DISSERTATION

‘Essential Religious Practices test’ doctrine and ‘secular activity’ under Article 25 of the Indian Constitution

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TABLE OF CONTENTS

DECLARATION

I, Damodar Singh Rajpurohit, bearing roll no. 19ML006, do hereby declare that the dissertation submitted is original and is the outcome of the independent investigations/research carried out by me and contains no plagiarism. The dissertation is leading to the discovery of new facts/techniques/correlation of scientific facts already known. This work has not been submitted to any other University or body in quest of a degree, diploma or any other kind of academic award.

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CERTIFICATE

This is to certify that the dissertation entitled, "**'ESSENTIAL RELIGIOUS PRACTICES TEST' DOCTRINE AND 'SECULAR ACTIVITY' UNDER ARTICLE 25 OF THE INDIAN CONSTITUTION**", has been prepared by Damodar Singh Rajpurohit under my supervision and guidance. The dissertation is carried out by her after careful reseaerch and investigation. The work of the dissertation is of the standard expected of a candidate for Master of Laws [LL.M] in Constitutional and Administrative Law and I recommend it be send for evaluation.

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LIST OF ABBREVIATIONS

AIR	All India Reporter
Vol.	Volume
No.	Number
Pgs.	Pages
SC	Supreme Court
v.	Versus
Am. J. Comp. L.	American Journal of Comparative Law
PIL	Public Interest Litigation
NJA L.J.	National Judicial Academy Law Journal
GlobCon	Global Constitutional Journal
BYU L. Rev.	Brigham Young University Law Review
Pace L. Rev.	Pace Law Review
&	And
Law & Soc. Inquiry	Law and Social Inquiry Journal
Indian J.L. & Just.	Indian Journal of Law and Justice
Cri. LJ	Criminal Law Journal
U.S.A	United States of America
U.K.	United Kingdom
AP	Andhra Pradesh
TN	Tamil Nadu
J&K	Jammu and Kashmir
Cal.	Calcutta
Bom.	Bombay
SCC	Supreme Court Cases
SCR	Supreme Court Reports
Comm.	Commissioner
ISSN	International Standard Serial Number
ISBN	International Standard Book Number
US	United States

TABLE OF CASES

Case Name with Citation	Short Name (Popular)
1. Acharya Avdhut v. Comm. Of Police, Calcutta, AIR 1984 (4) SCC 522	Acharya Avadhuta Case
2. Adithayan v. Travancore Devasom Board, AIR 2002 SCC 123,124	Travancore Devasom Board Case
3. Arch R. Everson v. Board of Education of the Township of Ewing, 330, US l (1947)	Everson Case
4. Aruna Roy v. Union of India, AIR 2002 SC 3176	Aruna Roy Case
5. Bhuri Nath v. State of J&K, AIR 1997 SC 1711	Bhuri Nath Case
6. Bijoe Emmanuel v. State of Kerala, AIR 1987 SC 748	National Anthem Case
7. Bira Kishore Deb v. State of Orissa, AIR 1964 SC 1501	Bira Kishore Case
8. Commissioner, Hindu Religious Endowments, Madras v. Sri Lakshmindra Thirtha Swamiar of Sri Shirur Mutt, AIR 1954 SC 282	Shirur Mutt Case
9. Commissioner of Police and others v. Acharya Jagdishwarananda Avadhuta and another, AIR 2004 SC 2984	Ananda Margi Case
10. Dara Singh v. Union of India, AIR 2011 SC 1436	Dara Singh Case
11. DR Ramdasji v. State of AP, AIR 1970 SC 181	Ramdasji Case
12. Gram Sabha v. Union of India, Writ Pet. No. 8645 of 2013, Bombay High Court	Gram Sabha Case
13. Indian Young Lawyers Association and others v. State of Kerala and others, 2018 Indlaw SC 905	Sabarimala Case
14. John Vallamattom v. Union of India, AIR 2000 SC 2902	John Vallamattom Case
15. Keshavananda Bharati v. State of Kerala, AIR 1973 SC 1461	Basic Structure Doctrine Case
16. Lemon v. Kurtzman, 403, US 602 (1971)	Lemon Case

17. Mohd Hanif Quareshi v. State of Bihar, AIR 1958 SC 731	Hanif Quareshi Case
18. Mufti Sayed v. State of West Bengal, AIR 1999 Cal 15	Mufti Sayed Case
19. Narendra v. State of Gujarat, AIR 1974 SC 2092	Narendra Case
20. Nikhil Soni v. Union of India, 2015 Cri LJ 4951	Santhara Case
21. Pannalal Bansilal Pitti v. State of Andhra Pradesh, AIR 1996 SC 1023	Pannalal Case
22. Rangnath Mishra v. Union of India, (2003) 7 SCC 137	Rangnath Mishra Case
23. Ratilal P. Gandhi v. State of Bombay, AIR 1954 SC 388	Ratilal Case
24. Seshammal and others v. State of Tamil Nadu, AIR 1972 SC 1586	Seshammal Case
25. Shayara Bano and others v. Union of India and others, AIR 2017 SC 4609	Shayara Bano Case or Triple Talaq Case
26. Shri Jagannath Puri Management Committee v. Chintamani, AIR 1997 SC 3839	Jagannath Puri Case
27. Shrimad Swami v. State of TN, AIR 1972 SC 1586	Shrimad Swami Case
28. SP Mittal v. Union of India, AIR 1983 SC 1	SP Mittal Case
29. SR Bommai and others v. Union of India and others, AIR 1994 SC 1918	SR Bommai Case
30. Sri Venkataramana Devaru and others v. State of Mysore and others, AIR 1958 SC 255	Devaru Case
31. Stanislaus v. State of MP, AIR 1977 SC 908	Stanislaus Case
32. State Board of Education v. Barnette, 319, US 624 (1943)	Barnette Case
33. State of Bombay v. IB Mali, AIR 1952 Bom. 84	IB Mali Case
34. State of Rajasthan v. Sajjanlal Panjawat, AIR 1975 SC 706	Sajjanlal Case
35. The Durgah Committee Ajmer and another v. Syed Hussain Ali and others, AIR 1961 SC 1402	Durgah Committee Case
36. The State Of Bombay v. Narasu Appa Mali, AIR 1952	Narsu Appa Mali

Bom 84	Case
37. Tilkayat Maharaj v. State of Rajasthan, AIR 1963 SC 1638	Tilkayat Case

CHAPTER - 1

INTRODUCTION

1.1. Introduction

"According to Sardar Vallabhbhai Patel, Religion is a matter between man and his maker"[1]

To know 'Essential Religious Practice Test' doctrine and 'secular activity' under Article 25 of the Indian Constitution first we have to know the scope of religious freedom in India. 'Part III' of the Indian Constitution speaks of Fundamental Rights that are provided by the Constitution to the individuals. In Part III, Articles 25-28 specifically deals with the religious freedom of individuals.

To know the scope of freedom of religion in India we have to know whether India is secular or not. If India is secular then what kind of secularism does India adopts. India is a country of people having various beliefs, faiths following different religions. The preamble of the Indian Constitution clearly declares India to be a "secular" country after the 42nd amendment which inserted the terms 'secular and socialist' in the preamble.[2] Articles 25 to 28 of the Constitution of India confer certain rights of freedom of religion not only to citizens but also to non-citizens living in India. Articles 25 to 28 protect religion and religious practices from state interference. But, the policy of non-intervention does not allow religious freedom to affect secular rights of the citizens and is subject to state's power to regulate socio-economic matters.[3]

The concept of what is a 'secular activity' has raised a several problems of interpretation. Nor is 'religion' defined anywhere in the constitution. This gives judiciary an important role to decide in the matters of freedom of religion. To strike a balance between 'religion' and 'secular activity' judiciary has tried different measures to resolve issues. One of such methods is the "Essential Religious Practices Test" doctrine. This doctrine states that freedom of practice elongate to only activities

[1] Sardar Vallabhbhai Patel, Addressing a public meeting at Ernakulam, 15 May 1950, available at pib.archive.nic.in
[2] The Constitution (Forty-second Amendment) Act, 1976 had made many amendments to the Constitution of India of which adding 'secular and socialist' in Preamble is the major one.
[3] The Constitution of India, 1950, Universal Lexis Nexis Bare Act, 2020

which are essential for a religion. Each case is judged by its own facts to ascertain as to whether a particular practice is "essential" for a religion.

The political system envisaged in the Constitution states the principles of ("Sarva Dharma Samabhava" i.e. protection to all religions with equal regard). The question which always arises is whether state can be kept separated from religion in absolute sense. Dr. B. R. Ambedkar explained the varying nature of religion in India in the Constitutional Assembly debates and stated that – "*definition of religion should be limited in the sense that beliefs and rituals which are to be protected should be essentially religious and connected to such religion*". [4] The term "essentially religious" used by Dr. Ambedkar is stated to be drawing a clear intention to separate secular and religious activities.

The judiciary first time came with this new "Essential Religious Practice Test" doctrine in the *Shirur Mutt*[5] case. The court stated in this case that what constitutes 'essentially religious' can be ascertained from the practices of the religion itself. So, the preliminary interpretation of the doctrine was in accordance to what was thought of by the constitutional framers especially to Dr. Ambedkar's views. The courts in further cases have been unwilling in forming guidelines or giving directions to decide as to what is essence for a religion.[6] The question being raised to the available doctrine which tries to resolve the issue between 'religion' and 'secular activity' is not when and how this doctrine is to be applied but why it should be applied. In the *Triple Talaq*[7] case the Supreme Court has observed and made a right point that the approach to decide the validity of a religious practice based on the "Essential Religious Practice Test" doctrine is not unanimous.

The recent judgement in *Sabarimala*[8] Case raises a very important question regarding the intervention of courts in religious matters. It questions the very objectivity of law and the relation between law and religion. The doctrine is applied in different cases with different perspectives and cannot be said an effective measure to be applied in all cases related to religious matters. But in reality it is applied to almost

[4] Vol. VII, Constitutional Assembly Debates
[5] Commissioner, Hindu Religious Endowments, Madras v. Sri Lakshmindra Thirtha Swamiar of Sri Shirur Mutt, AIR 1954 SC 282
[6] Sri Venkataramana Devaru and others v. State of Mysore and others, AIR 1958 SC 255, The Durgah Committee Ajmer v. Syed Hussain Ali, AIR 1961 SC 1402
[7] Shayara Bano and others v. Union of India and others, AIR 2017 SC 4609
[8] Indian Young Lawyers Association and others v. State of Kerala and others, 2018 Indlaw SC 905

all the cases where right to religion is involved. It's time to know the actual objective of such doctrine and its relation with the secular activity under Article 25 of the Indian Constitution. As rightly interpreted by Justice Indu Malhotra in *Sabarimala*[9] Case Article 25 speaks of State to redress inequalities through legislation and not judicial intervention.

