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Defining religion: the Supreme Court of India and the 'Essential Practice of Religion' Doctrine

Valentina Rita Scotti

1. *Introduction*

The definition of the role religion should play in the public sphere has acquired great relevance in the Union of India since the constituent debates and involved also the adjudication of the Supreme Court. Due to the central position religion has in regulating the social life of the Indian communities, indeed, the Court has often to deal with the possible violation of the rights and principles affirmed in the Constitution deriving from the application of religious prescriptions. Therefore, the Court elaborated the 'essential practice of religion' doctrine, allowing for ascertaining which elements are fundamental for a religious practice and which may be considered as mere superstition, and thus may be purged through an intervention of the State without infringing the principle of State neutrality in religious affairs.

Willing to analyze how the doctrine developed and has been applied, a brief presentation of the Indian context and of the constituent debates on religion are provided before to deal with the relevant case-law. Some concluding remarks on the role the doctrine has had in ensuring the respect of secularism are finally proposed.

2. *Handle with care: the role of religions in the Union of India*

Religions have always had a strong influence in the public life of the country. Though the Hindu 'way of life' strongly affected the social structure of the population all along India's history, during the Mughal Empire (1526-1720) a Muslim elite dominated over the country[1] and also Islam permeated the law and the culture of Indian people. Then, during the British colonization (1757-1947) the coexistence of the charge of King with that of

[1]. M. Lapidus, *A History of Islamic Societies* (3rd edn, CUP, New York 2014), 391-413.

Chief of the Church of England produced some consequences on the status of Christians. Furthermore, under the British rule, on matters of personal status religious pluralism was recognized and each community was entitled to regulating its life according to the prescriptions of its own religion until they do not infringe the quietness of the 'civilizers'.

Indeed, at the moment of the independence (1947), while suffering for the partition of the country establishing two Muslim entities at the borders and for the clashes between Muslim and Hindus inside them, India's founding fathers had to approve a Constitution able to preserve the huge variety of languages and of ethnic and religious groups at the same time providing for principles able to ensure equality and non-discrimination. The result was a long and very detailed Constitution (1949).[2]

Aware that religions play a major role in the self-identification of groups, framers had first to face the need for a 'correct meaning of religion', willing to respect religious pluralism as well as the principle of secularism they tried to entrench in the fundamental Charter.[3] On this point, different positions arose. Bhimrao Ramji Ambedkar[4] proposed to leave little room for religions in the public sphere, while Kanaiyalal Maneklal Munshi[5] suggested a recognition of the strong relevance religions have for Indian people. The final prevailing position was advanced by Jawaharlal Nehru,[6] proposing the equal respect and recognition of all religions practiced in the country according to a principle of secularism which protects them until they do not interfere with each other or with the basic conceptions of the State itself. As it will be clarified henceforth in this paper, however, the Supreme Court seemed to take into account even Ambedkar's proposal, notably when he stated that 'there is nothing extraordinary in saying that we ought to strive hereafter to limit the definition of religion in such a manner that we shall not extend it beyond beliefs and such rituals as may be connected with ceremonials which

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[2] On the drafting of the Indian Constitution, see: B.N. Rau, *India's Constitution in the Making* (Allied publishers, Bombay 1963); B.S. Rao et al., *The framing of India's constitution*, 5, (Indian Institute of Public Administration, Tripathi, Bombay 1968); S.C. Kashyap, *Our Constitution: An introduction to India's Constitution and constitutional law* (NBT India, New Delhi 1994).

[3] Secularism became a fundamental principle of the Constitution, recognized in art. 1 Const., after the amendment introduced in 1976.

[4] Ambedkar (14 April 1891 – 6 December 1956) was a jurist and an economist actively participating in the drafting of the Indian Constitution. He was also the first Law Minister of the independent India.

[5] Munshi (30 December 1887 – 8 February 1971), educationist and lawyer, was member of the Indian Constituent Assembly.

[6] Nehru (14 November 1889 –27 May 1964) was the political and spiritual heir of Gandhi and was the first Prime Minister of the independent India. He also served as a member of the Indian Constituent Assembly.

are essentially religious'.[7] This statement, indeed, was at the base of the 'essential practice of religion' doctrine the Supreme Court elaborated.

