RELIGION: A COHESIVE OR DIVISIVE FORCE IN INDIA-AN EVALUATIVE ANALYSIS OF THE LEGISLATIVE FRAMEWORK AND JUDICIAL PRONOUNCEMENTS

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I. Introduction

The etymological definition of the term 'Religion' is difficult to fathom as the term has varied meanings among the people. The only indispensable fact regarding religion is its ability to act as cohesive and divisive bond among the people. Some authors Religion is a set of beliefs, practices, feelings and dogmas that define the relations between human beings and sacred or divinity.[3] It helps in creating a cohesive bond among the members of same fraternity. It is perceived as a social phenomenon which has its roots in faith and unity. It acts as an indivisible bond for persons who follow it and it gives a collective identification for the members of same faith. The essence and harmonisation factor of religion leads to close knit among people which propels the development of a community based on some shared goals, beliefs and thoughts. People belonging to the same religion tend to unite because of several common factors like: common deity, common practices and rituals, common place of worship, charitable institution, sense of security from religion, common religious leader etc. In traditional societies, religion acted as a form of social control.

However, *Karl Marx* said that religion is the opium of people and it leads to illusionary happiness and one must abolish religion to attain real happiness.[4] Religion contains rules of spiritual and ethical discipline for attaining self-perfection and these rules vary from one religion to another. Thus, religion at times leads to diversity in identity. Within the sphere of religion, there persist two groups: fundamentalists and liberals. Conflict may break out between these two groups taking the shape of an inter-religion conflict. Similarly, conflict may break out amongst several religions leading to an intra-religion conflict. Because of competing religious sentiments, it

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[3] Retrieved from http://atheisme.free.fr/Religion/What-is-religion-1.htm on 01.06.2016 at 8:00 p.m.

[4] Marx and Religion: A Brief Study, Himel Shagor, https://muktomona.com/Articles/himel_shagor/Religion_Marx.pdf, last visited: 5/06/16

brings out social tension and often hinders social change. The cry that one's religion is in danger or that one's religion is superior to another's religion often leads to collective violence and religion starts acting as a divisive factor.

II. Idea of Religion: Divisive or Cohesive?

In the case of *Aruna Roy v Union of India*[5], the Supreme Court observed the plurality of religion in India and stated that religion and culture are in the same footing. Preserving one's culture does not mean contempt towards another's culture.

Even though different religions give different rules for attaining and preserving self-perfection, but the basic rules of moral perfection, justice, truthfulness, love, charity, tolerance etc. remain common in every religion. The State tries to preserve certain percepts of religion which leads too common good and harmony among people. State can play with religion in three possible ways viz: positive, negative and neutral. In India, during the British rule, the British rulers made it mandatory not to interfere with the religious affairs of the country (Charter Act 1833). In India, it is initially understood that State is playing neutral role, but State does try to protect the minority religion. Minority is understood as numerically smaller groups and in a democracy, it is important to protect their identity-be it religious, linguistic, ethnic, regional or political. Indian Constitution provides religious minorities with the right to establish and administer educational institutions of their choice. *Art-15(4)* permits identification of beneficiary based on multiple factors, which includes religion. In the case of *Indra Sawhney*[6] backward classes of persons within religious communities may be considered for reservation in public employment under Art-16(4). As understood by the legal framework of the Constitution, India is a hybrid of all models.

India being a secular country promotes equal faith towards all religions. Secularism does not mean that State is hostile to a religion. The 42nd amendment to the Indian Constitution inserted the word "secular" in the Preamble of the Constitution. In *S.R. Bommai Case*[7] it was said that secular nature is one of the basic features of the Constitution. But, secularism in India is perceived differently from the Western practice of secularism where there is a clear division between church and the State. This was referred to in the case of *Ahmedabad St. Xaviers College Society v State of Gujarat*[8] where question was raised regarding the secular nature of the Constitution.