The religious practices in India are tested in accordance with the doctrine of "Essential Religious Practices Test". The courts deny constitutional protection to religious practices which are not essential. The courts have to consider the religious beliefs of the communities even if they are superstitious and shall only be subjected to the restrictions mentioned in Article 25. Otherwise, the religious freedom in India would be interfered by the state every now and then. The limitations which could be inflicted by state are clearly expressed in "Article 25" and the judges cannot assume the power to decide in the matters of religion just because the practices or beliefs are superstitious. The explanatory term 'essential' used to restrict the scope of religious beliefs is not even mentioned in Article 25. The courts can resolve the religious issues by other constitutional methods the necessity to always apply essential practices test is not a correct approach.

The religious freedom should not be against the health, morality and public order and should not infringe any of the fundamental rights of individuals. State can "regulate" on "secular activities" connected with religious practices. The state has no power to stand in the way of the personal matters of religious beliefs of individuals. But, the provision of Article 25 (2) (b) has left a scope of social welfare and reform which is being misused by the state to enter into the religious domains. The courts added to this by evolving a new doctrine 'Essential Religious Practices Test' doctrine and entering into religious domains. To define religion is subjective in nature but the court objectifying it is fundamentally wrong. The court to decide a practice as essential or non-essential considers each practice individually.

"Religion" and "Spirituality" has always been foremost to the Indian society since time immemorial. It can be observed even in the historical context as to how religious practices and morals were the ethical code of conduct on the individual's absolute liberty when there was no rule of law. Religion has played an eminent role to

[9] ibid

maintain peace in the society but the interference of other parties in the domain of particular sects religious beliefs have increased chaos.

The inclusion of the word 'secular' created more problems as it was left undefined. There was already an ambiguity as to the definition of the term 'religion'. It created more problems as to now two undefined words defines the essential practices test doctrine. The doctrine is propounded on the basis of two undefined and ambiguous words that have their own different interpretations. The essential practice to a religion is decided as to what is the integral part or the main practices of a religion. If a "practice" is termed "not essential" then it may hinder the secular character of the constitution. This is somewhat a very vague concept to arrive and resolve issues of freedom of religion.

According to the author it is all the practices put together which constitutes the religion and not through separating essential from non-essential. And to keep a check on the irregular practices there are already other methods mentioned in Article 25 itself. There is a freedom of religious beliefs based on individual's own judgement and conscience.

1.1.1. Review of literature

- **Articles**

1) Rajeev Dhavan, *Religious Freedom in India*, 35 Am. J. Comp. L. 209 (1987), available at heinonline.org

   The article as per its title is very wide topic and covers a lot of literature. This article though being written a very long time ago is quite relevant to know the interpretation of the judiciary during the 1980's when the PIL's were instituted for larger public interest. The concept of religion is well explained in this article mentioning the Constitutional Assembly debates. But the article is wide enough to cover a lot of concepts. The researcher is only focused on a particular doctrine and its evolution through judicial pronouncements. So, the researcher has a limited scope than the author of this article.

2) Surya Prasad Koirala & Rewati Raj Tripathee, *Freedom of Religion and Secularism: A comparative of Indian, American and Nepali Practices*, 4 N.J.A. L.J. 163 (2010), available at heinonline.org

This article focuses on the comparative study of the "concept of secularism" and religious freedom in three different countries. The concept of secularism and freedom of religion is explained in the light of the Constitutions of the three countries. The article also discusses the opinions of various legal scholars regarding the concept of secularism. This article only deals with comparative analysis of the three Constitutions regarding right to freedom and does not explain the development of the doctrine of 'essential practice' test. The researcher has referred this article to know the concept of freedom of religion in other countries facing similar issues.

3) Gautama Bhatia, *Freedom from Community: Individual Rights Group Life, State Authority and Religious Freedom under the Indian Constitution*, 5 GlobCon 351 (2016) - available at heinonline.org

   This article is very informative regarding the various issues of individual rights which are in conflicts with religious freedom under the Indian Constitution. But it is limited only to the comparison of the rights. In this article it assesses the important questions of how, and to which extent, "Constitution of India" grants persons (specifically, objectors) rights against the religious groups to which they themselves belong. It does not explain the very concept of 'The essential religious practices doctrine' which is the very essence of discussion regarding the reasoning of the Supreme Court to reach to conclusions. This article is helpful in knowing the concepts of secularism and religion in India.

4) Faizan Mustafa and Jagteshwar Singh Sohi, *Freedom of Religion in India: Current Issues and Supreme Court acting as a Clergy*, B.Y.U. L. Rev. 915 (2018) – available at heinonline.org

   This article deals specifically with the 'essentiality test doctrine' and the role of the Supreme Court as a deciding factor of essential practice in religion. This article has stated that judgements of the Supreme Court have unfortunate effect of 'Essential Practices Test' on the freedom of religion. The researcher partially agrees with the as the use of 'essentiality test' by "Supreme Court" in many cases have proved to be restricting the scope of the freedom of religion. But the concept of 'essentiality test' is also necessary to remove the discriminative measures otherwise it would be misused.

5) Paul Babie and Arvind Bhanu, *Freedom of Religion and Belief in India and Australia: An introductory Comparative Assessment of two Federal Constitutional Democracies*, 39 Pace L. Rev. 1 (2018) – available at heinonline.org

As the topic of the Article suggests this only deal with the freedom of religion in the two federal countries i.e. Australia and India. It does a qualified study of the religious freedom in both the Constitutions. It does not explain the Indian situation and judicial pronouncements much effectively. The researcher aims to explain the concept of 'essentiality test' with regards to Indian context.

- **Books**

1) Robert Baird, *Religion and Law in Independent India*, Manohar Publishers & Distributers, 2nd edition, 2005

This book contains multiple essays by jurists, legal scholars, political scientists, historians. This book gives an overview of relationship between law and religion in India after independence. Though this book is quite informative but it still has a little to deal with judicial approach and understanding of religion through case laws.

2) M.P. Jain, *Indian Constitutional Law*, Lexis Nexis, 8th edition, 2018

This book deals with the whole Constitutional law. The researcher has referred only those chapters of this book which deals with Right to freedom of religion for understanding of the concepts and case laws. The book just gives an overview and is not detailed about the doctrine which is under study. This book is informative to understand the concepts but does not cover all the aspects of the area under study.

3) Dr. J. N. Pandey, *Constitutional Law of India*, Central Law Agency, 55th edition, 2018

This book is a student friendly book to understand the Indian Constitutional Law through case laws. The researcher has referred only those chapters of this book which deals with religious freedom for understanding the concepts and case laws. This book gives brief about concepts and does not cover the topic under study in detail.

1.2. Present Study

1.2.1. Statement of Problem

In the Indian Constitution there is a separation between a "secular domain" that the state manages and regulates and a "religious domain" in which the state should not interfere. Notwithstanding, characterizing the partition between the two has demonstrated petulant – the state is legitimately engaged with the organization of several religious institutions and the courts are routinely approached to settle on rights connected to religious functions and bodies. Such choices add to rethinking and redefining the religious categories and practices.

The Constitution of India has no mention of the "Essential Religious Practice Test" doctrine. It is a judicially evolved principle which came through interpretation of Article 25 with the concept of secularism in India. This doctrine adds a lot of ambiguity to the position of law in the freedom of religion. Article 25 is a well defined provision where Freedom of Religion has been subjected to only three exceptions that are – public order, health, morality. Despite a well defined provision, the "Essential Religious Practice Test" doctrine is applied to know the scope of freedom of religion.

There are loopholes to this doctrine as it is now applied in a lot of cases. And there is increase in number of PIL's. The objective of the 'Essential Religious Practice Test' doctrine was different when it was first introduced. But, now though the facts being different the Apex court is applying this doctrine as a matter in almost all the cases dealing with the issue of freedom of religion. This paper tries to study the evolution of the "doctrine of essential practice" through judicial interpretations in various cases and whether this doctrine is standing the test of time. This paper endeavours to examine the inadequacy of checking a religious practice on the criterion of 'Essential Practices Test Doctrine'.

1.2.2. Conceptual Framework

1.2.2.1. "Concept of Secularism" and Indian Secularism

The word "secularism" is understood as complete state neutrality and separation and treating all religions equally.[10] There are two major concepts of "secularism" i.e. Positive Secularism and Negative Secularism. Positive Secularism states that – 'The state does not prefer any religion over others. It gives all the religions the same constitutional protection and rights.' While on the other hand the Negative Secularism states – 'Complete state separation from religious affairs'. India follows the positive concept of secularism while USA follows a negative concept of secularism.[11] The positive concept of secularism requires that State should not be anti-religion but at the same time it should also be remain separated from religious affairs. India being a religious country adopted the positive concept to develop individuals and providing more religious liberty while framing the Constitution.[12]

Not all the countries are secular. The secular nature of a country is understood by its constitutional principles and the law of the land. Article 9 of the Sri Lankan Constitution states the official religion of the country as Buddhism.[13] The national religion of Pakistan is Islam.[14] But the situation in India is different as it is secular. The preamble of India expresses India to be a 'secular' country after the 42nd Amendment.[15] Though the word 'secular' was added in the 42nd Amendment, 1976 the nature of Indian Constitution was secular from the very beginning of its formation.[16] Freedom of religion and secularism go antonymous to each other but the Indian Constitution is drafted in such a way to have a peaceful co-existence between the two. But the problem which arises in India is that neither religion nor secularism is defined anywhere in the Indian Constitution. So, it requires judicial interpretation. There is always a different view and understanding of the concept of secularism and religion in India. So, the judiciary has to step in to play a vital role and remove all the ambiguities of the Constitutional interpretation.

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[10] V. Vijaya Kumar, Constitution and Secularism - A Rejoinder, 6 Student Advoc. 83 (1994)
[11] Mathew John, Decoding Secularism: Comparative Study of legal decisions in India and US, Economic and Political Weekly, 2005, Vol. 40, No. 18, pgs 1901-1906, available at www.jstor.com
[12] Dr. J. N. Pandey, Constitutional Law of India, Central Law Agency, 55th edition, 2018
[13] The Constitution of the Democratic Socialist Republic of Sri Lanka, 1978, Chapter II, Article 9
[14] The Constitution of the Islamic Republic of Pakistan, 1973, Part I, Article 2
[15] Supra Note 2
[16] Article 14, 15, 21, 25 of the Indian Constitution 1950 read together before the Amendment of 1976, also observed in SR Bommai v. Union of India, AIR 1994 SC 1918

The term 'secularism' first coined in 1851 when it was used by George Holyoake a British writer.[17] In England, there was always a scuffle between the "state" and the "church" which propounded the idea of "secularism" that state not to allow supremacy of religion in state matters.[18] In India the concept of secularism is understood differently by different people. This is the reason it is always a controversial topic for debates. The United States of America had no reference to secularism in its Constitution when it was formed but after the Constitution first Amendment Act it became a secular state.[19] The concept of secularism is said to be evolved by western countries. The idea of secularism in its understanding is different in different countries. This is the reason there is a difference in English Secularism and American Secularism. India has another unique understanding of secularism than the American and English Secularism.[20] India is land of different religions living in a diverse culture and traditions. India is the birthplace of one of the olden religions of the world.[21] The history of India shows coexistence of several religions since thousands of years.[22] This brought a different concept of secularism in India than the other nations. The principle of secularism in other countries speaks of religion and state to be separate. But in India the secularism concept deals with peaceful coexistence of all the religions.[23]