Both the intention of framers and of the Supreme Court was to provide the country with a legal system able to overcome the inequalities suffered by the population, with a specific attention to those discriminations deriving from the Hindu castes system[8] and from the previous treatment of religious minorities.[9] Therefore, the complexity deriving from such a pluralism made necessary to entrench in the Charter a principle of equality designed as the prohibition of discriminatory treatments among groups and minorities, and based on the neutrality of the State toward any religious belief. Nevertheless, having regard to the peculiarities of the country, the Constitution imposes the latter also the duty of eliminating all the obstacles to the enjoyment of fundamental rights for people that had been historically subject to traditional cultural and religious dogmas.[10]

3. The Indian Constitution and the provisions ruling religions

Although the general approach of the Constitution was based on secularism, it was only in 1976 that the 42nd amendment introduced secularism as a founding principle of the State, both in the Preamble and in art. 1. This amendment also reaffirmed the intent of the State to be neutral toward all religious belongings, already stated in articles from 25 to 28 of the Constitution, grouped under a specific section denominated 'Right to freedom of religion'.[11] Notably, the State shall not compel any person to pay taxes that shall be used to foster a particular religion (art. 27) and no religious teaching shall be provided in any educational institution that is wholly funded by the State (art. 28). The Charter also states that all persons are equally entitled to freedom of conscience and to the right to freely profess, practice and propagate religion, subject to public order, morality, health and to the existing or

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[7] See Constituent Assembly Debates, 507-8, cit. in G.J. Jacobsohn, *The Wheel of Law: India's Secularism in Comparative Constitutional Context*, (Princeton, Princeton University Press 2009) 98.

[8] See G. Shah (ed), *Caste and Democratic Politics in India* (Anthem Press, London 2004).

[9] Indian population is religiously divided among Hindus (79.8%), Muslims (14.2%), Christians (2.3%) and Sikhs (1.7%) (CIA Factbook, 2011).

[10] F. Alicino, 'Libertà religiosa e principio di laicità in India', in D. Amirante, C. Decaro, E. Poestl (eds), La *Costituzione dell'Unione Indiana. Profili introduttivi* (Giappichelli, Torino 2013) 196.

[11] See: M. Mohsin, M. Alam, 'Constructing Secularism: Separating 'Religion' and 'State' under the Indian Constitution' (2009) 11 *Australian Journal of Asian Law* 29, 55 and M. Sankhdher, *Secularism in India* (Delhi, Deep&Deep Publication 2006).

future laws made by the State to regulate or restrict any economic, financial, political or other secular activity associated to religious practice or to provide for social welfare and reform or to open Hindus religious institutions to all classes of Hindus (art. 25).

Evidently, freedom of religion is designed as an intrinsically individual fact, which cannot be subject to any distinction between citizens and non-citizens or among individuals because of their social position. Nevertheless, this freedom can be limited if it hampers the achievement of the other tasks the Constitution aims to perform. Being inspired by art. 44, 2 of the 1937 Constitution of Eire, the Indian Charter introduces the possibility of limiting freedom of religion whether necessary for protecting public order, morality and health. It also makes a specific reference to the Indian context when imposing the principle of equality (art. 16 Const.) to Hinduism by abolishing the traditional division of the believers in castes, with a particular reference to the caste of the untouchables (art. 17 Const.).[12] The duty of ensuring equality is not only of the State, but also of citizens, compelled to 'promote harmony and the spirit of common brotherhood amongst all the people of India transcending religious, linguistic and regional or sectional diversities' (art. 51A).

Furthermore, the Constitution guarantees the freedom to manage religious affairs, affirming the rights of any religious denomination or of any section of it to establish and maintain institutions for religious and charitable purposes, to manage its own affairs in religious matters and to acquire properties and administer them according to the law (art. 26). On this point, the content of art. 26 is noteworthy. It does not refer only to beliefs, but considers religious denominations and religious sections, thus giving a specific recognition to religious groups' internal divisions. At the same time, however, it imposes to a group of believers the obligation to obtain the legal identification as a religion in order to be considered as a religious denomination or as a section of it. But the Constitution remains completely silent on the discipline for obtaining this legal identification, devolving this task to the Supreme Court.