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5 (2002) 7 SCC 368

6 *Indra Sawhney v. Union of India* AIR 1993 SC 477

7 *S.R. Bommai v. Union of India*, 1994 SCALE(2) 37

8 1974 AIR 1389

Amartya Sen clearly stated that Secularism in political sense requires clear division of State from any religious order. But, in India, such clear division is not there. In India, State is not partial towards any religion and this helps in maintaining co-existence between different religious groups. However, if religion becomes a threat to the peace and harmony of the Nation, State may intervene in religious matters and act as a reformist. Similarly, Law may protect and preserve certain percepts of religion like humanity, togetherness, harmony etc. Society is the common ground for both religion and State and for orderly development of the society a balance between the values preserved by religion and those preserved by State must be reached.

There is a triangular relationship between State, religion and individual and this helps in shaping the legal policies of the State. The State ensures Right to freedom of religion in the Constitution (Art.-25 to 28).

Art-25(1) of the Indian Constitution ensures freedom of conscience and free profession, practice and propagation of religion. Art-26 talks about freedom to manage religious affairs and it includes establishing and maintaining institutions for charitable purpose, managing own affairs in matters of religion etc. However, these are subjected to public order, morality and health. Art-27 says that no person shall be compelled to pay any taxes for promotion of any religion and Art-28 says that an institution which is wholly maintained out of State funds shall not impart religious instructions. However, if it is established under a trust which requires religious instructions to be imparted, then Art-28(1) shall not apply.

There are no set rules as to how the essentiality and non-essentiality of religion can be determined and it is entirely left on the discretion of the judiciary. There are no set rules as to which percepts of religion the State must protect. In the case of *Ratilal Gandhi v State of Bombay*[9], the court said that religious acts performed in pursuance of religious practices are a part of religion and the State regulation on these acts are not permissible unless such acts are not associated with religious practice and are solely economic or political in nature. The State does not clarify as to what are religious establishments or practices and it is entirely left to the judiciary to decide.

Art-44 of the Constitution calls for a Uniform Civil Code and has got egalitarian approach towards all religions. But it has remained in the dead letters of law because of the conflicting political ideologies of different parties. Also, Art-51(e) and (f) talks about fundamental duty of the citizens to promote harmony and common brotherhood transcending religious, linguistic diversities etc. It also hints at religious tolerance.

[9] 1954 AIR 388

When the Constitution is transgressed, the State relies upon Indian Penal Code (chapter-xv). Sec-295 to 298 talks about crimes against religion and it can be divided under 3 divisions: Injuring places of worship or object with the intention to insult the religion of any class, outraging or wounding the religious feelings of persons and trespassing burial grounds or disturbing religious assemblies. This chapter helps the state in maintaining religious harmony in the country and provides punishments in case religious beliefs of individuals become causes of hostility or violence amongst people. The acts defined in the sections relate to deliberating outraging, wounding or insulting religious beliefs or religion of a class of persons. The sections punish deliberate acts of verbal or visible representation. It also punishes persons who voluntarily cause disturbance to religious assembly and persons who physically or materially affect the religious properties or places of worship.

Sec-295 says that any person with the intention of insulting the religion of any class, if damages or spoils the purity of a place of worship, then he shall be punished with imprisonment of either description for a term which may extend to 2 years or with fine or both. Sec-295A criminalizes deliberate and malicious acts which intend to outrage the religion or religious feelings or belief of a class through writings, words, signs etc. Here punishment is prescribed for 3 years or with fine or both. *Sec-296* says that if anyone voluntarily causes disturbance to religious assemblies then he shall be punished with imprisonment of either description for a term which may extend to 1 year or with fine or both. Sec-297 criminalizes trespass in burial grounds or acts that shows indignity to human corpse or causes disturbance to the persons who are assembled in the death ceremony. Sec-298 says that if any person who intentionally hurts the religious feelings of another person through words or sounds or through any object or gesture shall be punished with imprisonment of either description for a term which may extend to 1 year or with fine or both. However, IPC does not talk about misuse of religious institutions and such is protected under *The Religious Institutions (Prevention of Misuse) Act, 1988.* The Act prevents misuse of religious institutions for political and other purposes. The presence of penal laws for to prosecute offences made against the religion is testament to the act that religion is both a divisive and cohesive factor. The religion in country have its role of uniting the people but it also creates intra and inter religion conflict. The State in its role of guarantor of rights has always taken a pivotal role in mediating between the issues concerning the religion.

