SANTHĀRĀ/SALLEKHANĀ AND THE INDIAN LAW: A CRITIQUE OF THE ESSENTIAL RELIGIOUS PRACTICE TEST

Sanskriti Prakash*

Abstract

The interaction between law and religion is often a subject of much controversy in a faith-based society constitutionally committed to a secular liberal democratic order. The Indian polity is a case-in-point, where conflicts between religious practices and the extent of the State's power to intervene in the exercise of such practices arise very frequently. While the Constitution of India provides a liberal approach towards religious freedom and protection to religious minorities, the Supreme Court, in interpreting the Constitution, has begun to restrict the scope of these freedoms and protections by giving it a narrow interpretation. In effect, it seems that the Courts have begun to sit in judgement over which religious practice should be afforded protection under the Constitution from state interference and which ones should be left out. In doing so, the Court has created a number of other tests to determine whether or not a practice is essential to religion or not, which find no place in the text of the Constitution, nor can be reasonably implied. This has made state interference in religious matters very easy.

The practice of *sallekhanā*/*santhārā* prevalent amongst the Jains had found itself in the midst of debate, after the Rajasthan High Court criminalised the practice, declaring it to be punishable under the Indian Penal Code, 1860. The Jains, on the other hand, claimed that it was a part of their fundamental right of religious freedom guaranteed by the Constitution. The ruling of the Rajasthan High Court has now been stayed by the Hon'ble Supreme Court. The instant paper critiques the Essential Religious Practice Test evolved by the judiciary, by taking *santhārā* as a case study.

Introduction

Secularism, in a broad sense, involves the separation of the temporal from the spiritual (Editorial: The Secular State 169), or the worldly from the divine. Today, it is considered to be one of the fundamental and almost indispensable features of a liberal democracy. Secularism has been held to be a part of the 'basic structure' of the Indian Constitution (S. R. Bommai vs Union of India); but the Indian model of secularism is quite distinct from its western counterparts. The Constitution of India provides not for strict separation, but for 'principled distance' between religion and the State, with some provisions establishing separation and non-interference[1], and others directly pertaining to religion and religious reforms.[2]

Since the Constitution of India provides so extensively about the interaction between the State and religion, it is obvious that disputes with respect to the powers of the state to intervene in

* B.A.L.L.B. (Hons.), Jamia Millia Islamia, New Delhi; LL.M., National Law University, Delhi; Currently working as Consultant at the Ministry of Home Affairs, Government of India.

1 See for example Articles 15(1), 16(1), 16(2), 25(1), 27, 28(1), 28(3), 29(2), Constitution of India, 1950

2 See for example Article 17, 30(1), 30(2), 25(2), Constitution of India, 1950

religious affairs and questions of interpretation occur frequently, given that India is a faith-based society constitutionally committed to a secular liberal democratic order.

In 2015, the Rajasthan High Court was faced with deciding such a conflict (Nikhil Soni vs Union of India & Others). The practice of *santhārā* prevalent amongst Jains, is a religious/spiritual practice which entails fasting as a way of embracing death. The practice has often been questioned as being equivalent to suicide and in direct conflict with the fundamental right of life, while Jains view it as an intrinsic part of the Jain faith, and a part of the fundamental right of religious freedom and the freedom to manage the own affairs of a religious community, guaranteed by the Constitution. The practice was challenged in the Rajasthan High Court, which passed a judgement holding the practice of *santhārā* as being violative of Section 306 and 309 IPC and Article 21 of the Constitution. The Court further observed that it could not be included as an 'essential religious practice' under Article 25 of the Constitution.

While the said High Court judgment has now been stayed by the Hon'ble Supreme Court of India, the larger question that arises is with respect to the use of the essential religious practice test (ERP) – a judicially formulated test which finds no mention, either expressly or by implication, within the Indian Constitution. The test has been evolved over time by the Indian judiciary, and is often used as a basis for allowing the State to interfere in the religious realm.

This paper broadly argues that with the formulation of the Essential Religious Practice test, the dangers of secularism becoming a religion of its own is beginning to manifest itself in India (Bhargava). This is sought to be established by taking *santhārā* as a case study. Part I of this paper provides an overview of the practice of *santhārā* prevalent amongst Jains. Part II briefly describes the key contentions and the judgment in Nikhil Soni v. Union of India (subsequently stayed by the Hon'ble Supreme Court and currently pending before it). Part III presents a critique of the HC judgment, while Part IV finally concludes the paper.