Finally, aiming at confirming the neutrality of the State, art. 60 of the Indian Constitution mirroring the US non-establishment clause (First

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[12] On untouchability, see, among many others, M.K. Gandhi, *The removal of untouchability*, (2nd edn, Navajivan, Ahmedabad 1959), M. Galanter, 'Untouchability and the Law' (1969) *Economic and Political Weekly* 131-170, G.S. Sharma, *Legislation and cases on untouchability and scheduled castes in India* (Allied Publishers, Bombay 1975), S. Kumar Lal and U. Raj Naha, *Extent of Untouchability and Pattern of Discrimination* (Mittal, New Delhi 1990).

Amendment) and the tradition about oaths and affirmations established there, allows the President of the Union to quote or not the name of God in the oath she/he must pronounce before taking office. Actually, the non-establishment clause seems to influence the whole Constitution, where there is a total absence of references to an established Church or to a majoritarian religion.

4. *The 'essential practice of religion' doctrine*

As mentioned, the Constitution attaches great relevance to the recognition of groups as religious denominations and, broadly, to the role they may play in the public arena, but fails to state a clear definition of what must be intended as religion. Therefore, this very difficult task felt among the duties of the Supreme Court. The latter has had to define 'religion' in order to state which practices may be eligible for constitutional protection, which are the limits of the independence of religious denominations, and which are the possible interference of state legislation on the activities of religious institutions.[13] In a nutshell, the lack of a definition in the Charter imposed the Court the duty to decide which elements are essentially religious, transforming it into an interpreter of the tenets of the faiths able to 'strike down those tenets that conflict with the dispensation of the Constitution'.[14]

With this aim, in the *Shirur Mutt* case,[15] the Court elaborated for the first time the so-called 'essential practice doctrine' in order to draw a red line between what are matters of religion and what are not, even looking at the US and Australian case-laws. Indeed, in this decision, the Court first discussed the definition of religion the US Supreme Court proposed in *Davis v. Beason*[16], based on the distinction between the relation of an individual with his Creator (religion) and the forms of worship (mere practice), rejecting it because it was deemed as not consistent with the Indian context, where there are Buddhists or Jains who do not believe in God or in any Intelligent First Cause. Instead, the Indian Court, also recalling the influence of the

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[13] R. Sen, 'Legalizing Religion: The Indian Supreme Court and Secularism' (2007) *Policy Studies* 30, 10.

[14] R. Dhavan and F. Nariman, 'The Supreme Court and the Group Life: Religious Freedom, Minority Groups and disadvantaged Communities', in B.N. Kirpal (ed), *Supreme but not Infallible: Essays in Honour of the Supreme Court of India* (Oxford University Press, Delhi 2000) 259.

[15] Commissioner, Hindu Religious Endowments, *Madras v. Sri Lakshimindra Thirtha Swamiar of Sri Shirur Mutt* (1954 SCR 1005).

[16] 133 U.S. 333 (1890).

Constitution of Eire in the drafting of articles 25 and 26 of the Indian Constitution, relied on the decision *Adelaide Company of Jehovah's Witnesses v. Commonwealth*,[17] where Australian judges affirmed that the Constitution protects both the religious opinions and the acts done in pursuance of a religious belief. On this ground, the Supreme Court of India affirmed that 'rituals and observances, ceremonies and modes of worship are regarded as integral parts of religion' and religious denominations behaviors must be considered in order to ascertain the essential practices of their own religion, the State protects until they do not infringe the limits provided by articles 25 and 26 of the Constitution.[18] *Shirur Mutt* therefore became a landmark case for the Court. Following its rationale, the Supreme Court overturned the 1953 Bombay High Court's decision in *Ratilal*[19] – where Justice Changla observed that the Constitution intends as religion only 'whatever binds a man to his own conscience and whatever moral and ethical principles regulate the lives of men' – and also its own decision in *Saraswathi Ammal*,[20] on the wives practice to set up a perpetuity to have worships at the burial places of their husbands. In this latter case, the Court deeply analyzed Hindu scriptures in order to affirm that a practice in order to be defined as a 'religious practice' has to be recognized by the society. Finally, as *Shirur Mutt* declared, with minor remarks, the constitutional legitimacy of the Madras Act regulating Hindus temples and institutions, it represented the precedent for deciding on the following appeals on the consistency with the Constitution of the acts regulating religious affairs.[21]

Once established, the 'essential practice of religion' doctrine became the main test in Court's adjudications on the topic. For instance, the Court used it in *Sri Venkatramana Devaru*,[22] when it had to decide whether the exclusion of some people, the untouchables, from entering in a Hindu temple could be considered as an essential part of Hinduism. The case originated from the castes division of the Hinduist tradition and put in question the attempt of the State to implement concretely the principle of equality. The Court

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[17] 67 CLR 116 (1943).

