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THE PARADOX OF ESSENTIAL PRACTICES DOCTRINE UNDER CONSTITUTIONAL THEORY

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ABSTRACT

The Essential practices doctrine has been one of the most influential doctrines adopted by the Supreme Court of India. However, there has been insufficient analysis of the doctrine from the perspective of constitutional theory. Irrespective of the fact that such judicial doctrines derive their validity from constitutional theory itself. Constitutional theory helps in answering the very fundamental question, what is constitution? Is it just a text or is it beyond the text, in the history, philosophy, culture, values, morality, circumstances, intent and much more. Now, the meaning of constitution is different for different people. For some it is constant and fixed in the time, known as "Textualism", for some it is changing and evolving according to the needs and circumstances of the modern times, they are the propounders of "Living Constitutionalism".

While applying these different Constitutional theories to the Essential practices doctrine, this paper argues that the pragmatic approach taken by the Indian courts in application of this doctrine supports the Living Constitutionalism theory of interpretation. This paper is split into four parts. The first part commences with the introduction. The second part discusses the journey of the doctrine in Indian judiciary. In the third part, doctrines of Originalism, Textualism and Living Constitutionalism are applied to the doctrine and in the last part the analysis is summarized into conclusion.

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INTRODUCTION

"*Judicial doctrines arise out of litigational contests as well as from judicial leadership that seizes the contingent adjudication movement to fashion a wide-ranging normality.*"

- *Upendra Baxi*

Essential practices doctrine is a contentious doctrine. It has always remained in debates due to the questions which challenge its legitimacy. Very recently, the Supreme Court had resorted to this test while deciding the practice of Triple Talaq in ShayaraBano v UOI[2], where the court could have resorted to gender-based reasoning also. Similarly in the famous judgment of Sabrimala[3] also, this doctrine was employed to decide whether the restriction on entry of women intothe Sabrimala temple was integral to the practice of religion or not. To check the validity of this doctrine it can be seen from the lens of different theories of constitutional interpretation. And therefore in this paper, such different theories of constitutional interpretation would be applied to this doctrine to check from where it could derive its validity.

ESSENTIAL PRACTICES DOCTRINE

The doctrine of essentiality was first crystallized in the case of Shirur Mutt[4] in the year 1954. In this case, the Supreme Court had stated that the term religion covers all the practices and rituals that are integral to the religion and took the responsibility of determining what are essential and non-essential practices of a religion. This doctrine is the innovation of the judiciary developed to suit the pluralistic peculiarities of Indian society where the courts have attempted to define what is fundamental to religion. The functions of this doctrine are three-fold, first, it helps the courts to decide what all religious practices could be constitutionally protected. Second, to check the legitimacy of legislation for managing religious institutions and third, it determines the extent to which religious denominations can enjoy independence.

In short, courts employ this doctrine to decide which tenants of faith are so essential that they cannot be struck down by constitutional power. This doctrine has always remained contentious as proponents of different constitutional theories see it from different perspectives to validate

[2] (2017) 9 SCC 1
[3] Indian young lawyers association v. State of kerala (2019)11SCC1
[4]Endowments Madras vs. Sri LakshmindraThirthaSwamiar of Sri Shirur Mutt AIR 1954 SC 282

their arguments. To have a deeper understanding of this doctrine and to substantiate the validation that can be given for this doctrine under different constitutional theories it becomes pertinent to see this doctrine from the lens of those different theories.

ESSENTIAL PRACTICES DOCTRINE THROUGH THE LENS OF DIFFERENT THEORIES OF CONSTITUTIONAL INTERPRETATION

Constitutional theories which justify the solutions provided for controversial issues by the court that arise in a society could be Originalism where one has to look for the intention of the framers of the constitution and also how it was understood by a large segment of the population at that time or by Living Constitutionalism which argues that constitution is dynamic and it develops with the needs of society and provides a flexible tool for fulfilling those needs and therefore the interpretation should also be evolving, which also promotes judicial activism. Or simply the Textualism where the focus is on the plain meaning of the text of the constitution and how the terms would have been understood by the people at the time they had ratified it and therefore there is no scope for creativity or innovation by the judiciary.

A. Originalist and Textualist approach

To apply the originalist approach we need to look for the intention of the Drafting committee by closely reading the constitutional text and debates, but it is not an easy task. How one should gather this intent? Through voting or behaviourof the drafters or their speeches or through the amendments proposed by them, whether the ones that were accepted or the ones that were rejected orthrough monologues or dialogues. One cannot ignore the fact that the Indian constitution has undergone so many amendments after its enactment. Even the word "secularism" was added later to the constitution by the forty-second amendment.

If we go by the debates we'll realize that there was no real consensus, several voices of that of Nehruvians and Hindu nationalists had come together, where on one hand B R Ambedkar strictly wanted to restrict religion's role in public spheres and KT Shah had even demanded an explicit article on that on the other hand K M Munshi argued that the state must acknowledge that in our country people have deep religious moorings. For Nehru, the secular state doesn't mean an irreligious state rather it means respect for all religions and giving them the independence to function. And thereforethey come up with the "equal respect theory" a system that has both

"SarvadharmaSambhava" and "Dharma Nirpekshata". This is also described as the Principled Distance model of secularism by Rajeev Bhargava, in which the state has to maintain principled distance from all religions and this is the reason why the word secular was not used in the Indian constitution, unlike in the west, in India, there is no wall of separation between the state and the religion. In India the states can take affirmative action, it has been given the authority to recognize minorities and give them special rights, also the state can intervene in the business of religious institutions and their practices through fundamental rights and directive principles of state policies.