I

Many religions prevalent in the East, such as Hinduism, Jainism and Buddhism, provide for the attainment of death voluntarily under certain circumstances when death is imminent.[3]

The word *santhārā* originates from the Sanskrit word *saṁstara* which in Prakrit becomes *santhāra*, meaning a bed of grass. In the last stage of life, when a dignified life according to the Jain religion is no longer possible due to old age or an incurable disease and death becomes an indisputable certainty, a person takes a vow of *sallekhanā* after seeking permission for the same from religious leaders or *munis* and from his/her own family members.[4] The leaders may even refuse to allow the seeker to take the vow if they believe that the person still has pending responsibilities, or is otherwise fit and can continue with his life. Once the permission is given,

---

3 See generally (Lakhan, 2008) and (Hillman, 2014).

4 upasarge durbhikṣe jarasi rujāyāṁ ca niḥpratīkāre |
dharmāya tanuvimocanamāhuḥ sallekhanāmāryāḥ || (*Ratnakaṇḍa Śrāvakācāra* 122)

the person sits on a bed of grass and goes into deep meditation, gradually leaving all attachments from the material world, and eventually even food and water and thus embraces death.[5] Those who choose to die in this manner are admired and such a ritual is celebrated by the community.

Jains believe in seven elements: *jīva* (soul), *ajīva* (non-soul), *āsrava* (influx), *bandha* (bondage), *saṁvara* (stopage), *nirjarā* (dissociation) and *mokṣa* (liberation).[6] Of them *jīva* (soul) and *ajīva* (non-soul) are the main elements, while the other elements are their modifications. According to Jainism, every soul is perfect and pure, but is associated with karmic matter, which suppresses the properties of the pure soul and thus puts it in the cycle of birth and rebirth.[7] Religion is a mode of liberating the soul from the bondage of karma. Thus, the individual must endeavor to shed off karma so as to liberate the soul.

Fasting is a prevalent practice in most religions, but is deeply embedded and of much greater significance in the Jain lifestyle. Fasting in Jainism is seen as a way to control greed, to purify the body and the mind and to overcome all worldly desires—a major step to attain *mokṣa* by shedding off karma. Once a person falls terminally ill or reaches the stage where death becomes certain, he begins to accumulate more karma rather than shedding it off. In such a situation, Jainism provides for the person to voluntarily embrace death. This is the main philosophy behind the practice of *santhārā*. That is why it is said that this practice is done without the desire for either death or life[8]. An individual should not have the desire either for life or for death, only then can he be liberated.

As discussed in beginning, *santhārā* is undertaken voluntarily at the last stage of life, when death is near, or in cases of terminal illness or famines. No specific period is given for undertaking *santhārā*. The procedure can be followed both by laymen as well as monks and ascetics. It is taken in full consciousness by the undertaker and with the permission of the spiritual masters and the family. Once the person dies, his body is taken out on a palanquin in a religious procession while chanting hymns.

Sallekhanā is a reversible vow, i.e., it can be revoked. It is mentioned clearly that in case the ascetic becomes sick due to no intake of food and drink, he should revoke the vow and accept

---

5 sneham vairam saṅgam, parigraham cāpahāya śuddhamanāḥ |
svajanam parijanamapi ca, kṣāntvā kṣamayetpriyairvacanaiḥ ||
ālocya sarvamenaḥ, kṛtakāritamanumatam ca nirvyājam |
āropayenmahāvratamāmaraṇasthāyi niḥśeṣam ||
śokam bhayamavasādam, kledam kāluṣyamaratimapi hitvā |
sattvotsāhamudīrya ca, manaḥ prasādyam śrutairamṛtaiḥ ||
āhāram parihāpya, kramaśaḥ snigdham vivarddhayetpānam |
snigdham ca hāpayitvā, kharapānam pūrayetkramaśaḥ ||
khārapānahāpanātmapi kṛtvā kṛtvopavāsamapi śaktyā |
pañcanamaskāramanāstanum tyajetsarvayatnena || (ibid 124_128)

6 "jīvājīvāsravabandha saṁvaranirjarāmokṣāstattvam" (*Tattvārthasūtra* 1.4)

7 jīvo carittadaṁsaṇaṇāṇaṭhido taṁ hi sasamayaṁ jāṇe |
poṅggalakammapadesaṭṭhidaṁ ca taṁ jāṇa parasamayaṁ || (*Samayasāra* 1-2-2)

8 jīvitamaraṇāśaṁse bhayamitrasmṛtinidānanāmānaḥ |
sallekhanāticārāḥ pañca jinendraiḥ samādiṣṭāḥ || (*Ratnakaraṇḍa Śrāvakācāra* 129)

food.[9] It shows the prerequisite of *sallekhanā* that the person must be free from all desires, including the desire to die. Jains believe that this is one of the features that distinguish *santhārā* from suicide. It must be pointed out here that suicide is strictly prohibited in Jainism, as it is considered an extreme case of violence.