Secularism as a concept is regarded important for the development and industrialization of the nation.[24] Secularism in dictionary meaning in many books is considered as a concept not connected with religion.[25] So, for this now the need is to know what religion is. Religion in simple dictionary meaning is something which is connected to God or Creator of the universe.[26] Each religion has its own beliefs and

[17] Subhan Jelis, Concept of Secularism, (2016), available at www.ssrn.com
[18] ibid
[19] The Constitution of the United States, Amendment I, 15 December, 1791 (first of the ten amendments known as Bill of Rights)
[20] Deepa Das Acevedo, Secularism in the Indian Context, 38 Law & Soc. Inquiry 138 (2013)
[21] Barbara Metcalf, Religion and Governance in India-A Comment, South Asia: Journal of South Asian Studies, Vol.33, April, 2010
[22] ibid
[23] N. P. Verma, Secularism in Indian Constitution and the Experience, 4 Indian J.L. & Just. 1 (2013)
[24] Gilles Carbonnier, Religion and Development: Reconsidering Secularism as the norm, International Development Policy: Religion and Development, 2013, No.4, pgs 1-5, available at http://journals.openedition.org/poldev/1351
[25] 1. Oxford English Dictionary Online, Oxford University Press, June 2020, 2. Cambridge International Dictionary of English, Cambridge University Press, 2014, 3. The Merriam Webster Dictionary, Merriam Webster Mass Market, 2016
[26] ibid

practices. These practices and beliefs are considered to be necessary to follow the particular religion otherwise it would not be considered religious. The concept of secularism in other countries some way go opposite to religion which is not a neutral situation. But, in India the Constitution has been framed in such a way that a neutral model is followed.[27] Indian Constitution gives Right to religious freedom and nevertheless it states that India is a secular country.[28] So a balancing situation has been formed. Freedom of religion is essential but it is also to be observed that law and order situation does not arise due to it. That is the reason there is no absolute freedom of religion in India. But this doesn't mean that Freedom of religion cannot be adhered to. Each and every individual in India has a religious freedom. The right of religious freedom extends to the non- citizens as well.

It is the obligation of the state to preserve lawfulness and it is the Right of the citizens to have freedom of religion. The balancing situation is ascertained with the concept of Indian secularism. In which the state tries to treat all religions equally.

1.2.2.2. "Indian Secularism" and the Constituent Assembly Debates

The word "secular" was not the part of the Preamble of the Indian Constitution before 1976 Amendment. At the time when Preamble of the Constitution was talked about in the "Constituent Assembly" as on October 17, 1949, difference and discussion about the inclusion of the "concept of secularism" took a large portion of the Assembly's time.[29] H.V. Kamath began discussion bringing an "Amendment" to start "the Preamble" with the words – "In the name of God".[30] There were disagreements saying that it gives a notion of anti-secularism. The parties for the motion stated that it does not point towards any particular religion. Examples of other Constitutions were given which had 'God' word in their Preambles. But H. V. Kamath's proposal was rejected.[31] The various views at the time of making of Constitution were towards 'Nationalism'. The idea was to focus more on nationalism than on the religion. The speech of Dr. Radhakrishnan clears this point which was

[27] Supra Note 18
[28] Preamble and Article 25, The Constitution of India, 1950
[29] Shefali Jha, Secularism in the Constituent Assembly Debates, 1946-1950, Economic and Political Weekly, 2002, Vol. 37, No. 30, Pgs – 3175-3180, available at www.jstor.com
[30] ibid
[31] ibid

made during the 'Objectives Resolution' as on December 13, 1946 stating that – 'Nationalism is the foundation of modern life and not religion'.[32]

Mr. K. T. Shah had made some attempts in the Constitutional Assembly Debates to introduce concept of Secularism in India.[33] He gave an idea to include the word 'Secular' in "Article 1" of the "Draft Constitution" which read – "India shall be a secular, federal, socialist union of states." Another suggestion of Mr. K.T. Shah was to have an Article specifically speaking of State neutrality having no concern with religion.[34] These amendments of Mr. K. T. Shah were opposed by Mr. B. R. Ambedkar. Proposal of adding 'secularism' word in the Preamble was also rejected.

The exclusion of the word 'secular' in the Preamble was deliberate. The intentional omission can be understood as the fear of the understanding of the concept of 'Secularism'. The Indian secularism was at last being adopted as an equality of all religions with state given regulatory powers under Article 25 (2) (a) activities which are 'secular' and connected with religious practices. To give more religious liberty also the word 'religious practice' was adopted than the word 'religious worship'.[35] The idea was to have more religious liberty. The religious beliefs and faiths were intended to be given utmost freedom. It could be understood through all the debates and the ultimate adoption by the Constitutional framers.

1.2.2.3. Judicial Interpretation of "Religion" in India

The term "religion" is not defined anywhere in the "Constitution of India". It is difficult to define religion. It cannot be given a precise definition. This is the reason there is always scuffle as to what activity is religious and what is not. The Supreme Court has in many cases tried to give 'religion' a definition to resolve issues.[36] 'Religion' involves belief and faith of an individual. A religion has its assertion in "an arrangement of opinions or teachings which are respected by the individuals who purport that religion as helpful for their profound prosperity."[37] Religion is nothing else but a convention of beliefs and faiths. A religion may just set out a system of

[32] ibid
[33] Vol. VII, Constitutional Assembly Debates, 3rd and 6th December, 1948
[34] ibid
[35] Supra Note 27
[36] M.P. Jain, Indian Constitutional Law, Lexis Nexis, 8th edition, 2018
[37] Dr. J. N. Pandey, Constitutional Law of India, Central Law Agency, 55th edition, 2018

moral guidelines for its believers to acknowledge, it may recommend observances and rituals, services and methods of worship which are viewed as integral piece of religion, and these observances and rituals may extend even to issues of food and dress.[38] "Religion" is in this manner basically a matter of individual "belief and faith". Each individual has right not exclusively to engage such strict belief and thoughts as might be endorsed by his conscience or inner voice yet in addition display his faith and thoughts by such obvious acts which are authorized by his religion.

Under Article 25 (1) the provision is framed in a way to provide two-way freedom i.e. i) Freedom of conscience and ii) freedom to practice, propagate and profess. The "freedom of conscience" gives internal freedom to relate to god in whatever sense the individual wants to. The other freedom to 'practice, propagate and profess' can be said as an external expression of the internal belief. 'Professing a religion' a religion means to openly declare and display one's religion. 'Propagating a religion' means to impart and expand one's religious views to others. But 'propagating a religion' doesn't mean forceful conversion or conversion by coercion or any other unlawful means.[39]

1.2.2.4. Practicing a 'Religion' in India

Practicing a 'religion' in India actually means following or incorporating teachings of religion in one's life. When an individual starts to follow certain principles of a particular religion and makes it his routine to follow them and imbibe in his lifestyle then he is said to have practicing a particular "religion". The 'right to practice' a "religion" is guaranteed under "Article 25 (1)" and if somebody infringes such right then the constitutional remedies under Article 32 and 226 can be adhered to. But state under Article 25 (2) (a) has been given regulatory powers to make laws on economic, financial, political, secular activity connected with such 'right to practice'.

In a case popularly known as *National Anthem Case*[40], the Supreme Court stated that – no person can be forced to sing National Anthem[41] if it is against the

[38] SP Mittal v. Union of India, AIR 1983 SC 1
[39] Stanislaus v. State of MP, AIR 1977 SC 908
[40] Bijoe Emmanuel v. State of Kerala, AIR 1987 SC 748
[41] Article 51A (a) of the Constitution of India states it is the fundamental duty of citizens to respect the ideals of the Constitution, the National Anthem and the National Flag.

practices of his religion. But in further case of *Rangnath Mishra v. Union of India*[42], the Supreme Court ordered governments to make suitable circumstances to spread awareness of the importance of Fundamental duties so that balance is formed between religious freedom and fundamental duties under Part IVA of the Constitution of India.

1.2.3. Methodology

- **Objectives** –

1) To study the nature of freedom of religion which the Constitutional Assembly thought of providing while making the Constitution of India.
2) To know what is the nature of correlation between secularism and religion in India through the study of judicial pronouncements.
3) To know the Indian Judiciary's contribution to decide the religious practices while separating secular from religious activity.

- **Significance of the Study -** The aims and objectives of the research paper are quite clear to study deep into the relationship between the concept of secularism and its relationship with freedom of religion. The study analyses a lot of Supreme Court landmark judgements with this regard. The study tries to give an insight into the concepts by Supreme Court in a nutshell. This would lead to understand the concepts for the upcoming judgements on the same issues. There is still an important constitutional question as to what 'essential practices' means. It depends on case to case basis. But if it so, then it would lead to uncertainty of law. So, it gives the chance to grab upon the subject and its importance.
- **Scope of the Study -** The scope of the study is limited to study the interpretation of the Articles related to "freedom of religion" within the "Indian Constitution". The study can be done through a thorough review of all the judicial pronouncements dealing with Right to religion. Studying and analysing all the judicial pronouncements would be a hectic task. So, for the brevity of time and resources the study will be limited to review landmark judgements of the Supreme Court, and the High Court judgements will only be dealt with for comparative study. The researcher would also refer some part of the Constitutional Assembly debates dealing with right to religion for better understanding of concepts.

[42] (2003) 7 SCC 137

- **Hypothesis -** The essential practice test doctrine has proved to be unreasonable as a deciding factor in the matters of religion. The 'essentiality test' has an adverse effect on the religious freedom.
- **Research Questions –**

1) What is the correlation between secularism and religion in India?
2) Why the individual rights are considered over religious rights of groups or a sect?
3) How the issue of individual rights in contrast with religious rights of a particular sect can be resolved?

1.3. Data Analysis/ Discussion

The nature of research adopted would be doctrinal referring to secondary resources such like books, commentaries, scholarly articles and web journals. The approach towards the research would be a mixture of both quantitative and qualitative with a comparative study on some points which will help in analysing the research. The researcher will carry out a lot of case analysis. The researcher will refer a lot of Supreme Court landmark judgements, Constitutional Assembly debates, and Law Commission reports for better understanding of the concepts.

1.4. Chapter Scheme

The scope of the study would be limited to study the judgements of the Supreme Court dealing with Article 25 in view of the doctrine of "Essential Religious Practices Test". So, the chapters will go accordingly –

Chapter 1 – Introduction: It would be introducing the concepts with brief and precise definition as much as possible. It will mention the objectives of the study, the limitation and significance of the study. It will give a brief overview of what the research study is all about. It further lays down the methodology adopted, the scheme of chapterisation, the literature referred for the study.

Chapter 2 – Comparative Study of Secularism in India, UK and USA: This chapter is regarding the comparative study of secularism with major countries which claim to be 'secular'. And the countries selected for comparison are UK and USA which are two major countries of the world adopting their own perception of secularism. The reason

for adopting these countries for comparison is clear due to their unique Constitutional histories.

Chapter 3 – 'Essentiality Test' and 'Secularism' under Indian Constitution: This chapter will disclose with regards to how translation of "Article 25 of the Indian Constitution" prompted the development of the "Essential Religious Practices Test" doctrine.