[18] C. Mudaliar, *the Secular State and Religious Institutions in India: A Study of the Administration of Hindu Public Religious Trusts in Madras*, (Schriftenreihe des Sudasien-Instituts der Universitat Heidelberg, Steiner Verlag, Stuttgart, 1974).

[19] *Ratilal Panachand Gandhi v. State of Bombay* case (1954 SCR 1035).

[20] *Saraswathi Ammal v. Rajagopal Ammal* (1953, 2 MLJ 63).

[21] P.K. Triphati, 'Secularism: Constitutional Provisions and Judicial Review', in G.S. Sharma (ed), *Secularism: Its Implications for Law and Life in India*, (N.M. Triphati, Bombay 1966).

[22] *Sri Venkatramana Devaru v. State of Misore* (1954 S.C.R. 1046).

relied on the Privy Council's precedent *Sankarlinga Nadan v. Raja Rajeswara Dorai*[23] as well as on religious scriptures and on Hindu traditions. Indeed, the Court reminded that, although it was not conceived as an essential part of this religion according to the Upanishads,[24] the worship in a temple became an obligatory duty of the believers during the Puranic period,[25] and that the 28 Agamas[26], when prescribing to the believers how a temple is to be built and where the idols are to be placed, clarify where the believers should stand. Then, the Court recalled that in the Privy Council's decision judges affirmed that 'under the ceremonial law pertaining to temple, who are entitled to enter them for worship and where they are entitled to stand and worship and how the worship is to be conducted are all matters of religion'. Indeed, once made clear the essentiality of the distinction among believers according to Hindus religious practices and the related need to protect it according to the provisions on freedom of religion, the Court had to ascertain whether it hampers the achievement of other duties of the State established by the Constitution, and notably the abolition of the untouchability (art. 17 of the Constitution) and the right of the State to open public temples to all Hindus (art. 25). Supreme judges therefore affirmed that art. 17 does not apply to denominational temples, distinguishing 'between excluding persons from temples open for purposes of worship to Hindu public in general on the ground that they belong to the excluded communities and excluding persons from denominational temples on the ground that they are not object within the benefit of the foundation'. On the contrary, they deemed art. 25 as applicable to all Hindus religious institutions, including denominational temples. Thus, the Court declared as unconstitutional the exclusion of the untouchables from a temple, but, in a minor concession to the Brahmins who founded the temple, allowed it during specific ceremonies to safeguard the distinction among believers whose essentiality has been recognized through the essential practice test. The relevance of this decision is self-evident. Here the Court based its judicial review on a structured interpretation of

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[23] *Sankarlinga Nadan v. Raja Rajeswara Dorai*, 5 I.A. 176 (1908).

[24] Upanishads recollect texts of unknown author/s representing the philosophic tenets of Hinduism. Transcribed between 800 and 300 b. C., for long time they have been orally transmitted.

[25] The history of Hinduism is traditionally divided in different periods: the Vedic period, started from about 1750 b. C.; the formative period of Hinduism, between 800 b. C. and 200 b. C.; the Puranic period, from c. 200 b. C. to 500 A.D., also known as the 'Golden Age' of Hinduism, coinciding with the Gupta Empire; the Middle Ages, from roughly 650 to 1100, when the Islamic domination began.

[26] It is a collection of essays of Hindu devotional scholars, concerning philosophy as well as the religious practices believers have to follow in many field, such as meditation, yoga, mantras, temple construction and deity worship.

religious provisions, analyzing Hindu scriptures when defining whether the distinction among worshippers is essential or not for Hinduism, and taking the responsibility of deciding from which ceremonies untouchables may be excluded according to these sources.

More than sixty years later, this precedent is still valid, as confirmed by a 2016 Bombay High Court's decision,[27] ruling that the trustees of the Haji Ali tomb could not bar women from entering the inner sanctum. The Court, clearly recalling the Supreme Court reasoning, states that the constitutional protection of religions applies only to those rules that are 'an essential and integral part of the religion' and therefore, as the Koran does not prohibit women from entering mosques or tombs, the trustees of the Haji Ali Dargah Trust could not bar women from entering the inner sanctum nor pretend any constitutional protection for this ban.