II

Advocate Nikhil Soni filed a PIL in the Rajasthan High Court seeking a ban on the Jain ritual of *santhārā*, being violative of Sections 306 and 309 and hence punishable under the law. The grounds on which the practice was contended to be inconsistent with the laws in India were (Nikhil Soni vs Union of India & Others):

a. It is an act of taking one's own life by 'starving to death' and 'waiting for death to arrive' akin to suicide and hence, punishable under Sections 306 and 309 of the Indian Penal Code, 1860.
b. It is violative of Article 21 of the Constitution which provides for the right to life, and it has been consistently held over a series of judicial precedents that right to life does not include the right to die.
c. The community glorifies and worships the individual who undertakes *santhārā*. It is a cruel act and may be misused or abused and is thus a social evil just like *satī*. It is 'abhorrent to modern thinking'.
d. The ritual is not an "Essential Religious Practice" of Jains and is therefore not protected under Article 25 of the Constitution of India. State can intervene to bring about reform.

The respondents contended that:

a. *Santhārā* is in fact an essential practice of the Jain religion. It is a living tradition that has been continuing for a long time. Also, it is not violative of public order, health or morality and is thus protected under Article 25. State intervention in this matter would violate the principles of secularism.
b. Comparisons with *satī* are flawed as *satī* was not a religious practice, but only a social custom. It does not have a religious backing. *Santhārā* has been mentioned in Jain texts and is a way to attain *mokṣa*.
c. *Santhārā* is different from suicide, due to the procedure, age and the circumstances in which it is undertaken, which are very different from those of a person committing suicide. A person attempting suicide is stressed, disappointed and has the desire to end his life. It is a sudden and irrevocable decision which can be taken at any stage of life. *Santhārā* is done in a state of peace, with no desire for death or for life, and can only be taken when the natural life is certain to end, with the consent of all family members and religious heads. It is slow and revocable. It is not the giving up of life, but rather, taking death its stride.
d. While right to die may not be included in the right to life, the right to live with human dignity is a part of Article 21. This dignity must also be maintained towards the end of

[9] "The ascetic should first reduce passions and then reducing his foods intake, he should tolerate afflictions and abuses. If he becomes sick, he should accept food; otherwise he should do Anshan by completely abandoning food." (*Ācārāṅga Sūtra* 8.232)

one's natural life. So, a dying man also has the right to die with dignity. **Gian Kaur v. State of Punjab** (AIR 1996 SC) has left this question open. Also, there are a number of foreign judgements where withdrawal of life support has been allowed to ensure a dignified death.

e. The Constitution overrides the Indian Penal Code. Article 25 is a fundamental right that must prevail. A right guaranteed by the Constitution itself cannot be curtailed by the Penal Code.
f. Article 26 guarantees religious denominations to manage their own affairs in religious matters. The State must not intervene in this matter.
g. Article 29 also protects *santhārā* as Jains are a separate community with their own particular culture and the constitution guarantees its protection.

After hearing the parties and their contentions, the Court boiled down the entire discourse on one fundamental question: whether or not *santhārā* forms an essential religious practice of Jainism.

The Court concluded that in all Jain scriptures, it was not proved successfully by the State that *santhārā* is an essential religious practice, and was thus not protected under Article 25. It also held that *santhārā* was violative of Article 21, which did not include the right of voluntarily ending one's life. It imposed a ban on *santhārā* and made it an offence punishable under Section 306 and 309 of the Indian Penal Code.

III

The case of Nikhil Soni brings out the following main points to consider with respect to the place of religion in a secular polity like India. They are:

a. the drawbacks and shortfalls of the ERP test
b. the disconnect between the philosophy on which the so-called secular laws are made and the religious philosophy that governs the everyday life of individuals in a faith-based society like India
c. the incompetence of judiciary in dealing with religious matters
d. the debate on cultural relativism versus universalism

The Flawed Essential Practice Test

Since the 1950s, the court has had to frequently indulge in questions of religious doctrines and rituals, especially in delineating the scope of religious freedom guaranteed under the Constitution. On analysis of the various cases that have come before the Supreme Court, one can see the shift in the approach of the judiciary towards religious matters over time, with the Court formulating the ERP test, and thereafter, creating more and more tests and criteria to determine what is 'essential to religion', leading to increasing state intervention in religion.

Initially, the court began by stating that practices that were ‘essentially religious’, i.e. religious by their very nature, were protected under the constitution from intervention by the state. Only the religious denomination itself had the right to decide as to what were the essential rites and ceremonies of their religion and the state could only intervene in such practices, if they were against public order, health or morality or in violation of other provisions of Part III of the Constitution. The state could also legislate for social welfare or reform, and could only regulate activities that are economic, commercial or political, though associated with religious practice.

Accordingly, in 1954, in **Commissioner Hindu Religious Endowments, Madras v. Shri Lakshmindra Thirur Swamiar of Shirur Mutt** (AIR 1954 SC 282), the Court held that religion included all practices and rituals essential to it. Essentially religious practices warranted protection from state intervention. What was essential and what was not was to be decided by the denomination. However, it went on to note that while some secular practices not essential to religion may be clothed in religious clothes, other religious practices may simply be a result of superstitions and unessential to religion.