Chapter 4 – This chapter will deal with the "Issues and Challenges to the Essential Religious Practices Test" doctrine. The chapter would explain the nature of application of doctrine and its adverse effects.

Chapter 5 – This chapter would deal with the conclusion and suggestions of the study. The chapter would give an idea as to what all approaches are possible to harmonise between individual rights and religious sect rights.

CHAPTER – 2

COMPARATIVE STUDY OF SECULARISM IN INDIA, UK AND USA

2.1. Secularism in U.S.A.

Doctrine of separation of powers evolved in America which also brought separation between "state" and "the Church". Before the "American Constitution" were formed most of the states in America declared Christianity as State religion.[43] After 1791, USA declared itself a secular nation in the world.[44] No person of a particular religion will be preferred over people of other religion for any public office in U.S.A. The "1st Amendment" brought to the "Constitution of U.S.A." made sure that "Congress shall not enact any law favouring any religion over others". In this way America became the first official secular state in the world.

The U.S. Supreme Court in *Arch Everson v. Board of Education of Township of Ewing*[45] has held that – "The state or federal government cannot setup a church out of it funds. The state cannot aid or favour any religion nor can the federal government for this purpose. The state or federal government neither can force anyone to a belief or disbelief of any religion." Still there are many religious practices which can be observed in America as – 1) Chaplains are appointed for both the houses; 2) The witnesses take oath in the name of God in the court of law; 3) Public Holiday on religious festivals; 4) Congress Session starts by invoking God's name etc. So, there is a major difference in theory and in practice.[46] In theory it can be stated as a secular state but in practice there are various examples where in public offices, courts etc. God's name is invoked. In America the role of judiciary cannot be stated satisfactory as some or other sort of religious interference can be observed.

In a landmark case *State Board of Education v. Barnette*[47] two school students were not reciting pledge to National Flag because their religion Jennovah's Witnesses doesn't allow it. The students were expelled. The matter reached before West Virginia Court stating compulsory pledge towards national flag is infringement of their

[43] George W. Jr. Dent, Secularism and the Supreme Court, 1999 BYU L. Rev. 1 (1999)
[44] Supra Note 17
[45] 330, US 1 (1947)
[46] Supra Note 29
[47] 319, US 624 (1943)

religious freedom. The court stated that it is not interference but a secular activity. Appeal was filed before the Supreme Court. The Supreme Court stated that the State could not make it compulsory if it infringes right to religion.

In the U.S the Constitutional scheme of separation of 'State' and 'religion', and the 'Establishment Clause'[48] specifically, has been the subject of much discourse and debate recently.[49] In the previous times there was at any rate five points of view with respect to the idea of separation in the USA. The five different viewpoints[50] are -

1) That the 'Establishment Clause' inclusion is essentially to protect "the Church" from "the State",
2) That it is intended to protect "the State" from "the Church",
3) That it is a way to protect the person's freedom of conscience, from the interventions of either Church or State, or both intervening,
4) That it is for the security of States from intervention by the Federal government in administering religious issues,
5) That it is intended to protect the society and its individuals from forceful conversions or unwanted participations.

But the philosophical idea behind the U.S secularism has consistently been to 'protect religion from the State'.[51] So as to help interpret the 'Establishment Clause' the Supreme Court came up with a three-step test, once in a while known as 'Lemon test'. This test is named as such because the principle was laid down in a 1971 U.S. judgement of *Lemon v. Kurtzman*[52]. As per this test, 1) the legislative action in question must have a secular reason, 2) its essential impact must be that it neither promotes nor restrains religion, and 3) the legislative action should not have an unreasonable interference in religion by the government.

Sometimes the U.S. courts apply the 'purpose test' stating that the legislative action must be for a purpose for instance it is for education, wellbeing or security of

[48] Refer to The Constitution of the United States, Amendment I, 15 December, 1791 (first of the ten amendments known as Bill of Rights), the 'establishment clause' prohibits state to establish any religion
[49] George W. Jr. Dent, Secularism and the Supreme Court, 1999 BYU L. Rev. 1 (1999)
[50] ibid
[51] Mathew John, Decoding Secularism: Comparative Study of legal decisions in India and US, Economic and Political Weekly, 2005, Vol. 40, No. 18, pgs 1901-1906, available at www.jstor.com
[52] 403, US 602 (1971)

general society.[53] In USA, an administration can't compel an individual to join in or to restrain a religion without his will or power him to declare a faith or belief in any religion. Also, State or the Federal government cannot secretly participate in religious gatherings etc. The U.S. courts sometimes apply the 'Endorsement Test' to determine whether a government action does not endorse any religion in the guise of regulation. Sometimes the 'coercion test' is applied to determine whether a government action does not force people to favour any religion.[54] The principles of secularism in USA are described as free exercise of religious beliefs given to the individuals with minimal state intervention.[55]

2.2. Secularism in U.K.

The concept of secularism in U.K. is totally different from India and U.S.A. The relationship of state and religion in England cannot be explained. There are no Fundamental rights in U.K. because it has an unwritten Constitution. There are two ways in which it can be said that UK has an unwritten constitution. Firstly, UK does not have a single specifically enacted document containing the principle rules which control the powers of government or stating the rights and duties of the citizen. Secondly, UK Parliament is sovereign and no difference can be made between "ordinary laws" and "Constitutional laws". There are no laws which can be expressed as of principal significance which can be changed distinctly through special legislative procedure.[56] In ancient England the Church was the ultimate decider.[57] The philosophy of Church believed that all the powers of state are derived from God or religion.[58] The concept of Secularism has now brought a change in England where Church is headed by the King and the Crown gives directions to the Church.[59] England believes in parliamentary sovereignty so the King acts on the Assistance and Counselling of the prime minister. The Parliament of England decides in the matters

[53] Supra Note 49
[54] Supra Note 49
[55] Supra Note 51
[56] A.V. Dicey, Comparative Constitutionalism, OUP oxford, 1st edition, 2013, ISBN – 978-0-19-968581-3
[57] Anthony Bradney, Religion and the Secular State in the United Kingdom, 2015, available at Strasbourgconsortium.org
[58] ibid
[59] Javier Garcia Oliva, Sociology, Law and Religion in the United Kingdom, 152 Law & Just. - Christian L. Rev. 8 (2004)

of functioning of Church and financial matters related to it.[60] Grant in aid is provided by the State to the Churches for administration.[61] Though there is liberty in matters of belief. There are no Fundamental rights in U.K. because it has an unwritten Constitution. So, the religious freedom is not as enforceable as in India. In England the position changed after the 'Human Rights Act, 1998'.[62] The 'Human Rights Act' was passed to recognise certain European Convention Rights. The Article 9 of the 'Human Rights Act' recognised the right to belief, thought and religion. Still the position is quite different as this is not a fundamental right in England. In USA and India the right to faith and religion is a fundamental right.

The Church of England by certain internal actions can establish a 'General Synod' consisting of ministry and common people and they can provide recommendations considering religious matters, for example, fellowship, sanctification, etc. These propositions don't have the lawful authority until it is affirmed by the Parliament by a simple resolution and thereafter Royal consent as per procedure. This clearly states the connection and relationship between "the Church" and "the State" in England.[63]

So, ultimately there is no official separation of state and church, but still the United Kingdom declares it as secular. The reason of such notion is that there is no oppression of minorities and there is right to belief and faith of an individual. Also, there is a democratic concept in UK which does not pay religion much heed. Thus, inspite of a declared State Church and relationship with religion, the U.K. model is considered 'secular' in some circumstances.[64]

2.3. Secularism in India

The way secularism in India is understood is that it believes in peaceful co-existence of religions.[65] In India unlike other countries people of many religions co-exist with religious freedom. So India follows a different concept of secularism than

[60] Supra Note 35
[61] Supra Note 37
[62] ibid
[63] Anthony Bradney, Religion and the Secular State in the United Kingdom, 2015, available at Strasbourgconsortium.org
[64] Javier Garcia Oliva, Sociology, Law and Religion in the United Kingdom, 152 Law & Just. - Christian L. Rev. 8 (2004)
[65] VM Tarkunde, Secularism and the Indian Constitution, India International Centre Quarterly, Spring 1995, Vol. 22, No.1, pgs 143-152 available at www.jstor.com

the western concept.[66] Only peaceful existence is not necessary to be a secular state but it is also to be observed that all religions have an equal status in theory and in practice.[67] In Europe there was a conflict between state powers and church powers ultimately state was given the Supreme power but in Indian situation there is no religion dominance over public matters. What gives rise to unequal treatment is the division between the majority and the minority. This is the reason India also cannot observe pure secularism.[68]

In India the concept of secularism can be observed officially since the Charter Act 1833 which stated that by reason of religion no person shall be disabled to hold office in the Company.[69] This can be stated as the earliest of attempts to secularise India. The nature of concept of secularism can be stated political and is only focused on state separation from religion. The Concept of 'Secularism' gained a lot of popularity in Modern States to control law and order situations arising due to religious conflicts.[70] The religious group's conflicts involved large masses of population and this required a neutral concept. Karl Marx once stated – 'Religion can be opium for masses if it interfered in the state policies'.[71] But the concept of secularism in India also does not give State the supreme authority over religious matters. Article 25-28 can be understood in this way. At the same time certain restrictions are necessary on Freedom of religion as no right can be absolute.

The western concept of Secularism of state separation from religion is not completely followed in India. India has always been a land of culture, tradition and morality. Before the word 'secular' was placed in Preamble of Constitution of India in 1976 it were already having provisions like Article 15 which stated 'State not to discriminate on grounds of religion'. The Article 25 itself is an example of balance between the freedom of religion and secular nature of India. Article 25 provides freedom to all people to propagate, practice and profess their choice of religion. But the right provided under Article 25 is restricted and not absolute. Right under Article

[66] Shabnum Tejani, Secularism, Key Concepts in Modern Indian Studies, NYU press, available at www.jstor .com
[67] Mathew John, Decoding Secularism: Comparative Study of legal decisions in India and US, Economic and Political Weekly, 2005, Vol. 40, No. 18, pgs 1901-1906, available at www.jstor.com
[68] Supra Note 60
[69] Charter Act 1833, Section 87
[70] Supra Note 18
[71] Karl Marx, A contribution to the critique of Hegel's Philosophy of Right, first published in Deutsch-Frenzosische Jahrbucher, 1844, available at Marxists.org

25 is subject to health, morality and public order. Article 26, 27 and 28 are also great examples of reaching a neutral position between the freedom of religion and secularism concept. In India the major division and conflict is due to majority and minority divide. This can only be resolved by protecting the interests of minorities in a democratic society. So, Article 29 and 30 were formed for this purpose. The 42nd Amendment only made a formal expression in the Preamble which was already present in the Constitutional interpretation of provisions. The insightful reading of the provisions of Indian Constitution brings to conclusion that Secularism is an inbuilt concept in Indian Constitution and it is distinct from western concept of 'secularism'.