III. Secularism in India: Analysis of Judicial Pronouncements

India is home to eight major religions of the world. Therefore, there must be a necessary concomitant for peaceful co-existence of all the religions in the country. A necessary requirement was for law of equality for

all the religions. Queen Victoria of Britain issued a proclamation in 1858 just after the Sepoy Mutiny of 1857 which was the very first document which spoke about 'equal treatment of all religions'. Ironically, later this very document turned out to be a reason for the British Policy of Divide and Rule.

The Britishers' invariably and in a very tactful way sowed the seeds in the heart of people about the difference in religious belief in the minds of Indians. This step of the Britishers proved to be the master stroke for the British policy of Divide and Rule in the long run. V.D. Savarkar in his essay "Hindutva: Who is a Hindu", for the first time used the term "Hindutva" in 1923. The document has specifically mentioned Hindutva to be an umbrella under which Hindu comes. The document further explains the inception of Hindu and its history along with the philosophy behind it[10]. The apex court in Hindutva judgment[11] has rightly pointed out:

> *39. Ordinarily, Hindutva is understood as a way of life or a state of mind and it is not to be equated with, or understood*

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[10] *Essentials of Hindutva* - by V.D. Savarkar, (Sometime between 1921-22 Veer Savarkar completed his historic book "*Essentials of Hindutva*" while still in Andamans. This was later published under the pseudo name '*A Mahratta'*) Hindutva is not a word but a history. Not only the spiritual or religious history of our people as at times it is mistaken to be by being confounded with the other cognate term Hinduism, but a history in full. Hinduism is only a derivative, a fraction, a part of Hindutva. Unless it is made clear what is meant by the latter the first remains unintelligible and vague. Failure to distinguish between these two terms has given rise to much misunderstanding and mutual suspicion between some of those sister communities that have inherited this inestimable and common treasure of our Hindu civilization. What is the fundamental difference in the meaning of these two words would be clear as our argument proceeds? Here it is enough to point out that Hindutva is not identical with what is vaguely indicated by the term Hinduism. By an 'ism' it is generally meant a theory or a code based on spiritual or religious dogma or creed. Had not linguistic usage stood in our way then 'Hinduness' would have certainly been a better word than Hinduism as a near parallel to Hindutva. Hindutva embraces all the departments of thought and activity of the whole Being of our Hindu race. Therefore, to understand the significance of this term Hindutva, we must first understand the essential meaning of the word Hindu itself and realize how it came to exercise such imperial sway over the hearts of millions of mankind and won a loving allegiance from the bravest and best of them. But before we can do that, it is imperative to point out that we are by no means attempt ion a definition or even a description of the more limited, less satisfactory and essentially sectarian term Hinduism. How far we can succeed or are justified in doing that would appear as we proceed.

[11] *Ramesh Yashwant Prabhoo (Dr)* v. *Prabhakar K Kunte,* (1996) 1 SCC 130; *Manohar Joshi* v. *Nitin Bhau Rao Patil,* (1996) 1 SCC 169; *Ramchandra K Kapse*v. *Haribansh R Singh,* (1996) 1 SCC 206.

> *as religious Hindu fundamentalism…the above opinion indicates that the word 'Hindutva' is used and understood as a synonym of 'Indianisation', i.e. development of uniform culture by obliterating the differences between all the cultures coexisting in the country.*

The famous *Upton Lectures (1926)* of S. Radhakrishnan characterized Hinduism as a 'way of life' rather than a religion based on dogma.[12]

It was only after making discrimination since religion which made the people aware and conscious of the differences, there arose a need to come up with a provision and a law wherein all the people of the nation is to be treated equally and not to be discriminated only based on religion. But, interestingly, the makers of our constitution did not include 'secular' while framing the constitution.

Unlike Britain, where there was a separation of Church and the State and so State never used to interfere in the workings of Church and religion, India was not a country where the religious institutions could function independently. The basic concern is the State and the laws cannot and should not dictate or regulate any religious practices in any country. Wearing a turban and carrying a sword by a Sikh in India is a respect their religion and their own belief in their almighty where the laws of the country cannot and should not interfere.