This call for the rationalization of religion paved the way for greater judicial intervention in religious matters. The court rejected the ‘assertion test’ where the plaintiff could simply assert that a particular practice was essential to his religion. To determine the essentiality of a practice, the court looks to the nature of the practice and the importance that the community gives to it. It is pertinent to note here that the essentiality was only in the context of distinguishing between religious and secular acts (Adelaide Co of Jehovah's Witnesses Inc v Commonwealth, 1943 ALR 193).

A major change came through **Ram Prasad Seth v. State of Uttar Pradesh** (AIR 1957 AII 411) wherein the Allahabad High Court used the expression ‘essential part of the Hindu religion’ instead of ‘essential religious practice’. The use of the term ‘essential to religion’ caused the crystallization of the Essential Religious Practice test. While essentially religious meant those practices that by nature were of religious character, the ‘essential to religion’ phrase meant the importance that the practice holds for the community. This opened religion to the scrutiny of courts. The subsequent judgements began to interpret essential not as a qualification to the nature of practice, i.e., religious or secular, but rather connoted it to mean important to religion. The string of cases that followed since then are all examples of how courts have ventured into religious questions which the constitution forbids under Article 25.

According to the essential practices test, religion is to encompass all those practices, rites and ceremonies considered ‘essential’ according to the tenets of the practitioners of the religion. These essential practices would then constitute the essential core of a religion and therefore could not be subject to the interventionist and regulating powers of the state, leaving all other non-essential practices open to State intervention. However, it is being seen increasingly how the Courts, in order to determine what amounts to ‘essential practice’ are formulating more and more criteria, leaving out more and more practices from within the fold of ‘essential’. These additional criteria/tests have not been laid down by the Constitution, nor can they reasonably

be interpreted to be included within its text. These tests are solely based on the judges' own conception of right and wrong, morality and immorality, equality and justice.

For example, in **Sastri Yagnapurushadji and Others v. Muldas Bhudardas Vaishya and Others** (AIR 1966 SC 1119), the petitioners claimed that they were not Hindus and hence, the temple-entry legislations would not apply to them. The court went into a detailed exposition of the tenets of Hinduism and concluded that the *satsaṅgīs* were in fact Hindus. It further went on to hold that their views on temple entry were based on a mistaken and false understanding of the teachings of their founder Swami Narayan and superstition and ignorance. The court effectively tutored a religious group as to what their religion actually meant, which the judges were clearly ill-equipped to do, being untrained in theology.

Similarly, in **Qureshi v. State of Bihar** (AIR 1958 SC 731), the Supreme Court held that slaughter of cows was not an essential practice of Muslims in Eid and was not 'obligatory' as they did have the option of slaughtering other animals. The test of obligation got added here by the Supreme Court, further reducing the scope of religious freedom. Similarly, in **Fasi v. SP of Police** (1985 ILLJ 463 Ker), a police officer challenged a regulation that disallowed him from keeping a beard as violative of his freedom of religion. The court disregarded the evidence from the Holy Quran provided by the petitioner and instead relied on the argument that there are many Muslims who do not have beards and the petitioner himself did not have a beard earlier and thus, it is not essential. This shows the utterly whimsical approach of the courts to questions of religion.

In **Bal Patil v. Union of India** (Appeal (civil) 4730 of 1999), the court held that Jainism is not a separate religion but merely a 'revolutionary movement within Hinduism', even when the two religions differ on the very basic principle of belief in God, and yet, the court found this difference to be insignificant. Many scholars criticised the judgement and held that law has no business in delineating the scope of religion.

The major flaw with the **Nikhil Soni** judgement was that it relied on the flawed Essential Religious Practice Test where despite ample evidence being adduced to the contrary, the Court went on to hold that there is no evidence that *santhārā* is an essential tenet of Jainism:

> "We do not find that in any of the scriptures, preachings, articles or the practices followed by the Jain ascetics, the Santhara or Sallekhana has been treated as an essential religious practice, nor is necessarily required for the pursuit of immortality or moksha. There is no such preaching in the religious scriptures of the Jain religion or in the texts written by the revered Jain Munis that the Santhara or Sallekhana is the only method, without which the moksha is not attainable. There is no material whatsoever to show that this practice was accepted by most of the ascetics or persons following the Jain religion in attaining the nirvana or moksha. It is not an essential part of the philosophy and approach of the Jain religion, nor has been practiced frequently to give up the body for salvation of soul…" (Nikhil Soni vs Union of India & Others).