Under Indian concept the philosophy of Dharma was prevalent from ancient times.[72] Dharma is a concept which is less religious and more moral and ethical. The Concept of Dharma believes in right thing to do in a particular situation.[73] Article 44 of the Indian Constitution gives State directions to create uniformity in civil codes. But still there is no "Uniform Civil Code" because if it is enacted it may jeopardise Freedom of Religion. In India, the applicable personal laws are different as per some religions. The Hindu personal law regarding succession and Muslim Personal laws vary as per their religious code of conduct. The majority population in India at the time of partition was Hindu but unlike Pakistan, Nepal and Sri Lanka India adopted the different concept of secularism. The situation in India tries to give religious communities an assurance that minorities do not suffer due to majority dominance. This gives a unique picture to Indian secularism respecting all the beliefs and faiths. Mr. Ayyangar was quite clear to this point in his statement in the Constitutional Assembly Debates stating – 'secular' in Indian concept doesn't signify that we don't recognise any religion. It is infact respect for all religions.[74] The scope of secularism in Modern India can be understood as – not to consider any religion above the rest and not to go against all the religions as an atheist state would go. It can be understood as a balance between state and religion in India. This is the reason the minorities have the right to preserve their language and culture but it is applicable to all the religions in any part in India.[75] Article 290A which is much debated for against the concept of

[72] Leepakshi Rajpal and Mayank Vats, Dharma and the Indian Constitution, Christ University Law Journal, 5, 2
(2016), Pgs 57-70, ISSN 2278-4322
[73] ibid
[74] Supra Note 27
[75] Article 29 and 30 of the Indian Constitution, 1950

secularism was also introduced due to its historical perspectives.[76] The Indian understanding of secularism is much of a practical one then understanding of "secularism" in other countries. The Indian "concept of secularism" brings a new idea as to how a multi-religious country can go ahead in modern times by respecting all the religions equally.

Trusts, charities and religious institutions are under Concurrent List (List III) in the 7th Schedule of the Indian Constitution.[77] This lies down that both the "Central government" and the "State governments" can make laws in this field as per Article 246.[78] The one way administration of religious institutions as per constitutional norms is a type of state interference in religion in India. That is as per the fine reading of Article 14, 15, 25, 26, 27, 28, 29 and 30. The legislative Acts should be in accordance with the Constitutional mandate. The secularism in India is to apply a neutral support to all religious groups. The major point to note regarding Indian Secularism is that in spite of the impact of other countries constitutions while forming the Constitution, the Constitutional framers adopted a different approach.

In *SR Bommai v. Union of India*[79], the Supreme Court declared the "secularism" as the "basic feature"[80] of the Constitution and stated that it cannot be taken away. In *Aruna Roy v. Union of India*[81], the Supreme Court clearly stated that 'Secularism' in the Indian context is quite distinct from western secularism and it means in Indian context to develop, understand and respect all religions equally. The court mentioned the intent of Constituent framers to bring a positive meaning to the word 'secularism'. The meaning according to the court was made clear by Mahatma Gandhi who stated 'secularism' as simply three words– '*Sarva Dharma Samabhava*'. It expresses equal respect of all religions. Moral value based education on religious notions was encouraged by the court to provide fundamental values.

[76] Article 290A of the Indian Constitution, 1950
[77] Entry 28, List III, Seventh Schedule, Constitution of India, 1950
[78] Read with Article 246 of the Indian Constitution
[79] AIR 1994 SC 1918
[80] Basic feature doctrine laid down in the case of Keshavananda Bharati v. State of Kerala, AIR 1973 SC 1461
[81] AIR 2002 SC 3176

CHAPTER – 3

'ESSENTIALITY TEST' AND 'SECULARISM' UNDER INDIAN CONSTITUTION

3.1. "Secularism under Indian Constitution"

Dr. Sarvapalli Radhakrishnan described Indian Secularism as – 'No one religion should be preferred over others and no special privileges should be provided to a particular religion. This would be for the best interests of both – the government and the religions'. What he wanted to convey was equal treatment for all religions and no official religion should be there. All religions should be respected equally without any kind of discrimination this nature of secularism was thought of by Dr. Sarvapalli Radhakrishnan. He also wanted that non-interference by the state should be followed in letter and spirit. This is also important for the international position of India because internationally India is perceived as a multi-religious country with harmony. To this point Dr. Kamath had made himself clear in the Constitutional Assembly debates that – 'India will be a secular state that doesn't mean it is anti-religious or irreligious Article 25 is the example of that. Indian secularism means that it doesn't identify with a particular religion rather treats all religions equally'. Dr. Kamath was the Constitutional Advisor and while giving speech on secularism he was quite clear to differentiate between Western secularism and Indian Secularism. He supported the beliefs and faiths of the people but at the same time stated that no one is above the law. So, religious freedom exists but with some restrictions to be imposed by law.

3.2. "Right to Religion under Indian Constitution"

The meaning of "religion" is defined by the "Supreme Court" in various judgements as for a Hindu it is 'the way of life' but this definition cannot be said as complete. There is a need of an exhaustive definition of 'religion'. The courts should also be clear with the concept of 'Indian Secularism'. But the situation is the opposite. In the name of globalisation and modernisation the courts are touching upon the personal issues of a religion. This can be observed from various decisions of the Supreme Court and the High Courts of India. The stance of the judiciary is not clear regarding the meaning of religion. In India to know what are the beliefs and practices

of a particular religion one has to approach to the judiciary. In U.S.A. the state has made it clear that what is religious would be defined by the particular religion itself. But in India, the judicial interference to decide a practice as religious or non-religious is not satisfactory, as this has bring a doctrine which is not applicable uniformly.

The question which arises every time is that 'freedom of religion' is guaranteed by the "Indian Constitution" but what is the meaning of "religion" and upto what extent it is protected. This issue was raised to the Apex court many times and received a different answer every time. This is the reason there is no uniformity in the opinion which could be arrived at. Starting from the *Shirur Mutt's case,* Supreme Court stated that Freedom of religion is something which cannot get affected by external forces and it is a personal affair of belief and faith of a person. But personal beliefs can be many and varies from person to person. The court also came to the conclusion that God is not the essential part of a religion because there are religions like Jain community and Buddhist Community who have no particular God. Even in Hindu religion there are as many Gods as the followers. Each individual have its own personal belief and faith. So there was a need to come to a solution. This formed the basis for the administration of 'Essential Religious Practices Test' doctrine.

The principle of *Shirur Mutt case* started applying in the following cases having similar concern. In *DR Ramdasji v. State of AP*[82] the "Supreme Court" stated that – 'religion is the force regulating Human behaviour from thousands of years and made human realise to learn moral and ethical values'. It also interpreted the judgement of *Shirur Mutt* and stated that state interference to restrict freedom of religion is only on the grounds mentioned in Article 25. Any superstition in the name of belief which affects natural human life or is against public policy is not guaranteed under Article 25.

In *Ratilal P. Gandhi v. State of Bombay*[83] the Supreme Court gave the definition of Religion as – 'Combined Religious practices which are part of a particular faith in pursuance of religious belief'. In *Mohd Hanif Quareshi v. State of Bihar*[84] cow slaughter on Bakr-Id was claimed as fundamental to Islam. State legislature had

[82] AIR 1970 SC 181
[83] AIR 1954 SC 388
[84] AIR 1958 SC 731

passed many laws prohibiting cow slaughter. After examining all the records the court stated that - "cow-slaughter is not an 'essential' part of Islam."

In *Shrimad Swami v. State of TN*[85] the court stated that philosophies of religion differ as per specific circumstances. Islam was originated in Arab country and earlier Arabs used to have many Gods. Islam emerged to bring oneness of God i.e. Monotheism. Christianity is also said to have emerged due to certain specific circumstances. Buddhism, Jainism and Sikhism are said to have emerged due to multiple beliefs in Hindu religion. So, the essentials of every religion are to be examined on the criterion of the fundamental concepts of the religion itself.

The issue to decide what is religion was debated in *Narsu Appa Mali Case*[86]. The court stated that there is distinction between practice of religion and religious belief or faith. The court held that freedom of 'conscience' and faith is ensured but freedom to practice is restricted by health, morality, public order and subject to other freedoms under Part III. The freedom to have faith and belief is intangible which is protected and guaranteed. Each person can have their own belief and faith of a particular religion. But the tangible right that is to practice religion it is available with certain restrictions as mentioned in Article 25. If a belief or faith is not causing harm to others then it is permissible under Article 25.

3.3. Reasonable Restrictions under "Article 25"

The starting of Article 25 is from a restricting clause – as this right is conditional to "health, morality, public order and other freedoms under Part III". "Religious freedom" under "Article 25" is guaranteed in forms of propagation, practice and profession but priority is given to the restrictions imposed. This explains that freedom of religion though important is secondary to the life and liberty of people. In Indian Constitution Freedom of Religion is guaranteed but it is not an "absolute right" because "reasonable restrictions" can be imposed. Court is the ultimate authority to define what religion is and which practices are essential for a religion. There have been many state interventions in religious matters e.g. Sati (Prevention) Act, Dowry Prohibition Act etc. Constitutionality of these types of Acts has always been challenged in the Court of law. The reason to bring these types of Acts was to bring a

[85] AIR 1972 SC 1586
[86] The State Of Bombay v. Narasu Appa Mali, AIR 1952 Bom 84

religious reformation. As while forming the Indian Constitution the major of the problems to resolve was social discrimination. Article 25 was put in with certain restrictions intentionally to bring this religious reformation. The restrictions are for the interests of the society at large to bring harmony as one's right is other's duty.

The state intervention in religious affairs is allowed when the religious activities are against the morality, health or public order. The individual is not only free to choice of following a particular religion but it also extends to 'practice, profess and propagate' such. Restrictions on the Freedom of Religion are permitted both under Article 25 and 26 on the various grounds mentioned. Under Article 25 (2) (a) state can manage or control any financial, economic, political or any other secular activity connected with religious practices. This provision was present since the formation of the Constitution. The word 'secular' in Preamble was added in 1976 almost 26 years later. The word 'secular activity' mentioned in Article 25 further explains the scope of Secularism in India. The necessity which arises is to precisely define religion and secularism otherwise the ambiguities will be in rise in future.

3.4. 'Essentiality Test' and 'secular activity' under Article 25

Article 25 of the Constitution of India has two clauses (1) and (2) and two explanations. Which can be explained as described under -

Clause (1) declares that 'all individuals are uniformly enabled to "freedom of conscience", and "right to profess, propagate and practice religion" which is subjected to 'health, morality, public order and other freedoms under Part III'. A proper reading of Article 25 plainly conveys that Right to religion is available to all persons whether citizens, non-citizens, legal persons etc. All the individuals are uniformly enabled to this freedom. It guarantees four types of freedom – "freedom of conscience", right to "practice" religion, right to "propagate" religion and right to 'profess' religion. These four freedoms are subjected to four restrictions – health, morality, public order and other freedoms under "Part III" of the Constitution. 'Public order' is an exception because maintenance of law and order is the primary and foremost duty of the state. Morality is a vague concept which depends upon society and culture. The judiciary is involved in to decide what moral principles can be enforced and upto what extent. Health is the most important aspect which cannot be ignored while providing

freedom. If a religious activity could affect human health then it can be restricted. Example can be seen in *Nikhil Soni v. Union of India*[87] the act of 'Santhara' (voluntary fasting to death in Jain tradition) was said to be violative of Article 21.