The people of our country are free to profess and follow any religion of his choice as far it is not hurting any other person or religious beliefs. However, not until the 42nd Amendment the word 'Secular' was introduced in the Preamble to the Constitution of India in 1976. But a definition of neither 'secularism' nor 'religion' was provided in the Constitution. Therefore, there was always a tendency to interpret and re-interpret the actual meaning of the newly included *term*. Supreme Court then, through several judgments tried to give a precise meaning.

The Supreme Court, in the judgment *Sardar Taheruddin Syedna Saheb* v. *State of Bombay*[13], expressed its views on the Secular nature of the Constitution for the first time. The Court said:

> *Articles 25 and 26 embody the principle of religious toleration that has been the characteristic feature of Indian civilization from the start of history…Besides, they serve to emphasize the secular nature of Indian Democracy which*

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[12] *Supreme Court's Tryst with Secularism and Hindutva* by Namit Saxena, Vol. L. No. 18, Economic & Political Review, May 2, 2015

[13] AIR 1962 SC 853.

the founding fathers considered should be the very basis of the Constitution.

This judgment passed by the Supreme Court was before the 42nd Amendment where the court only mentioned the nature of secularism but did not explain the term nor used it directly.

However, in *Ahmedabad St. Xaviers College Society* v. *State of Gujarat*[14] Justice Chandrachud and Mathew wrote:

> *Our Constitution has not erected a rigid wall of separation between church and state. We have great doubts whether the expression 'secular state' as it denotes a definite pattern of church and state relationship can with propriety be applied to India. It is only in a qualified sense that India can be said to be a secular state. There are provisions in the Constitution which make one hesitate to characterize our state as secular…*[15]

However, a contradiction arose between the judiciary-construed concept of secularism in the *Keshavananda Bharati*[16] case where Chief Justice Sikri named "Secular Character" as one of the basic features of Constitution, which was similarly worded and affirmed by Justices Shelat, Grover and Jaganmohan Reddy.

Thus, neither the Preamble nor the founding fathers of Constitution and nor the Supreme Court provided a precise definition of the term 'secular' and the legal dignitaries still now interpret it with the changing scenario.

In *S R Bommai* v. *Union of India*,[17] the Court once again confirmed secularism as part of the Constitution where seven out of the nine judges confirmed that secularism was one of the basic features of the Constitution[18].

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14 (1974) 1 SCC 717.

15 Dr. Radhakrishnan has said: -
"The religious impartiality of the Indian State is not to be confused with secularism or atheism. 'Secularism as here, defined is in accordance with the ancient religious tradition, of India. It tries to build up a fellowship of believers, not by subordinating individual qualities to the group mind but by 'bringing them into harmony with each other. This dynamic fellowship is based on the principle of diversity in unity which 'alone has the quality of creativeness… In short secularism in the context of our Constitution means only an attitude of live and let live developing into the attitude of live and help live.

16 (1973) 4 SCC 225.

17 (1994) 3 SCC 1.

18 I am, therefore, in agreement with the views expressed by my learned colleagues Sawant, Ramaswamy and Reddy, JJ., that secularism is a basic feature of our

Despite these there was a constant discrepancy among the Judges all over the years to reach a definite meaning of the term 'secular'. Different interpretations continued to come from judicial pronouncements over the years. While Justice J S Verma justified his concept of *Sarva Dharma Samabhava* while quoting from the vedic scriptures like the Yajur Veda, Atharva Veda and Rig Veda, the Court in *Ismael Faruqui* v. *Union of India*[19], *R C Podayal*[20] *case* and the *Ram Janmabhoomi case* equated secularism with tolerance.