This statement clearly shows a paternalistic approach of the court, where it simply tutors the followers of Jainism the proper understanding of their own religion. The Constitution does allow the state to intervene in situations where the religious freedoms violate public order, health, morality or other fundamental rights. But it does not bestow a discretion on the Courts to sit in judgement over what practice is 'essential to religion'. This has only led to the dilution of the right to religious freedom, much beyond what was constitutionally allowed and envisaged by the constitution makers.

Limitations of Judges

The judges, being untrained in theology and philosophy, cannot be expected to understand a religious philosophy in a comprehensive manner. In the Nikhil Soni judgement, the Court has proceeded on a wrong understanding of the philosophical underpinnings of the practice. The Court sees *santhārā* as a vow in which the person 'waits for death to arrive'. This led the court to believe that *santhārā* is nothing but suicide, and is hence violative of Section 306 and 309 of the Indian Penal Code. Quite to the contrary, Jain texts clearly lay down that during fasting, the person should have no desires at all – neither to live, nor to die[10].

Also, the Court fails to appreciate the very strict internal regulatory mechanisms of the religion to check abuse of the practice. Religious texts have laid down strict conditions and prerequisites for undertaking this fast. A healthy young individual with responsibilities to fulfill is never allowed to take up *santhārā*. It is only under certain enumerated conditions – old age with indisputably certainty of the imminence of death, terminal illness or famine. It would be an oversimplistic (and thus erroneous) view to see sallekhanā simply as the giving up of food and drink, with an intention to accelerate one's death. It is important to appreciate that the vow does not stem from the desire to die. Rather, the practice is rooted in spiritual reasons, wherein the person taking the vow voluntarily wishes to focus upon the soul by trying to limit his desires and passions. Gradually reducing one's desires automatically leads to reduction of intake of food and drink and eventual death. The focus here, therefore, is not what the body requires, but rather, what the soul requires. Being a voluntary fast, a person is not coerced into fasting. Since it is not a sudden and hasty death but involves a gradual process, the person does have ample opportunity to reconsider his decision and to even withdraw from it at any time since it is revocable. Additionally, the fast is not kept secret but is undertaken in full public view and under the supervision of religious leaders. In fact, if a person falls ill due to the fast, it can be stopped. A closer reading of the religious texts would also show that Jainism expressly condemns suicide.

These limitations on the religious knowledge of judges leads to ill-informed judgements that have real-life consequences for persons who wish to live their lives according to their religious beliefs and as long as the practice does not violate public order, health, morality or other

[10] jīvitamaraṇāśaṁse bhaya-mitrasmṛti-nidāna-nāmānḥ |
sallekhanāticārāḥ pañca jinendraiḥ samādiṣṭāḥ || (*Ratnakaraṇḍa Śrāvakācāra* 129)

fundamental rights, such persons have a fundamental right to live a life in adherence with their religious beliefs.

Limits to Legal Transplant

Fasting unto death is not specific to Jainism alone. A number of other religions provide for a similar way of embracing death. Jainism, Buddhism and Hinduism, unlike Christianity or Islam believe in reincarnation and do not see death as an end, but merely a transient stage for the soul.

Samādhimaraṇa in Jainism, and *mahāprasthāna*[11] and *prāyopaveśa* (fasting unto death) in Hinduism) are examples of religiously sanctioned methods of embracing death through gradual abstention from food and drink. *Prāyopaveśa* can be performed only under very strict rules and regulations. The decision is publicly declared and is allowed only after the cessation of all worldly desires and responsibilities. It is necessary before committing *prāyopaveśa* that there should be an inability to perform normal bodily functions, death appears imminent or in conditions of extreme pain. Multiple references have been made of this practice in *Manusmṛti* (6.16-31),considered to be one of the most authoritative Hindu texts.

The *santhārā* controversy brings to light the limitations to legal transplants. Clashes and conflicts between religion and laws are bound to arise frequently in cases where the legal system is not based on the philosophy and lifestyle of the citizens (Pillai and Aquil 34). The IPC, drafted by a devout Christian does not reflect the values of Eastern systems of thought and criminalises acts based on the Christian sense of right and wrong, good and evil, morality and immorality.

The laws in India are based on the English philosophy which treats the body as a gift of God and a temple for the soul. That is why, suicide or voluntarily choosing death is considered as disrespectful towards God. However, Indian traditions do not consider death to be an ultimate end, rather, it is seen as a transitional phase where the soul is liberated and only bodily death occurs. *Bhāgavad-gītā* compares body to old garments that are to be given up and new garments to be put on like the soul accepts new material bodies.[12] In fact, Jains see the human body as a prison of the soul and thus, seek liberation from it through fasting and other means (Hattangadi).

The disconnect between law and religious philosophy is amply illustrated by this case.