Clause (2) is further sub-divided into two sub-clauses i.e. (a) and (b). Clause (2) (a) states that – 'State can enact any law managing or controlling any political, financial, economic or other secular activity which may be linked with religious practice'. It also states that any pre-existing law (Pre-Constitutional laws) which regulates or restricts such financial, political, economic or other secular activity connected with religious practice is also not to be getting affected unless it is held unconstitutional. Secular, economic, political and financial activities are the fourfold activity under Clause (2) (a) on the grounds of which state can intervene in the religious affairs. There is a very thin line difference as to what accounts for a secular activity in matters of religion. Only these fourfold activities can be controlled and managed by the "State" other than what "Article 25 (2) (b)" states. Article 26 further provides for freedom to manage religious affairs. So, many activities are involved in matters of a religious denomination and section. But state can regulate or restrict only those fourfold activities referred in Article 25 (2) (a). There are end numbers of cases where state is alleged to have interfered in religious affairs where the petitioners have argued that activities in issue do not constitute secular activity. The petitioners allege that State have misused its powers in matters of religion in the name of or disguise of power to regulate or restrict secular activity. There are also many controversies as to use and misuse of movable and immovable properties of various religious institutions. It is obligatory for the state to 'regulate or restrict' affairs of religious denominations which are connected with financial, economical, political or secular activities. Use of religious property cannot be restricted as it would violate Article 26 but the same can be regulated if the use is economical, political, financial or secular in nature. While interpreting Article 25 2 (a) read with Article 26 the Apex court stated that the Madras Hindu Religious Charitable Endowments Act 1951 was violative of Article 26 (d) because it gave Commissioner Powers of appointments and to administer.[88] In *Tilkayat Maharaj v. State of Rajasthan*[89] The Nathwada Act of 1959 was challenged.

[87] 2015 Cri LJ 4951
[88] The Commissioner, Hindu Religious Endowments, Madras v. Sri Lakshmindra Thirtha Swamiar of Sri Shirur Mutt, AIR 1954 SCR 1002
[89] AIR 1963 SC 1638

The Supreme Court corrected High Court's interpretation by saying that only those activities can be regulated which are mentioned under Article 25 (2) (b) and the term 'religious affairs' is not to be widely understood as to regulate activities which are not in the power of State. In *Bira Kishore Deb v. State of Orissa*[90] the Supreme Court stated that liberty should be given to "religious denominations" to maintain "religious affairs" though state can regulate but this should be done in extreme cases where the situation requires state interference. Clause 2 (b) gives power to the state for religious reforms. It also gives power to throw open "Hindu religious institutions" of "public character" to all categories and segments of "Hindus".

Explanation I states that – Carrying and wearing 'Kirpans' is to be considered to be part of Sikh religion. Explanation II states that Hindu religion to be understood as including 'Sikh, Jain and Buddhist' religion. This is due to long traditions being followed since ancient times in India. Buddhist, Sikh and Jain religions are considered to be emerged and evolved out of Hindu religion.

The social welfare and reform power of the State to regulate and restrict religious activities was used to such extent that for agrarian reforms a religious endowment property was acquired under Article 31A (1) (a).[91] Due to many beliefs the question which arises is who is to ascertain whether a certain belief is an "essential" fragment of a "religion" or not. The Supreme Court and the High Court always try to resolve these issues in different judgements.

The 'Essential Religious Practices Test' is known with different names by many scholars like – The "Essentiality Test", The Integral Test, "Three-Step" Test, and "Essential Elements" Test etc. At the end what is necessary to understand is the practices which are to get legal protection are to be decided on the basis of this test. The test in India is applied over rights under Article 25 and 26 but for the specific purposes the cases which are dealt are focused mainly on Article 25. The Essentiality Test was propounded in the *Shirur Mutt's*[92] Case. It expressed that "religion" is an affair of personal faith and belief. It stated that God is not an essential element of a religion. A person can have belief and faith as per its own conscience. There are

[90] AIR 1964 SC 1501
[91] Narendra v. State of Gujarat, AIR 1974 SC 2092
[92] The Commissioner, Hindu Religious Endowments, Madras v. Sri Lakshmindra Thirtha Swamiar of Sri Shirur Mutt, AIR 1954 SCR 1002

various religions in India and every religion has their own religious beliefs and practices. The inquiry as to if a practice is necessary to be essence of a religion is resolved by the court through the 'Essential Religious Practices Test' doctrine. It can be tested on the philosophies and beliefs of the particular religion itself. If a person has made others believe that he had been part of a particular religion then he will be treated by law as part of that religion.

In *Hanif Quareshi case*[93] the Essential Religious Practices were explained on the basis of *Shirur Mutt case* principle and stated that – 'Every religion has some basic fundamental principles to be observed by the followers to be part of such religion. Without following these fundamental principles their being part or follower of religion is of no value.' So, to examine these essential fundamental principles it has to go through a test i.e. Essential Religious Practices Test doctrine. This is applied differently in different cases. The essential religious practices are known through the fundamentals of the religion itself. In this way the court reached to the conclusion that cow-slaughter on Bakr-Id is not an 'essential practice' of the particular religion i.e. Islam because other animals can be slaughtered i.e. goat, sheep, camel as per past practices.

Applying the same Essential Practices Test doctrine in *Mufti Sayed v. State of West Bengal*[94] case stated that restriction imposed on use of loudspeakers and microphones for Azan in Islam is not violative of Freedom of religion. Also in *Acharya Avdhut v. Comm. Of Police, Calcutta*[95] the court stated that Tandava Dance with lethal weapons in an open place in front of general public is not an "essential practice" of Anand Margi sect. Similarly, in *Adithayan v. Travancore Devasom Board*[96] the state interfering in appointment for religious rites in a Temple appointed a Non-Brahmin; as though, the person not being Brahmin is a Hindu and the appointment was held legal and Constitutional by the court.

In *State of Bombay v. IB Mali*[97] the petitioner had contended that bigamy or polygamy is allowed in Hindu religion because Lord Shri Krishna had more than 16000 wives. So, bigamy should not be punishable for Hindus. The court rejected the

[93] Mohd, Hanif Quareshi v. State of Bihar, AIR 1958 SC 731
[94] AIR 1999 Cal 15
[95] AIR 1984 (4) SCC 522
[96] AIR 2002 SCC 123,124
[97] AIR 1952 Bom. 84

contention by stating that it is not essential practice amongst the Hindus. This case was decided earlier than the *Shirur Mutt case* but the doctrine of "Essential Religious Practices Test" was laid in "*Shirur Mutt case"* only. In *Shri Jagannath Puri Management Committee v. Chintamani*[98] the term 'secular activity' under "Article 25" was in issue. The court held that distribution and collection of temple offerings amongst the temple sevaks is not a religious activity and it will come under the ambit of 'secular activity' as referred in Article 25 and it can be regulated by state.

In *Venkataramana Devaru Case*[99] the issue was what constitutes a secular activity or non secular activity. Article 25 (2) authorizes "state" to interfere in "matters of religion". The state can interfere if the activity carried by the religious institution is secular in nature. In Jagannath Puri temple mismanagement of temple funds was discovered by state authorities. The State of Orissa passed law to administer these activities. The question which arose was whether state is empowered to do so and if so then what are secular activities related to religion. In this case the question was whether appointment of a priest is a secular activity or non secular activity. The court stated that it is a secular activity. The court's approach to determine what is "secular" and what is "non-secular" though is not clear. It differs from case to case.

In *John Vallamattom v. Union of India*[100] the Supreme Court stated that – "though each and every person has religious freedom and right to follow all 'rites and rituals' as per his belief and faith. But not every 'rites and rituals' are termed as essential for a particular religion." So, the court deciding into the matter applying the Essentiality Test stated that making gift may be sacred for a religious purpose but it cannot be held essential. In this case judiciary has made it clear that for a practice to get protection of freedom of religion it should be an essential or elemental part of the religion.

In *Dara Singh v. Union of India*[101] the Supreme Court had a different approach and stated that state shall not intervene in religious affairs or any other incidental matters. The freedom of conscience is not to be restricted until it is against health, morality, public order or other fundamental rights. In *Bhuri Nath v. State of J&K*[102] the matter in front of the court was that –"Whether a Non-Brahmin can be designated as priest in

[98] AIR 1997 SC 3839
[99] Sri Venkataramana Devaru v. State of Mysore, AIR 1958 SC 255
[100] AIR 2000 SC 2902
[101] AIR 2011 SC 1436
[102] AIR 1997 SC 1711

a Hindu Temple". The court declared that any Hindu person whether Brahmin or not who can perform daily rituals of temple can be appointed as priest.

CHAPTER – 4

ISSUES AND CHALLENGES TO THE 'ESSENTIAL RELIGIOUS PRACTICES TEST' DOCTRINE

The important point about Article 25 that has been discussed earlier is that it doesn't refer to the terms essential or essential practices. The major reason of this doctrine being debated and challenged is that it lacks a constitutional basis. The Constitutional text does not have words like 'essential or essential practices' in Article 25. The doctrine has been created by the courts applying their own judicial minds. The problem to decide in the matters of religion is that to 'define a religion' is itself a religious affair. The courts demarcating the line between secular and religious are now involved in the issues to decide regarding practices of religions.

4.1. Before Aruna Roy Case

It becomes a difficult situation to differentiate between secular and religious activity. The doctrine to differentiate between essential and non-essential can also be termed important but in application it can be misinterpreted and would lead to state interference in religious activities. This would again be against the Constitutional norms.

In "*Shirur Mutt case"* the religious institutions carried the power to decide which ceremonies are essential. But gradually the power shifted from the religious institutions to the courts in the upcoming cases. How the position of law explained in the *Shirur Mutt case* was drastically changed in the upcoming cases can be understood by reading all the cases collectively. In "*Shirur Mutt"* the court itself stated that under "Article 26 (b)", a "religious denomination" has the right to determine what "rites, ceremonies and rituals" are "essential" for a particular "religion" and no outside authority should interfere. But the court itself in the upcoming various judgements tried to interfere in the practices naming them essential and non-essential. The issue can be seen in *Ratilal case*[103] where the court laid down that if a religious denomination considers certain ceremonies important for a religion

[103] Referring the case already dealt in Supra Note 52, Ratilal P. Gandhi v. State of Bombay, AIR 1954 SC 388

then those cannot be headed as secular activity just because they involve expenditure, employment or use of commodities.

Also in, *Venkataramana Devaru Case*[104] the understanding of essentiality test changed. Before Devaru case the word 'essential' was used to separate religious and secular but after that case new terms like 'essentially religious' and 'essential to religion' changed the full scope. The little grammatical shift of the court changed the nature of enquiry by the courts. It gave courts the scope to decide questions internal to religion and hence allowed the court to decide the very nature of religion itself. In *Durgah Committee case*[105] the application of essentiality test took a new turn and the court stated that every practice which is a superstitious belief shall be carefully scrutinized. The court started applying the test to rationalize religion.