The judiciary's attempt to define "secularism" in rational and religious terms continued when Justice Ramaswamy in *Bhuri Nath*v. *State of J & K*[21] held that non-religious practices and anti-religious practices are antithetical to "secularism"[22]. Subsequently in *Text Book Case*[23], Justice Shah observed that secularism is neither pro-God nor anti-God and that it treated alike the devout, the agnostic and the atheist[24]. Further in *M P Gopalakrishnan Nair* v. *State of Kerala*[25] Justice Sinha held that secularism under the constitution does not mean the constitution of an atheist society

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Constitution. They have elaborately dealt with this aspect of the matter and I can do no better than express my concurrence but I have said these few words merely to complement their views by pointing out how this concept was understood immediately before the Constitution and till the 42nd Amendment. By the 42nd Amendment what was implicit was made explicit. After the demise of Gandhiji national leaders like Pandit Nehru, Maulana Azad, Dr. Ambedkar and others tried their best to see that the secular character of the nation, as bequeathed by Gandhiji, was not jeopardized. Dr. Ambedkar, Chairman of the Drafting Committee, aware of the undercurrents cautioned that India was not yet a consolidated and integrated nation but had to become one. This anxiety was also reflected in his speeches in the Constituent Assembly. He was, therefore, careful while drafting the Constitution to ensure that adequate safeguards were provided in the Constitution to protect the secular character of the country and to keep divisive forces in check so that the interests of religious, linguistic and ethnic groups were not prejudiced. He carefully weaved Gandhiji's concept of secularism and democracy into the constitutional fabric. This becomes evident from a cursory look at the provisions of the Constitution referred to earlier.

19 (1994) 6 SCC 360.

20 (1994) Supp. 1 SCC 324.

21 (1997) 2 SCC 745.

22 Non-religious or anti-religious practices are anti-thesis to secularism which seeks to contribute in some degree to the process of secularization of the matters of religion or religious practices. A balance, therefore, has to be struck between the rigidity of right to religious belief and faith and their intrinsic restrictions in matters of religion, religious beliefs or religious practices guaranteed under the Constitution.

23 (2002) 7 SCC 368.

24 *Id, 3.*

25 (2005) 11 SCC 45, Para 20.

but merely that all religions enjoyed equal status without any preference in favor of or discrimination against any one of them[26]. For the first-time court in *Bal Patil* v. *Union of India*[27] dealt with minority religious rights and "equal treatment of all religions"[28].

This lead to question of claiming rights under the ambit of religion which still now the constitution was silent about. With no definite framework of what secularism meant there were varied interpretations of the term secularism in various aspects by the court in various cases over the years. Every time a new sphere of secularism came to light which was again substantiated or overruled by the next judicial decision. Providing a further advanced meaning of secularism, the court in *I R Coelho* v. *State of Tamil Nadu*[29] preceded by *M Nagaraj* v. *Union of India*[30] held that the ambit of secularism is also a right under Article 14, 15 and 21[31]. However, the interpretation of "secularism" was given a new dimension in *Dara Singh* v. *Republic of India*[32]:

> *96…Our concept of secularism is that the State will have no religion. The State shall treat all religions and religious groups equally and with equal respect without in any manner interfering with their individual right of religion, faith and worship.*

Having said that the court in *Khusheer Ahmed Khan* v. *State of UP & Ors.*[33] have reignited the debate and have held that although Muslim laws permit four marriages of a Muslim male but that does not provide any protection against service rules which very clearly stated that contracting a second marriage without dissolving the first will result in service termination and revoking of service laws on the ground of religious practices. But still the search for a suitable definition of secularism continues.

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26 *Ibid, 15.*

27 (2005) 6 SCC 690.

28 Our concept of secularism, to put it in a nut shell, is that 'state' will have no religion. The states will treat all religions and religious groups equally and with equal respect without in any manner interfering with their individual rights of religion, faith and worship.

29 (2007) 2 SCC 1.

30 (2006) 8 SCC 212.

31 Some of the rights in Part III constitute fundamentals of the Constitution like Article 21 read with Articles 14 and 15 which represent secularism etc. As held in Nagaraj, egalitarian equality exists in Article 14 read with Article 16(4) (4A) (4B) and, therefore, it is wrong to suggest that equity and justice finds place only in the Directive Principles.

32 (2011) 2 SCC 490, at page 531.

33 Delivered on 9th February, 2015 and viewed on 12th February, 2015.

Looking at it from a different perspective that who is the authority to decide about what is secularism and how it should be interpreted and what all should it include? Should the judiciary be given the privilege to state what secularism should be and how should that is practiced? Even after so many interpretations and rulings the question still troubles the Indian scholars of Indian secularism-the existence of separate personal laws for religious groups, the intervention of state in religious institutions and practices and reservations for groups defined by caste-continue to loom large.