The rules concerning temples, in effect, often gave the Court materials for applying the 'essential practice' test. For instance this was the case in *Durgah*,[28] when the Sufi Muslim Khadims of the shrine of Moinuddin Chishti in Ajmer[29] challenged the *Durgah Khawaja Saheb Act* of 1955 supposing it violated the religious rights of the Muslim Sufi Chishtia order by taking away their rights to manage the properties of the shrine and to receive offerings from pilgrims. In this occasion, Justice Gajendragadkar looked at the history of the Ajmer shrine and, even recognizing the Chishtia order as a religious denomination, affirmed that since the pre-Mughal period its administration had always been conducted by officials appointed by the State and thus the appealed Act was declared consistent with the Constitution and the violation of the religious rights was not recognized. The essential practice test was relevant for the note of caution introduced in the majority opinion, stating that sometimes there are practices, even secular ones, usually considered as part of a religion, which actually are just superstitions, unessential to the religion and hence excluded from the protection of the Constitution.

This reasoning evidently represents an interesting step forward for the Court, which not only confirmed its role in defining what is essential or not to the religion, but also recognized to itself the ability to rationalize religion and to purge it from mere superstitions.

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[27] Bombay High Court, Public Interest Litigation n. 106/2014, 26 August 2016.

[28] *Durgah Committee v. Hussain Ali* (1961 AIR 1402).

[29] Moinuddin Chishti (1141 - 1236) was an Islamic scholar who worked as an Imam in South Asia and finally settled in Ajmer. He introduced the Chishti Order of Sufism in India and had, among his followers, several Mughal emperors.

In the same vein, in *Sardar Syedna*[30] concerning whether excommunication can be considered an essential practice for the Shia sect Dawoodi Bohra, the Court read Koranic provisions together with the principles affirmed in the 1948 Universal Declaration on Human Rights and argued that this kind of practice is contrary to both and also 'out of date in modern times'. Therefore, considering that excommunication may endanger the civil rights on property management of the excommunicated, the Court confirmed the legitimacy of the challenged *Bommay Act* prohibiting excommunication and rejected the appeal of the petitioner.

The issue of the distinction between superstition and religion came again into question in *Tilkayat Sri Govindlaji*,[31] when the Court, confirming its self-confidence in distinguishing secular and superstitious practices from religious ones, reiterated that the positions expressed on contentious practices of religions by the appellants cannot be considered as the true interpretation of what a community considers an integral part of its religion because the community itself may speak with more than one voice. Indeed, quoting again the Australian case *Adelaide Company* and affirming that what is religion to one believer may be superstition to another, the Court confirmed that it is its specific duty to analyze if the practice is an essential part of the religion, extricating religious practices from secular ones.

This attitude of the Court in deciding on very controversial cases by self-attributing the competence in ascertaining the content of a religious belief and the interpretation believers have to have remained constant in the case-law. In 2015, for instance, a three-judge bench rejected two public interest litigations (PIL), respectively filled by a catholic nun excluded from taking a test because of her refusal to take off the veil and by the Students Islamic Organization of India, on the ground that 'faith will not disappear' if one does not wear the veil for a short period with the aim of respecting rules established to ensure the fairness of a procedure.

The Court has used a strong, and often restrictive approach, also when deciding on the recognition of the status of religious denomination to some groups. In *Shastri Yagnapurushdasji v. Muldas*, the Court affirmed that the claim of this Satsangis group to be recognized as an independent denomination following the teaching of Swaminarayan was 'founded on superstition, ignorance and complete misunderstanding of the true teaching of Hindu religion and of the real significance of the tenets and philosophy taught by

[30] *Sardar Syedna Taher Saifuddin Saheb vs. State of Bombay* (1962 SCR Supl. (2) 496).

[31] *Tilkayat Sri Govindlaji v. State of Rajasthan* (1964 SCR (1) 561).