---

[11] Book 17 of the Sanskrit Mahābhārata is titled as the Mahāprasthānikaparvan or "The Great Departure" and contains reference of how the Pāṇḍavas and Draupadi renounced the world by walking towards the Himalayas, climbing Mount Sumeru to ascend to Heaven.. (Johnson)

[12] vāsāṁsi jīrṇāni yathā vihāya, navāni gr̥hṇāti naro'prāṇi |
tathā śarīrāṇi vihāya jīrṇā-nyanyāni saṁyāti navāni dehī || (*Bhāgavad-gītā* 2.22)

Right to Life v. Right to Die with Dignity

The Court, based on an incorrect reading of **Gian Kaur v. State of Punjab** (AIR 1996 SC) held that the Supreme Court laid down that right to die is not included within the right to life. However, a closer reading of the judgement of Gian Kaur reveals that the Supreme Court has in fact, differentiated between the 'unnatural curtailment of the normal span of life' and the 'right of a dying man to die with dignity when the natural life is ebbing.' This slight difference was completely overlooked by the Rajasthan High Court. *Santhārā* falls in the latter category where a person fasts only when death becomes certain or where the quality of life due to incurable diseases becomes such that a life of dignity remains no longer possible.

That *santhārā* is mostly undertaken by the elderly Jains is clearly borne out by an empirical study done in Rajasthan province of India. (See Table 1).

Table 1: Age Distribution of Those Who Opted for Voluntary Peaceful Death (Baya 244)

Age group	21-30	31-40	41-50	51-60	61-70	71-80	81-90	91-100	>100	Total
No.	4	3	3	14	52	99	135	28	4	350
%	1.3	0.8	0.8	4.0	17.0	28.3	38.9	8.0	1.3	100

From this table, it is amply clear that it is only towards the end stage of life that a person undertakes *santhārā*. The cases in the early stages of life are due to accidents or incurable illnesses, as per the empirical study by Dr. Baya.

Cultural Relativism v. Universalism

Minorities may feel threatened and alienated by majority viewpoints where the majority is not willing to accommodate this diverse opinion, which makes the minority feel unheard and discriminated against. This would make the political society in itself to become illegitimate based on the popular sovereignty theory of legitimacy (Taylor 45).

Williams observes that there is a fundamental conflict between legal modernity and religion. Law by nature seeks to generalize and universalize, which is contrary to religious particularities. He argues that 'religious pluralism has been suffocated by a secular universalism that claims finality over legal meaning' (Williams 271-272). The respect for cultural diversity finds it impossible to articulate itself in the unitary rationalism of the language of rights (Chatterjee 365).

IV

While a number of factors in the Indian religious and political setting may impel judges to take this interventionist role: the desire to reconcile, to avoid explicit disregard of religious authority, to make reforms palatable, to propagate strongly held views of religion, to teach the

unenlightened etc., there are other factors too that make such judicial activism acceptable and appealing to the educated reformist elite (Galanter 286).

The Courts must refrain from going into the tenets of religious beliefs. It would be very dangerous for the institutions of any state to start tutoring a religious community as to its correct beliefs and practices according to its faith or that his entire faith is misguided. That could involve a secular ideology dictating to a religious one, with a government or courts re-educating believers to show them their 'errors'. Such a practice which allows courts to decide the contents of religions makes the state an insider into religion. And this transformation has given the judiciary a political role in 'secularism adjudication' – not only does it legitimise state intervention, it carries out the internal critique itself.

Such a setup completely negates the separation of power model of secularism where the state respects a 'preordained sphere of religion'. In this case, the law actually functions as a regulating body which supervises religion. According to Galanter, there are two modes for the exercise of law's regulatory oversight of religious control (Galanter 284):

1. The mode of limitation – refers to the shaping of religion by promulgating public standards and by defining the field in which these secular public standards shall prevail, overruling conflicting assertions of religious authority.
2. The mode of intervention – refers to something beyond mere limitation. It is an attempt to grasp the levers of religious authority and to reformulate the religious tradition from within, as it were.

It is submitted that while the constitution does give the state some power of interference in religion for purpose of reform, but clearly, the court, through the formulation of the Essential Religious Practice test, has gone a step further and assumed the power to internally reinterpret religions. Also, such a test poses an impediment to individual's right to religion. While the court does have a crucial role to play in balancing right to religion and the right of the state to bring about reform and stay committed to social welfare, the approach of the court at present has rendered individual right to freedom of religion to its weakest. It is impossible for an individual to practice his faith in varied ways from the rest of his community, completely opposite to the constitutional mandate. The court has imposed many constraints on the provision, which originally, through its textual construction, does not provide for any of the constraints that the court is applying.

The fundamental question that runs through the entire discourse is the role of the state in 'promoting, fostering or preserving its citizens' personal ideals of the good (or final ends)' (Russell 345). In the Indian context, religion is a way of life and not just a part of it. Thus, privatizing religion to an extent of complete separation can never be a viable solution. Also, killing diversity and aiming for homogeneity is 'deadly to democracy' (Cook 439).

