]the Supreme Court overruled a ruling of Calcutta High Court[23] in which the court had upheld public procession with people doing Tandav while carrying skull and trident as an essential practice of Anand Margi faith. The court held it as devoid of religious validation and also relied on the fact that it was adopted by the sect in 1966 no sooner than eleven years after the sect had been established in 1955. Thus the Court seems to have adopted a stand prohibiting religious reforms by setting a benchmark of essentiality that stems only when a practice is established on the date of establishment of that religion, a proposition that will be almost impossible to satisfy in any case. This also runs contrary to the previous stance adopted by Supreme Court ruling that"every person has a fundamental right to entertain such religious beliefs as may be approved by his judgment or conscience".[24]

In *Gramsabha of Village Battis Shirala* v. *Union of India*,[25]the capture and worship of live cobra to celebrate the festival of Naga Panchami was held as to have failed the test of essentiality because it lacked religious validation from the Dharamshastras.

In the case of *Dr. M. Ismail Faruqui*v. *Union of India,*[26] popularly known as the Ayodhya case, a five judge constitution bench of the Supreme Court held that offering Namaz in Mosque is not essential to Islam. It may be offered anywhere, even in the open. In another case,[27] the sacrifice of Cow by a Muslim on Eid was held as a non-obligatory option and thus not an essential practice.

The ambiguity also reflects in various judgments indicating the lack of clarity when it comes to interpretation of essentiality as meaning a practice that is essentially religious, or a practice

[21] [1958] SC 255.
[22]*Commissioner Of Police & Ors* v. *Acharya J. Avadhuta and anr* [2004] Civil Appeal No. 6230 of 1990.
[23]*Acharya Jagdishwaranand Avadhuta and Ors*v. *Commissioner of Police, Calcutta* [1984] SC 512.
[24]*Ratilal Panachand Gandhi* v. *The State of Bombay and Ors* [1953] Bom 242.
[25] [2014] Bom 1395.
[26][1995] SC 605A.
[27]*Mohd. Hanif Quareshi & others* v. *The State of Bihar*SC [1959] SCR 629.

that is essential to the religion. In several cases the Court has held that Hinduism is a way of life and not a religion.[28]

IV. CONCLUSION

The Court has considerable authority when it comes to interpreting the constitution. The lack of rigid boundaries in our legislations gives room to our judiciary to act as a moderator and gives it remarkable autonomy. The court does not declare what religion is or is not, its powers as an activist body are that of defining what secularism is and what it is not.

Religious beliefs are challenged as being mere philosophical convictions or cultural tenet devoid of theological or scriptural backings. It is for the courts to strike a balance between the obligatory nature of the religious practice and the constitutional justification behind the proposed restrictions. Judicial interference should be meticulously calibrated by adopting a nuanced approach that ensures proportionality between the essential practice and the proposed restriction. One needs to acknowledge the interpretational subjectivity of religious practices shaped by regional and sectional particularities before considerations of constitutionality outweigh individual freedoms.

[28] *SastriYagnapurushadji and others* v.*MuldasBhuradas Vaishya*[1959] 61 Bom 1016; *Manohar Joshi* v. *Nitin BhauraoPatil&anr*[1996] SCC (1) 169.