Swaminarayan himself'.[32] The decision of the Court to refuse the recognition as religious denomination to this group, however, may be considered a consequence of the consolidation of its case-law, which progressively resulted in a conservative attitude excluding several religious groups from obtaining the official identification as religious denomination. It was particularly evident in *S.P. Mittal*,[33] when the majority opinion ruled that 'the teaching of Sri Aurobindo represented only his philosophy and not a religion', therefore denying his followers the religious denomination status. Nevertheless, Justice Chinnappa Reddy, the author of the minority opinion, put in the pillory the decision of the Court by arguing that the concept of religion cannot be 'confined to traditional, established, well-known and popular religion', explicitly referring to Hinduism, Islamism, Buddhism and Christianity, but must be interpreted in an expansive way.

Despite this objection, the Court continued to follow the conservative approach, as evident in the series of appeals concerning the Ananda Margis group and the recognition of the *tandava* dance. At first, in 1984 *Jagadishwaranand* case,[34] the Court recognized to Ananda Margis[35] the religious denomination status and affirmed that its typical dance, the *tandava*,[36] is part of the related rites but, because of the recent affirmation of this worship, the dance cannot be considered among its essential elements. However, in 1990 the Calcutta High Court unsuccessfully asked the Supreme Court to reconsider the decision, taking into account that *tandava* was mentioned in Hindu literature, which the Court should carefully consider in order to avoid that 'religious practice would become what the courts wish the practice to be'. Then, in *Commissioner of Police vs Acharya J. Avadhuta* (2004),[37] the Supreme Court discussed again the issue denying once more to *tandava* the qualification of essential element. Though the majority opinion considered *tandava* as a simple superstructure and not an essential part of the religion – which in the opinion

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[32] 1966 SCR (3) 242. Etymologically, *satsang* means "meeting for seeking the truth". As in Hinduism the convention of a group for common meditation and prays is considered among the means to reach the salvation, the establishment of several groups following the teaching of a specific leader is a common practice among the believers.

[33] *S.P. Mittal v. Union of India* (1983 SCR (1) 729).

[34] *Jagadishwaranand v. Police Commissioner*, Calcutta (1984 SCR (1) 447)

[35] Spiritual community, whose name roughly means 'for the diffusion of the bliss path', founded during the first half of the Fifties by Prabhat Ranjan Sarkar in the Indian State of Bihar.

[36] The name indicates the dance Shiva did to begin the circle "creation, preservation, dissolution". In its Ananda version, it commemorates the creation of the universe.

[37] *Commissioner of Police vs Acharya J. Avadhuta* (case n. 6230 of 1990, decided by the Supreme Court on 11 March 2004).

of the Court have to be composed by the core belief and by those practices fundamental to follow the belief – the dissenting opinion arose some doubts on such a rigid application of the test. Notably, Justice Lakshmanan underlined that since essential practices are those 'accepted by the followers of such a spiritual head as a method of achieving their spiritual uplifting, the fact that such practice was recently introduced cannot make it any the less a matter of religion'.

In the light of this restrictive approach in the identification of the essential elements of a religion, the Court also affirmed that the management of religious institutions is not an essential part of religious practices, thus enlarging the State's influence on them. In *Bramachair Sidheswar Bhai*,[38] the Court stated that the establishment of educational institutions for the Ramakrishna Mission is not an essential practice of this religious denomination as well as the customary procedures to nominate the head of said educational institutions, so that the State may intervene in the selection procedures without infringing the constitutional provision on freedom of religion. Similarly, in *A.S. Narayana Deekshitulu*,[39] the Court affirmed that the appointment of the head of a Hindu temple according to hereditary rules does not represent an essential part of the worship; hence, the State's intervention in this field must be considered consistent with the Constitution. Finally, following the same reasoning, in *Pannalal Bansilal Patil*[40] the administration of religious institutions was defined as a secular activity, out of religious practices.

5. *Concluding remarks*

The 'essential elements of religion' doctrine represents a very relevant tool for the evolution of the interpretation of a fundamental principle, secularism, which has played a pivotal role in the definition of post-colonial India's identity.

Indeed, when establishing it during the Fifties, the Court seemed to strictly follow Nehru's idea of a free play for all religions, rejecting a too narrow definition of religion and allowing each religious denomination to define the essential practice of its worship. In the following decade, however, the Court recognized protection only to those religious practices suitable for

[38] *Bramachair Sidheswar Bhai vs State of West Bengal* (1995 SCC (4) 646).

[39] *A.S. Narayana Deekshitulu v. State of A.P.* (1996 SC 1765).