The state cannot use its secular ideology to silence the dissenting (Nandy 333). The gravest danger of judges deciding religious questions is that secularism would lead to the imposition

of majoritarian or elitist values on minority groups and such elites would assume power to decide on questions of religious rights of minorities based on their own morality and ethics. The state becomes a cultural imperialist if it chooses some values over others, through legislative or judicial coercion. But the question remains as to why the values of secular ideology are given privilege over some religious ideology. Just as religion lays down certain ethics and values that must govern life, so does secularism. Then what gives secularism the upper hand? No secular state is or can be merely neutral or impartial among religions, for the state defines the boundaries within which neutrality must operate (Galanter 283). Scholars argue that neutrality is meaningless as "We can agree on the principle of neutrality without having agreed on anything at all. From benevolent neutrality to separate but equal, people with a vast range of views on church and state have all claimed to be neutral" (Laycock 994).

Only those practices that are extremely controversial and where a very deep disagreement exists, so much so that it may lead to the use of physical force by the people should they be excluded from the public sphere (What is Secularism For? 499). As far as *santhārā* is concerned, it does not violate any other person's rights, nor does it affect public order or health. Thus, banning it seems unjustified.

The place for religion must be found neither above nor below the secular (Calo 900). It must be given due weight and respect and the state must not show a condescending attitude towards religious values, which currently seems the trend. Consider the **Nikhil Soni v. Union of India** judgement where the judgement describes how the counsel for the respondent chanted *ślokas* to show the antiquity of the practice in the following words (Nikhil Soni vs Union of India & Others):

> "He has explained to us the manner in which the vow of Santhara is taken and has recited the slokas in a loud voice in the Court, to the amusement of the general public sitting in the Court."

It is strange to see the kind of tone that the judgement uses. As Hattangadi points out, "Is the recitation of a sloka in an Indian courtroom during the hearing of a case involving the legality of an ancient rite or ritual such an incongruous act that it should invite mirth and derision? Could there be a more vivid illustration of the incompatibility between traditional religion and modern governance?" (Hattangadi)

Concluding Remarks

The case of *santhārā* serves to exemplify the dire need to strike a fine balance between secular laws and religious freedoms. It highlights not only the failure of the Essential Religious Practice test formulated by the Indian Supreme Court in balancing religious rights and secular principles successfully, but also illustrates the consequences of transplanting ideas from alien lands and applying them to very different socio-political conditions. It further casts doubts on the competence of the judicial wing to interpret and enter into the realm of religion from within to bring in reforms, rather than restricting themselves to testing religious practices on secular considerations only.

Of course, the practice needs to be brought in tune with the modern times and can be regularized by constant monitoring, assessment of the decision-making capacity as well as consent assessment. This would be possible through the involvement of medical and legal professionals and persons from the religious community. However, a deontological view on the matter is highly problematic.

With a stay on the Rajasthan High Court ruling, it is an opportunity for the Supreme Court to review its Essential Religious Practice test criteria to adjudicate upon religious questions, and to recognize its incompetence in dealing with such matters. This is not to say that any religious practice, no matter how discriminatory or inhuman, may be allowed to flourish. All practices should be tested on the touchstone of the Constitution. But for reasons spelt out before, the Essential Religious practice test is the least successful way to do so.

References

Adelaide Co of Jehovah's Witnesses Inc v Commonwealth,. No. [1943] ALR 193; 1943 WL 27496; 17 ALJ 134. High Court of Australia. 14 June 1943. 17 January 2022. <jade.io/article/64264>.

Amarmuni, ed. *Ācārāṅga Sūtra, Part-I*. Trans. Shreechand Surana. New Delhi: Padma Prakashan, 1999

Bal Patil & Anr vs Unioin of India & Others. No. Appeal (civil) 4730 of 1990. Supreme Court of India. 8 August 2005. 10 January 2022. <indiankanoon.org/doc/502741/>.

Baya, D. S. "Relevance of Sallekhanā/Samādhi-maraṇa in Today's Society." *Sallekhanā: The Jain Approach to Dignified Death*. Ed. Shugan C Jain and Christopher Key Chapple. New Delhi: DK Printworld, 2020. 241-248.

Bhargava, Rajeev. "Introduction." *Secularism and Its Critics*. Ed. Rajeev Bhargava. India: Oxford University Press, 2014.

Bhargava, Rajeev. "What is Secularism For?" *Secularism and its Critics*. Ed. Rajeev Bhargava. New Delhi: Oxford University Press, 2014.

Calo, Zachary R. "Christianity, Islam and Secular Law." *Ohio Northern University Law Review* 39 (2013): 879-900.

Chatterjee, Parth. "Secularism and Tolerance." *Secularism and its Critics*. Ed. Rajeev Bhargava. New Delhi: Oxford University Press, 2014.