In *Tilkayat Maharaj v. State of Rajasthan*[106] the court commented that in Hindus mostly all human actions from birth to death are considered religious in character. For example – Even marriage as per Hindu tradition is a sacrament and not a contract. The court still considered that to differentiate between the religious and secular is a necessary task, because in India, the individual rights are given importance. The *Tilkayat Case*[107] changed the position as the hereditary appointments to temples in the upcoming cases were held to be a secular matter.[108]

There have been many cases where the state interfering in the management and administration of religious institutions have been questioned in the Supreme Court of India. In *Pannalal Bansilal Pitti v. State of Andhra Pradesh*[109] the issue raised before the court was that the governance and administration of religious institutions would amount to infringement of right to practice or freedom or religion. It was contended that the management is intertwined with the religious faith and belief. Similar was the contention in *State of Rajasthan v. Sajjanlal Panjawat*[110]

It can be observed from series of cases from the *Shirur Mutt case* to the recent position that the issue to decide the matters of religion takes again to the point of

[104] Sri Venkataramana Devaru v. State of Mysore, AIR 1958 SC 255
[105] The Durgah Committee, Ajmer and another v. Syed Hussain Ali and others, AIR 1961 SC 1402
[106] AIR 1963 SC 1638
[107] AIR 1963 SC 1638
[108] Seshammal and others v. State of Tamil Nadu, AIR 1972 SC 1586
[109] AIR 1996 SC 1023
[110] AIR 1975 SC 706

debate on secularism. The noticing point in all the judgements is that for the application of the essentiality the court had to decide as per the doctrines of the particular religion itself which is in question. But in reality, the religious texts and evidences were taken by the courts in their own interpretive way. The court referenced as per its own expediency without any consistent pattern. The judges in the upcoming cases started introducing new criteria to the doctrine. This is the reason many criteria's were rejected by individual judges giving a dissenting opinion in major cases.[111] It can be observed that decisions in later stages in many cases have contradicted to the guidelines provided in the earlier cases. The addition to the requirements for applying essentiality test and adding more components to the test has lead to different conclusions by judges. The judges feel liberty to apply some aspects leaving the others. This makes it more complicated. Whether the court has a legitimate role to decide essential practices of a religion is itself in question in most of the cases. This weakens the decisive role of the Essentiality test. The major finding after reading all the major judgements applying the essentiality test is that mostly the court has taken a reformist attitude.

4.2. Aruna Roy to Sabrimala Case

In *Aruna Roy Case*[112], first time the Court took a liberal view towards the "freedom of religion" by understanding and explaining the concept of "Indian Secularism". It stated that "secularism in India" means to "respect for all religions" and decided that "religious teachings" in the school is not an "anti-secular activity". This started a trend to question the "essentiality test doctrine" to decide relgious affairs.

In *Anand Margi Case* [113] of 2004, the court explained as to what is contemplated by "essential part or practice" of a "religion". The court stated that belief, acts, modes of worship, ceremonies, rituals, rites, etc. all come under the essential practice of a religion which are to be determined by the court through religions texts, history and practices. The court further stated that essential character

[111] Reading and interpreting the full judgement of (Sabarimala Case), Indian Young Lawyers Association and others v. State of Kerala and others, 2018 Indlaw SC 905
[112] Aruna Roy v. Union of India, AIR 2002 SC 293
[113] Commissioner of Police and others v. Acharya Jagdishwarananda Avadhuta and another, AIR 2004 SC 2984

of a religion is its core belief and faith on which its foundation is laid. The term essential practices were defined as the practices which are fundamental to be followed in a religion. The fact whether a practice is of essence or not was determined on the basis that if the practice is not followed then whether the nature of religion is changed or not. The judgement in *Anand Margi case* states the long journey of fifty years of the use of the 'Essential Religious Practices Test' doctrine which started from a theory to become a legal test to determine matters of religion and the issues related to secular and religion.

The issue of deciding a religious practice on the basis of essentiality test was again reconsidered in the much debated case of *Triple Talaq*[114]. The case had a judgement of ratio 3:2. The majority relied its judgement on the inspection of the doctrines of Islam while the minority dissented by stating that to decide essentiality of a "practice" the belief of the "followers of the religion" has to be taken into consideration. The dissenting opinions in various judgements point towards the questions rose towards the application of the essentiality test. The *Sabarimala case* points towards the diverse viewpoints of the courts with regards to the application of essentiality test. The 'Essential Religious Practices Test' doctrine has taken a form of various principles laid down in different questions since its inception. In various cases even if the findings are the same the reasoning and justification of the judges differs.

4.3. The Sabarimala Judgement and the 'Essential Religious Practices Test' Doctrine

The socio-legal importance of strict religious rulings in India can be understood by deeply and thoroughly reading the judgement of the Sabarimala case.[115] This case is very important to be studied to know the actual exercise of the 'Essential Religious Practices Test' doctrine which was propounded way back in 1954 by the Judiciary of India to resolve issues related to religious practices. The Supreme Court's approach in this case is very much essential for better understanding of the concepts involved in the area under study.

[114] Shayara Bano v, Union of India, AIR 2017 SC 4609
[115] Indian Young Lawyers Association and others v. State of Kerala and others, 2018 Indlaw SC 905

The facts of the case are concerned with a "Hindu Temple" situated in the "southern-territory" of State of Kerala. The issue revolves around the entry of women (age group 10-50 yrs) in the temple. The devotees of the temple watch a 41 day fast and other practices known as 'vratham' before going to the temple. The entry of the women age group 10-50 years is restricted due to religious beliefs. There are various reasons stated for this restriction. The main reason is that the God of the Temple 'Lord Ayyapa' is a 'Brahmachari' (a celibate) and the presence of women of menstruating age would offend the deity. Also, the devotees who follow the 41 day fast follow obligatory celibacy during this period would get distracted.

It was argued that the restriction is age old tradition of the temple since many centuries. The central question was whether the restriction of women entering in temple of such ages 'an essential religious practice' under Article 25. The court applying the essentiality test ruled that it cannot be considered as an elemental part of the religion. As per the findings of the court the devotees of "Lord Ayyapa" were not a "separate religious denomination". So, they were considered as Hindus. Now, the question arose as to whether the practice is essential under Hindu religion. The court stated that – women entry in temple would not change the nature of Hindu religion fundamentally. The court treated it as a custom rather than a practice which is "essential" to the religion.

Justice Chandrachud in this judgement commented on the use of "Essential Religious Practices Test" doctrine. He observed that the court dearth capability to decide on religious beliefs. Justice Indu Malhotra giving a dissenting opinion expressed that religious communities themselves have the right to decide what is essential for their religion. She discussed in detail regarding the problems and issues in the doctrine of 'Essential Religious Practice Test'. She did not claim the Test to be entirely irrelevant but stated that it is not applied in true sense. She criticized the judgement in *Durgah Committee case*[116] and stated that the court in this case was wrong in changing the trend of the essentiality test. She accented on the point that the principles established in the *Shirur Mutt case* and the *Ratilal case* were not followed in Durgah Committee case. The reference to superstition in *Durgah Committee case* as per the opinion of Justice Indu Malhotra is not correct. An activity or practice can

[116] The Durgah Committee, Ajmer v. Syed Hussain Ali, AIR 1961 SC 1402

be superstitious for one person at the same time it can be belief for another. She also opined that rationality in matters of religious beliefs is not a correct approach. Personal views of judges should not dominate the religious beliefs of communities. It is the community or sect to decide as to what practices are essential and what are non-essential. A very nice observation by Justice Indu Malhotra was also that the persons challenging the religious faith themselves did not subscribe to such religion and permitting PIL's in religious matters by persons who are not part of such religion would create unnecessary burden to the judiciary. The rise in number of PIL's would create a serious injury to the very secular nature of the country.

4.4. Recent Challenges

The nature of the application of Essentiality Test has gone too many changes. In 1950's it started from the issue whether a practice is "religious" or "secular" and ended in the recent *Sabarimala case* to decide whether a practice is "essential" to a "religion" or not. The practice is "secular" or 'religious' finds its scope from the Article 25. But what is essential or not has no constitutional basis. This change in trend in the application of essentiality test has raised an alarm against the freedom of religion. The *Devaru case* and the *Durgah Committee case* mixed the above stated two different issues. After these cases the essential practice became integral part of the religion at the same time became opposite of secular. Both different concepts became part of the same test in the upcoming cases.

The authority to determine essential practices went through significant change. The freedom to determine essential practices in *Shirur Mutt* and *Ratilal* cases was with the religious denominations. The courts nowadays applying the same essentiality test citing these very cases in liberal sense have assumed a more authoritative role. The essentiality test has included more and more principles in the upcoming cases each of these principles are now applied by judge's own discretion. This creates an unsettling issue in decision making. The earlier cases formed a principle to decide the essential practices from the very "doctrine and tenets" of the "religion" itself. But how to reach to a conclusion was difficult as courts applied different modes of enquiry like – referencing religious texts, customs, traditions etc. As the time went more conditions were added to constitute a practice essential to a religion. In *Hanif*

Quareshi case[117] the courts stated to constitute essential practice it must be obligatory in nature. In *Anand Margi case* the court came to a new point as to whether if a practice is removed does it alter the fundamental nature of a religion, if not, then it is not an elemental practice. The court's approach to decide what is essential applying essentiality test is focused more on what is non-essential. The courts in many cases have cleared the point that "governance and administration" of "religious institutions" is a "secular activity" under Article 25. This creates interference of the state to regulate these 'secular activity' as per Article 25 (2) (a).

In *Devaru case*[118] though it was laid down that temple entry is an essential matter of religion but it was subjected to Article 25 (2) (b). The major issue to the doctrine is the sources which the court consults to arrive to conclusions in application of the essentiality test doctrine. The mischief of the Essential Practices Test Doctrine can be discerned in end number of cases. One such case is *Gram Sabha*[119] case. In this case, representatives of a specific denomination asserted that apprehending and praising a cobra during the festival of Nagpanchami[120] is an essential part of their religion. The Judiciary had taken sources of Dharmashastras into account. The plaintiffs claimed that the religious text Shrinath Lilamrut should be referred. The court applied its own sources to conclude whether the practice is 'essential' or 'not-essential' and at the end stated it non-essential.

4.5. The sources of courts

The sources used in the majority of cases are by religious texts. The courts believe that scriptures are the best way to know the tenets of a religion in a comprehensive form. Thus it can be observed that religious texts play an important role to reach to conclusions. The courts have referred Vedic literature for Hindus, Quran for Muslims, Jain scriptures for jains, and other texts by spiritual leaders of the particular religions. The lack of scriptures has moulded the courts decisions towards non-essentiality of a practice which cannot be appreciated many times. A religious practice to have a source in scriptures is not a correct approach in each and every case.