Though the philosophy of secularism is embedded in our constitution and can be seen under articles 25, 26 and 27. And therefore we'll observe that the religious and secular life in India is entangled with each other, also the state has to play a reformist role in our country, for example,in article 17 where the state has the power to abolish untouchability, then the affirmative action taken by a state to give reservations or the aids provided to the institutions run by religious communities. After so much discussion one thing is clear if the secularism in India is seen through an originalist approach then it can be seen as *reformist secularism* by some, due to the powers that are given to the state in the constitution while others could also see it as *principled distance secularism*. But both will agree that the religious denominations can enjoy complete autonomy and no outside authority has the jurisdiction to interfere, the state can interfere only if their autonomy contravenes public order, morality or health or when some secular activity is associated with it.[5]But nowhere has the constitution given this mandate to the courts to become interpreters of religions and to tell what is essential to religion and what is not.

Even if the Supreme Court seems to have indirectly taken the idea of "essential religious practices" by strictly interpreting the words of Dr B.R. Ambedkar who has said that "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 the beliefs and such rituals as may be connected with ceremonials which are essentially religious." And that the framers of the constitution had themselves left open the question on religious freedoms by giving authority to the State under Article 25 of the Constitution to make legislations "regulating or restricting any economic, financial, political or other secular activity which may be associated with religious

[5]Article 25 of Constitution of India

practice." andto determine the extent of this right the court had to invent this test. Still one cannot deny the fact that the court had preferred to lay down essential practices test rather than simply subjecting the impugned practices or legislations to the test of public order, morality or health.

One more argument that could be raised here is that under article 25(2)(b), where the state has been given liberty to make laws for providing social welfare and reform if the intention of the drafters would have been that the state could regulate only non-essential practices and only essential practices will be protected by the court then all the non-essential practices could have been freely regulated and restricted by the state regardless of them being of reformist in nature or not and therefore there would have been no need of explicitly adding this article to the constitution and if such is the case then if a practice is considered to be essential it can no longer be reformed by the state and therefore ultimately it will render this provision redundant.

And therefore one can easily conclude that neither the proponents of reformative secularism nor that of principled distance under the ambit of the originalist approach would support this doctrine. According to them, such a doctrine will affect the balance between the religious minorities and majorities in a pluralistic society like India. Communal tension will arise and will result in two extreme situations, one where the practice is essential and therefore cannot be regulated and the second where the practice is non-essential and can be even completely prohibited. Such a wide power in the hands of the judiciary when the text of the constitution itself provides adjudication of such religious questions by limiting the court's assessment to articles 25 and 26 would be completely unacceptable to those who follow this approach of constitutional interpretation.

Now the question arises, if not originalist then what other approach can be taken to validate the doctrine of essential practices.

B. Living Constitutionalism approach

The next approach that one may take is that of living constitutionalism, the one that could be changed or altered according to the needs of time and situation. If we see the judgments of the apex court on essential practice doctrine we will notice a great deal of deviation from the beginning to the present times. In the first case of Shirur Mutt, the court had left it to the religion

as to what is essential and what is the non-essential practice but in the case of Sri VenkataramanaDevaru v State of Mysore[6], the court itself had determined as to exclusion of Dalits from the denominational temple was essential religious practice or not. Later on, in some cases the court had instead of checking whether the practice was obligatory, checked whether it was optional or not as in the case of Dr M Ismail Faruqui v UOI (1994 SC), the court had held that mosque was not an essential feature of Islam and the prayer could be offered from anywhere and held such practice as optional. To a great extent, the judge has the freedom to choose the source he wants to rely upon to decide whether a practice is essential or not. For example in the case of ShayaraBano v UOI[7] secondary sources i.e. Mulla'sPrinciples of Mahomedan law were used. And court later in some cases even started to rationalize the religion acting not only asthe gatekeeper as to what qualifies as religion or not but also filtering out superstitions from the religious practices like in the case of ShastriYagnapurushdasji v MuldasBhudardas Vaishya[8]. As it has been rightly argued that the Supreme Court consistently tried to homogenize and rationalize religious practices in recent years. This contemporary approach towards the interpretation of the constitution can be said to be that of living constitutionalism. Where the judiciary keeps on updating the Indian Constitution so that it keeps pace with the changing times and circumstances.

CONCLUSION

The state has to carry out its functions not only according to the will of the framers of the constitution but also by upholding the values of a progressive state. Ultimately what we get to see is an amalgamation of liberal constitutional values and reformative secularism whose aim is to protect the religious freedom of an individual. We have observed that where on one hand the supporters of the Originalist approach would argue that instead of declaring something as essential or non-essential, it should be subjected to other secular tests of public order, health, morality etc by strictly sticking to the text of the constitution and intention of the framers of the constitution and that the framers of the constitution wanted to give the autonomy of religion to each individual but this doctrine impinges this autonomy. On the other hand, the proponents of Living Constitutionalism would claim that the judiciary must deliver the push required to act as

[6]AIR 1958 SC 255
[7] (2017) 9 SCC 1
[8] AIR 1966 SC 119

an agent of social change by acknowledging the transformative nature of the constitution. Both sides have a common goal of achieving an individual's autonomy but their paths are different. One tries to achieve it through the passive text and the other through the active judiciary. Though the initiative taken by the courts in inventing the essential practice doctrine seems to be supporting the living constitutionalism approach.