Cook, Anthony E. "God-Talk in a Secular World." *Yale Journal of Law & the Humanities* 6.2 (1994): 435-461.

Dwivedi, Girija Prasad, trans. *Manusmṛti*. Lucknow: Navalkishor Vidyalaya, 1917.

Galanter, Marc. "Hinduism, Secularism and the Indian Judiciary." *Secularism and Its Critics*. Ed. Rajeev Bhargava. New Delhi: Oxford University Press, 2014.

Gian Kaur vs The State of Punjab. No. 1996 AIR 946, 1996 SCC (2) 648. Supreme Court of India. 21 March 1996. 25 March 2022. <indiakanoon.org/doc/217501/>.

Hattangadi, Shekhar. "Santhara in the eyes of the law." *The Hindu* 15 August 2015. 21 January 2022. <thehindu.com/opinion/op-ed/Santhara-in-the-eyes-of-the-law/article62117263.ece>.

Hillman, Sean. "Sallekhanā-Santhārā: Jain Voluntary Death as a Model for Secular and End of Life Care." *Social Consciousness in Jainism*. Ed. Shugan C Jain and Prakash C Jain. New Delhi: International School for Jain Studies and New Bharatiya Book Corporation, 2014. 139-174.

J. E. W., Jr. "Editorial: The Secular State." *Journal of Church and State* 7.2 (1965): 169-180. 12 January 2022.s

Kundakunda, Ācārya. *Samayasāra*. Ed. Vijay K. Jain. Dehradun: Vikalpa Prnters, 2012.

Lakhan, Shaheen E. "Hinduism: Life and Death." *Student British Medical Journal* (2008): 294-336.

Laycock, Douglas. "Formal, Substantive, and Disaggregated Neutrality Toward Religion." *DePaul Law Review* 39.993 (1990): 993-1018.

Mohaammed Fasi vs Superintendent of Police and Others. No. (1985) ILLJ 463 Ker. Kerala High Court. 20 February 1985. 12 January 2022. <indiankanoon.org/doc/72808/>.

Mohd. Hanif Quareshi and Others vs The State of Bihar. No. 1958 AIR 731, 1959 SCR 629. Supreme Court of India. 23 April 1958. 7 March 2022. <indiankanoon.org/doc/93885/>.

Nandy, Ashsh. "The Politics of Secularism and the Recovery of Religious Tolerance." *Secularism and its Critics*. Ed. Rajeev Bhargava. New Delhi: Oxford University Press, 2014.

Nikhil Soni vs Union of India & Others. No. D.B. Civil Writ Petition No. 7414 of 2006. Rajasthan High Court. 10 August 2015. 5 January 2022. <indiankanoon.org/doc/173301527/>.

Pillai, K. N. Chandrashekharan and Aquil, Shabistan. *Essays on the Indian Panel Code*. New Delhi: The Indian Law Institute, 2005.

Prabhupad, Bhaktivedant Swami, trans. *Bhagavad-gītā*. Mumbai: The Bhaktivedanta Book Trust, 2011.

Ram Prasad Seth vs State of UP. No. AIR 1957 AII, (1957) IILLJ 172 AII. Allahabad High Court. 20 March 1957. 20 January 2022. <indiankanoon.org/doc/1481418/>.

Russell, John. "How to be Fair to Religious and Secular Ideals within the Liberal State." *The Advocate* 60.3 (2002).

S. R. Bommai vs Union of India. No. 1994 AIR 1918, 1994 SCC (3) 1. Supreme Court of India. 11 March 1994. 12 March 2022. <https://indiankanoon.org/doc/60799/>.

Samantabhadra, Ācārya. *Ratnakaraṇḍa Śrāvakācāra*. Ed. Pannalal Jain. Sagar: Jain Vidyapith, 2017.

Sastri Yagnapurushadji and Others vs Muldas Brudardas Vaishya and Others. No. 1966 AIR 1119, 1966 SCR (3) 242. Supreme Court of India. 14 January 1966. 17 January 2022. <indiankanoon.org/doc/145565>.

Taylor, Charles. "Modes of Secularism." *Secularism and its Critics*. Ed. Rajeev Bhargava. New Delhi: Oxford University Press, 2014.

The Commissioner, Hindu.....vs Sri Lakshmindra Thirtha Swamiar. No. 1954 AIR 282, 1954 SCR 1005. Supreme Court of India. 16 April 1954. 12 March 2022. <indiankanoon.org/doc/1430396/>.

Umāsvāmī. *Tattvārthasūtra*. Ed. Vijay K. Jain. Dehradun: Vikalp Printers, 2011.

Williams, Rowan. "Civil and Religious Law in England: A Religious Prespective." *Ecclesiastical Law Journal* 10.3 (2008): 262-282.