[117] Mohd Hanif Quareshi v. State of Bihar, AIR 1958 SC 731
[118] Sri Venkataramana Devaru v. State of Mysore, AIR 1958 SC 255
[119] Gram Sabha v. Union of India, Writ Pet. No. 8645 of 2013, Bombay High Court
[120] Festival in Hindu tradition where snakes are offered milk and worshiped

The views of popular representatives of particular religions are also taken in some of the cases. In *Tilkayat and Sabarimala* cases the views of the popular representatives was taken into account. In many cases it has been observed that courts have not taken the testimonies of the parties getting affected due to the decisions of the court. In theory, the essentiality test must seem a correct approach but in practicality the theory mainly depends upon the court's way in the selection process of sources which ultimately influences the findings. In recent judgements the questions rose on the reconsideration of the "essential practices test" as a correct approach can be observed.[121] The application of the essentiality test have taken numerous turns and judges are confused which can be observed in the inconsistency of the court's approach. The Supreme Court judges themselves criticizing the applicability of the test is a matter of challenge. The observations made by Justice Chandrachud and Justice Indu Malhotra in their respective judgements give thoughts regarding the misinterpretation of the doctrine of 'Essential religious practice test'.[122]

4.6. Criticism of 'Essential Religious Practice Test' doctrine

Fali S. Nariman and Rajeev Dhavan have stated that – Judges have assumed power more than a Maulvi, Dharmasastri, and priests to determine which beliefs are 'essential' to a particular religion.[123] They also stated that courts are unqualified to adjudicate matters related to religious doctrines as they have their own biased notions. The materials to decide on such issues are limited and are not satisfactory to reach to conclusions. Though, many people may support the judgements delivered by the courts as satisfactory but this does not negate the fact that the decision-making principles on which such judgements are delivered are not based on a uniform rule. Justice Lakshmanan in *Ananda Margi case*[124] having a dissenting opinion stated that courts are adjudicating as experts on matters of faith to which they are unfamiliar this gives a clear picture as to application of "Essential Religious Practices Test" doctrine.

[121] Reading and interpreting the full judgement of (Sabarimala Case), Indian Young Lawyers Association and others v. State of Kerala and others, 2018 Indlaw SC 905
[122] Refer Supra Note 83, Judgments of Justice Chandrachud and Justice Indu Malhotra in Indian Young Lawyers Association and others v. State of Kerala and others, 2018 Indlaw SC 905
[123] Ronojoy Sen, The Indian Supreme Court and the quest for a 'rational' Hinduism, South Asian History and Culture, Vol. 1, No. 1, 2009, pgs 86-104
[124] Commissioner of Police and others v. Acharya Jagdishwarananda Avadhuta and another, AIR 2004 SC 2984

J. Derrett in his famous book as prior as in 1968 has referred to the Indian Court's excessive authority and incompetency in applying 'Essential Religious Practices Test' doctrine.[125] But authors like Ronojoy Sen have claimed it as a balancing situation adopted by the courts to manage relationships of individuals, religion and state.[126] The court's approach is towards a rationalized legitimacy of practices of religion. This is a hindrance to the level of freedom of religion which was thought of as per Constitutional Assembly debates. Reformation of religious beliefs has been provided a different meaning in terms of rationalizing every practice of religion. The court's approach to apply essentiality test can be observed in a sense that it is easier to term a practice not essential than to apply the principles of a practice being against morality, health, public order. One point is still not clear that when there exists specific subjections like – "health, morality, public order and other fundamental rights" then why the court is delve into resolving the issues of essential and non-essential. This creates questions of broader discussions related to individual rights and group rights. Theoretically, the Essentiality test must seem an issue resolving doctrine but practical implications give another view as it ultimately results in an interventionist approach of the judiciary in religious matters. The application of doctrine in strict sense results in involving of questions which judiciary fundamentally is not suited to resolve. The essentiality test in its inception had a correct approach by the courts to differentiate between secular and religious. But, the recent application of differentiating between "essential" and "non-essential" practices of religion has taken it to another route.

The critiques of the essentiality test also claim that the doctrine is applied inconsistently citing the disagreements in the court's judgements and the sources which are used to reach conclusions.[127] In the *Ananda Margi case* there is a very vague logic applied that a religious practice will be considered integral to religion only if it existed since the foundation of the religion. This completely is against the principle of reformation of religions. The principle laid in *Ananda Margi case* if applied then the religious freedom would be interfered with and this is not the purpose of the Constitutional guarantee of religious freedom.

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[125] J. Duncan M. Derrett, Religion, Law and the State in India, Oxford University Press, 1999, ISBN – 978-0195647938

[126] Supra Note 89

[127] Faizan Mustafa and Jagteshwar Singh Sohi, Freedom of Religion in India: Current Issues and Supreme Court Acting as a Clergy, 2017, BYU L. Rev. 915 (2018)

So collectively the doctrine of 'Essential Practices Test' is considered inconsistent due to – 1) Divergence from early interpretations, 2) No constitutional basis for the doctrine, 3) Incompetency of the judges to decide in the matters of religion, 4) referring random expedient sources. Article 25 is quite clear as to restrictions to be put upon the religious freedom but the application of essentiality doctrine have given state a more wide scope to intervene in religious affairs. The Constitutional makers have laid a clear scope of restrictions permitted to the state. The judiciary have now become a prominent player to decide religious affairs. The judicial and state interference in the matters of religion have raised several communal riots. The already existing provisions should not be neglected to evolve a new concept and principles. The individual rights in many cases are considered above the group rights which do away with the application of the Essentiality test. For example, if there is clash between the "rights of religious denominations" under "Article 26 (b)" and the right of an individual under Article 25 (1) then the individual right is considered stronger then the group right. The Essentiality to work practically has to be applied consistently with a proper guideline as to its application. The burden of enquiry should be on the state as to whether the restrictions and limitations imposed by the states on religion are justifiable in the eyes of law.

CHAPTER – 5

CONCLUSION AND SUGGESTIONS

5.1. Conclusion

"Freedom of religion" under the "Indian Constitution" ensures every individual the right to conscience which can be said as an internal freedom and the right to 'practice', 'profess' and 'propagate' which is said to be external expression of the inner freedom of conscience. The scope of the "freedom of religion" in the "Indian Constitution" is framed in such a way to provide utmost liberty of belief and faith. The 'secular' word was incorporated in the "Preamble" to the "Indian Constitution" in the year 1976 by the 42nd Amendment. The terms 'secular' and 'religion' are not defined by the Indian Constitution. The judiciary plays an important role to decide religious affairs. This creates a judicial intervention in religious affairs. To make a balance between the "secular" nature of the "Indian Constitution" and the religious liberty guaranteed by the Constitution the judiciary applies the 'Essential Religious Practices Test' doctrine. The question which arises is whether in accordance to make a balance the issues are resolved or more issues are created.

The concept of secularism adopted by a country provides genesis to the evolution of the religious freedom in the country. There are two major concepts of secularism – Positive and Negative Secularism. Both are applied differently in different countries as per the country's own Constitutional histories. India leaned towards the "positive concept of secularism". The "positive concept of secularism" states 'Respect for all religions equally'. The total separation of state and religion is considered to be a negative concept. India's long standing history shows respect and religious tolerance for all religions. This is the reason Gandhi's belief of 'Sarva Dharma Samabhava' became the concept of secularism in India despite western concepts had different terminology.[128] In USA there is complete separation between religion and state and in England it is completely opposite. India adopted a middle way separating state from religion in some lines and at the same time gave powers to state to bring religious reforms.

[128] Aruna Roy v. Union of India, AIR 2002 SC 293

Under Article 25 (2) (a) of the Indian Constitution, state can manage or control any financial, economic, political or any other secular activity connected with religious practices. This has led courts to evolve a doctrine to separate religious activity from secular activity on which the state can regulate. The word 'secular activity' mentioned in Article 25 further explains the scope of Secularism in India. The necessity which arises is to precisely define religion and secularism otherwise the ambiguities will be in rise in future. There is a very thin line difference as to what accounts for a secular activity in religious affairs. And the administration of the 'Essential Religious Practices Test' is not uniform. This brings up issues and challenges to the doctrine.

There are many issues and challenges to the 'Essential Practices Test' doctrine. The major issue and challenges as per reading of various "Supreme Court and High Court" judgements are – 1) Article 25 does not refer to the terms 'essential' or 'essential practice', 2) The doctrine has no constitutional basis, 3) defining 'religion' is itself debated to be a religious affair, 4) The courts are diverging from the early interpretations of the doctrine, 5) The judiciary cannot intervene in religious affairs, 6) Incompetency of judiciary to decide religious issues, 7) Judiciary referring to random expedient sources for evidence, 8) Doctrine is not uniformly applied, 9) There are no guidelines or directions as to when and how the doctrine is to be applied, 10) Distinct views of judges creating confusion as to application of the doctrine.

5.2. Analysis of Research Questions

The researcher has formed three research questions at the beginning of the study that has been tried to being answered in the further chapters. A brief regarding the analysis as per the research question can be stated as follows:

- What is the correlation between secularism and religion in India?

The study has referred the respective Articles of the Freedom of religion and the specific judgements speaking of State restriction and regulation of 'secular activities' related to 'religious activities'. Secularism in India is understood as a positive concept

imbibing the principle of equal treatment of all religions with policy of 'Sarva Dharma Samabhava'.[129]

- Why the individual rights are considered over religious rights of groups or a sect?

The Article 25 (1) of the "Indian Constitution" plainly declares that "Right to freedom of conscience" and right to 'practice, profess, and propagate' a religion is subject to other freedoms of individuals under Part III. This is the reason individual rights are considered over religious rights of groups or a sect. The idea of the Constituent Assembly was clear to give Civil and Political rights more importance than Socio-Economic rights. Example can be observed from, Fundamental Rights including all the "civil and political rights" which can be enforced under Article 32 and 226 but, Directive Principles of State policy under Article 37 were not made enforceable in the court of law.

- How the issue of individual rights in contrast with religious rights of a particular sect can be resolved?

The Indian concept of Secularism is the correct approach to maintain balance and resolve issues of individual rights and group rights conflict. The understanding of the Indian secularism is to give individuals more liberty and religious freedom. But the judiciary in the recent years is seen to be intervening in this liberty of the individuals by applying the wrong notion of 'Essential Religious Practices Test' doctrine.

5.3. Testing of Hypothesis

The essential practice test doctrine has proved to be unreasonable as a deciding factor in the matters of religion. The 'essentiality test' has an adverse effect on the religious freedom. This can be observed from the recent challenges and issues related to the doctrine. The upcoming judgements in the future will prove to this point. The doctrine in its earliest application had a correct approach but in the recent years there is divergence from the early interpretations of the doctrine. The chapter of Issues and Challenges in detail describes the reasons for the criticism of the doctrine. The major issue of the administration of the doctrine is that it is not uniformly applied

[129] Aruna Roy v, Union of India, AIR 2002 SC 3176

and the sources taken by the courts are not considerable. There are no proper guidelines or directions to apply the doctrine.

5.4. Suggestions

1) The courts should adopt a different approach to decide religious affairs.

2) If the doctrine of "Essential Religious Practices Test" is to be applied then it should be uniformly applied.

3) There should be proper guidelines or directions as to apply the doctrine in religious affairs.

4) There should be minimal state or judicial intervention in the religious freedom.

5) The doctrine should be understood as per the Shirur Mutt case principles as it was in that case that the doctrine was propounded.

6) The correlation between secularism and religion should be understood through the views expressed in the Constituent Assembly Debates while framing the Indian Constitution.

7) The Fundamental Rights of the individuals are to be liberally construed.

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