IV. Understanding Essentiality and Non-Essentiality of Religion

After independence *Commissioner, Hindu Religious Endowments, Madras* v. *Sri Lakshimindra Thirtha Swamiar of Sri Shirur Math*[34] or popularly known as *Shirur Math case* held that the term "religion" will cover all rituals and practices "integral" to a religion. The Supreme Court took upon itself the responsibility of determining what is integral. The court said the question of religion would be decided by taking into consideration what the religious denominations considered essential or crucial. This is called the "essentiality test"[35]. *Shirur Math case* is landmark because it contains a very contradictory view about religion and its practices. On the one hand the judgment speaks in favor of widening the scope of religion to include rituals and practices and on the other hand it sanctioned an elaborate regulatory regime for religious institutions[36].

In *Ratilal Panachand Gandhi* v. *State of Bombay*[37] (hereinafter '*Ratilal*'), decided on the same year as *Shirur Mutt*, the Indian Court elaborated on *Shirur Mutt's* holdings. Bombay legislature had passed the Bombay Public Trusts Act of 1950 to regulate the public and religious trusts in the State of Bombay. Therefore, this Act of 1950 included all religious establishments including temples and Hindu Mutts. This was challenged in

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34 AIR 1954 SC 282.

35 Blurring the belief-practice dichotomy, Justice Mukherjee has observed, "A religion undoubtedly has its basis in a system of beliefs or doctrines which are regarded by those who profess that religion as conducive to their spiritual well-being, but it would not be correct to say that religion is nothing else but a doctrine or belief. A religion may not only lay down a code of ethical rules for its followers to follow, it might prescribe rituals and observances, ceremonies and modes of worship which are regarded as integral parts of religion…"
Judging the Headscarf, the essentiality of religious practices is best determined by clergy, not judiciary by Faizan Mustafa; Editorial Indian Express, 5th August, 2015.

36 *Legalizing Religion: The Indian Supreme Court and Secularism* by Ronojoy Sen, Policy Studies 30, East West Center Washington, 2007.

37 (1954) 17 SCJ 480.

the Bombay High Court by a Manager of a Jain temple, with endowed properties to the temple valuing INR 500,000 (which was a huge sum in 1954), on Indian Free-Exercise Clauses grounds[38]. The Court held that the Indian Free-Exercise Clauses did not merely grant the right to entertain religious belief but also the right to exhibit such belief by overt acts as enjoined or sanctioned by the religion[39]. The Court clarified that religious acts performed in pursuance of religious belief are as much a part of religion as religious doctrine[40]. State regulation of such overt acts is not permissible unless those acts are of solely an economic, commercial or political character though may be associated with religious practice[41]. The problem is where and how to draw the line and differentiate between the two? On this point the Court elaborated a bit. First, the Court stressed that a certain degree of deference should be given on these questions to the religious establishments[42]. Certainly, the State cannot tell a religious establishment what is or is not an essential practice[43]. Second, it is a question of proof and not a matter of the judge's own view on the desirability of such belief[44].

By a careful analysis of both the cases of *Shirur Math* and *Ratilal*, two important conclusions can be drawn. One, the State may act in interest with public order, morality, health, social reform and welfare. If these three principles are strictly followed, then the State action will be constitutionally

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[38] Indian Free-Exercise Clauses protect exercise of religion. One cannot exercise one's religion except by overt acts. This Clause was laid down in *Shirur Math Case*.

[39] Justice Mukherjee, said '… every person has a fundamental right under our Constitution not merely to entertain such religious belief as may be approved by him judgment or conscience but to exhibit his belief and ideas in such overt acts as are enjoined or sanctioned by his religion …'.

[40] Justice Mukherjee further said 'Religious practices or performances of acts in pursuance of religious belief are as much a part of religion as faith or belief in particular doctrines.'

[41] 'What sub-clause (a) of clause (2) of Article 25 contemplates is not State regulation of the religious practices as such which are protected unless they run couture to public health or morality but of activities which are of an economic, commercial or political character though they are associated with religious practices.'

[42] Justice Mukherjee laid down, 'No outside authority has any right to say that these are not essential parts of religion and it is not open to the secular authority of the State to restrict or prohibit them in any manner they like under the guise of administering the trust estate.'

[43] *Ibid.*

[44] *Supra 33;* Relying on a 1907 Bombay High Court decision this rule of evidence was laid down whereby a secular judge is bound to accept a religious belief an essential practice provided it is undoubtedly proved to be so irrespective of the judge's own views on such belief; see also *Sardar Sarup Singh* v. *State of Punjab*, AIR 1950 SC 860.

valid but The Essential Practices Test will not be able to save the religious practices question. But the Indian Free-Exercise Clauses also permits the State to regulate secular activities undertaken by religious institutions. This is where the problem arises. What happens when the State concludes that a certain activity is secular while the religious establishment maintains that it is religious?[45] At this juncture the court needs to invoke the Doctrine of Essential Practices. The second one is that Article 25 and 26 of the Indian Constitution are separate and not interconnected but if the court invokes Doctrine of Essentiality Test with these two provisions thereby comprising Indian Free-Exercise Clauses, Article 25 and 26, were interconnected.

The most prominent effect of this doctrine has been the widening net of state regulation over places of worship. Another effect is the unacceptance nature of the court to accept more recent religious groups as 'proper' religions or even religious denominations. Consequently, these religious groups have not passed the essential practices test. After all the attempt to provide an inclusive definition of secularism and religion and religious institutions the court refuses to give any religious sect a totally different entity which was quite evident from the Ramkrishna Mission case where the Calcutta High Court gave a separate religious status but that was overruled by the Supreme Court and was changed to religious denomination status.

In *S P Mittal* v. *Union of India*[46], the legitimacy of Auroville (Emergency Provisions) Act of 1980 was challenged. Does Auroville Society come under the religious denomination category was the first major question. After extensive research, teachings and discussions of the writings as well as secondary sources, Justice R B Misra ruled "there is no room for doubt that neither the society nor Auriville constitutes a religious denomination nor the teachings of Shri Aurobindo represented only his philosophy and not a religion"[47] Justice O Chinnappa Reddy argued that religion cannot be "confined to the traditional, established, well-known, or popular religions like Hinduism, Mohammedanism, Buddhism and Christianity" . Per him religion should be treated in a "liberal, expansive way". However, Reddy maintained that Auroville was not a place of worship but a township respecting undoubtedly about the teachings of Shri Aurobindo.

A year after the Supreme Court ruled Shri Aurobindo was not a religious teacher the Court decided Ananda Margis was a religious

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[45] *Protecting Free Exercise of Religion under the Indian and the United States Constitutions - The Doctrine of Essential Practices and the Centrality Test* by Khagesh Gautam, From the Selected works of Khagesh Gautam, October 2014.

[46] AIR 1983 SC 1.

[47] AIR 1983 SC 30.

denomination. However, in *Jagadishwaranand* v. *Police Commissioner, Kolkata*[48] the Court refused to accept the *Tandava Dance* as an essential practice of the Ananda Margis. Justice Ranganath Misra reasoned:

> *Ananda Margis as a religious order is of recent origin and Tandava dance as a religious rite of such a religious 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.*

However, a single Judge bench in Calcutta High Court agreed to differ[49]. Justice Bhagabati Prasad Banerjee wrote in this context:

> *The concept of Tandava dance is not a new thing which is beyond the scope of religion. The performance of Tandava dance cannot be said to be a thing which is beyond the scope of religion. Hindu texts and literature provide for such dance type. If the courts started enquiring and deciding the rationality of a religious practice, then there might be confusion and the religious practice would become what the courts wish the practice to be.*

Here essentiality was determined by earlier judicial verdicts and not religious texts. Further since the Ananda Margis came in to existence in 1955 and the *Tandava* dance has its inception in 1966, the practice could not be accepted as essential. The apex court said that since the religious practice came later than the religion/sect so it does not fall under the ambit of essential practice.

Further this issue was taken up in 2004 by the Supreme Court of India wherein the scope of essential practices was further narrowed down to mean the foundational 'core' of a religion[50]. The judgment read:

> *The essential part of a religion means the core belief upon which a religion is founded and those practices that are fundamental to follow a religious belief. It is upon the cornerstone of essential parts of practices that the superstructure of religion is built. Without which a religion will not be a religion.*

In *Gramsabha of Village Battis Shirala*v. *Union of India,* a sect claimed that capture of worship of live cobra is an essential practice of their religion. It relied on *Shrinath Lilamrut,* which prescribed such a practice.

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48 AIR 1984 SC 51.
49 AIR 1990 Cal 336.
50 2004 12 SCC 782. *Id, 27.*

The Court also relied on *Dharmasastra* and ruled that since there was no mention of capturing and then worshipping a live cobra so it cannot be an essential practice[51]. In another case a Muslim Police Officer was not allowed to grow beard by a regulation. When the person challenged it in the court the court instead of considering the essentiality of growing beard rejected the petitioner's argument justifying that certain Muslim dignitaries are not supposed to sport a beard. The Court looked at the empirical evidence of practice rather than religious texts. Yet, animal sacrifice among Hindus was denied protection, despite empirical evidence to the contrary[52].

The idea of essentiality and non-essentiality of religion has now open a new dimension in Constitutional studies. The idea of women emancipation and discrimination in the religion vis-à-vis women's entry in religious places. The Bombay High Court judgment in *Noorjehan Safia Niaz vs. State of Maharashtra*[53] which opened the Sanctum Sanctorum for the women's in Haji Ali Dargah is a landmark judgement for emancipation of women's freedom vis-à-vis religious institutions. The court is trying to examine practices of religion at the altar of Constitutional freedoms. Although, it is a welcome step in this regard, the jurisprudence in this regard will only settle the issue of religion vis-à-vis Constitutional freedoms. The ongoing Triple Talaq case and Sabrimala Case will have afar-reaching impact in deciding Indian judiciary approach towards the issue.

This essentiality test reached to another level when the land on which Babri Mosque stood was acquired. The Court, instead of settling the matter in the light of eminent domain, went into the question whether praying at the mosque is an essential Islamic practice. Ironically, it was held in the case that unless and until the place on which the mosque is located has any religious significance, only the infrastructure of a mosque is irrelevant as far as essentiality test is concerned. In fact, it is a well-known fact that Muslims praying in a mosque I the essentiality of Islam and is a very integral part of their religion. But the court had taken a totally different view and while contradicting the rationality and its precedents and opposing the essentiality test has said that which does not match with the 'secularist' character of the Constitution of India.

V. Conclusion

The Supreme Court has consistently accepted that "every person has a fundamental right to entertain such religious beliefs as may be approved by

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51 *Judging the Headscarf, the essentiality of religious practices is best determined by clergy, not judiciary* by Faizan Mustafa; Editorial Indian Express, 5th August, 2015.

52 *Ibid.*

53 MANU/MH/1532/2016

his judgment or conscience." [54] Religion and religious practices are individual rights and the court or the judiciary or a Single or Division or Full Bench Judge cannot take the liberty to interpret any religious practice or religious institution or individual religious belief to treat it as they want. This should be best left to the individual when the Court or the Constitution is not able to draw a definite conclusion and clearly demarcate the line of similarity and distinction about what and how is religion to be followed in such a religiously diverse country like India.

The true essence of 'secularism' must be then researched and found out and that should be accompanied by a definition. The essentiality test assumes some practices of religion are central while others are incidental. This is not the correct understanding of religion, since all elements and practices together constitute a religion[55]. The various facets of secularism are to be dealt with individually keeping the interests of religious institutions and individual religion in mind.

Despite various attempts, the true and correct definition of secularism is still open to interpretation and continues to elude us. On a critical note the State cannot and should not take the role of a clergy. However, one must remember that one cannot justify conversions brought about by violence or coercion on the ground of freedom of religion. These surely violate the freedom of conscience guaranteed by the Indian Constitution. Since present instances of these kinds of conversions are high, laws were designed to criminalize such activities.

[54] *Ibid.*
[55] *Ibid.*