[40] *Pannalal Bansilal Patil v. State of A.P.* (1996 SC 1023).

modernization, thus stating a strong distinction between religion and superstition notwithstanding the opinion of the concerned religious denominations. During this period, the consistency with constitutional provisions of the Acts regulating the intervention of the State in the administration of temples was also affirmed. Such interpretation consolidated during the Eighties and the Nineties, probably because of the increasing political influence of Hindu nationalism,[41] which shifted the Court's role from the interpretation of the content of religion and the purge of irrational elements to the legitimization of the State intervention in religious affairs.[42]

In effect, in a general perspective, the consolidation of Hindu nationalism represents a great challenge for the Court, which already in 1994 had to remind the relevance secularism has had for the definition of the Union and to highlight that 'The ideal of a secular State in the sense of a State which treats all religions alike and displays benevolence towards them is in a way more suited to the Indian environment and climate than that of a truly secular State by which [is] meant a state which creates complete separation between religion and the State'.[43] Actually, the Court not always proved to be immune from the influence of the rising Hindu nationalism, as demonstrated in *M. Ismail Faruqui v. Union of India*,[44] when Justice Verma, charged to write the majority opinion, in spite of the will of safeguarding the idea of secularism entrenched in the Indian Constitution, finally supported its interpretation according to the Hindu approach, at the point of quoting a speech of the then Indian President Shankar Dayal Sharma stating that Indian secularism has been drawn mainly on Hindu scriptures, whose principle of religious toleration represents an integral feature of Indian secularism.[45]

Therefore, it is possible to agree with the Indian legal doctrine that the 'essential practice of religion' test allowed the Court for solving several issues deriving from the vagueness of the Constitution, such as defining which practices are deemed to be constitutionally protected as expression

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[41] I chose to use this translation for the concept of *Hindutva*, which actually expresses the idea of a dominant Hindu majority tied up by common ethnicity, language and religion.

[42] See R. Sen, *Legalizing Religion*, 29.

[43] *S.R. Bommai v. Union of India*, (1994) 2 S.C.C. 1, at 146. In *Bommai* the Court also states that secularism is part of the basic structure of the Constitution, another fundamental doctrine the Court elaborated in the mid-50s.

[44] 1995 S.C. 605.

[45] For a comment on this interpretation of secularism by Supreme Court and on the influence of Hindu nationalism on its adjudications, see R. Kapur, The 'Ayodhya' Case: Hindu Majoritarianism and the Right to Religious Liberty (2014) Maryland Journal of International Law 29, 305-365.

of the religious freedom or legitimizing the public purposes of the State, but at the same time it introduces a sort of arbitrariness in the hand of judges.[46] Nevertheless, the latter is a peculiarity existing not only in India, as almost in every country when Courts have to judge on claims concerning religion they finally have to ascertain what is essential to that tradition and what is not.[47]

In this difficult and sometimes arbitrary task, previous adjudications of homologues may represent points of reference. For this latter reason, the doctrine elaborated in India is also relevant when studying the effect of cross-fertilization,[48] both because of the foreign influences discussed for its elaboration and for its migration in other legal systems, notably in Pakistan and Malaysia.[49] Such a circulation of models demonstrates the impact that globalization has had on Courts' adjudications,[50] as they cannot avoid of discussing the comparative arguments put forward by the appellants nor of relying on foreign precedents and doctrines when concerning the same topic they are adjudicating. However, although it is true that 'those who interpret local constitutional traditions take a lively interest in how their counterparts in other jurisdictions interpret their own traditions',[51] it is worthy to note that Indian interpreters are not prone to a simply reception nor they merely cherry-pick only those decisions that may fit with their point of view.[52] Indian judges deeply discuss foreign interpretations and, when deciding to follow them, they provide adaptations to domestic situations. Thus, when deemed appropriate, the comparative and foreign arguments become tools for interpreting national provisions in the light of international standards or trends.

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[46] See J.D.M. Derrett, *Religion, Law and the State in India* (London: Faber and Faber, 1968); P.B. Mehta, 'Passion and Constraint: Courts and the Regulation of Religious Meaning' in R. Bhargava (ed.) *Politics and Ethics of the Indian Constitution* (Oxford, Oxford University Press, 2008).

[47] W. Sullivan, *The Impossibility of Religious Freedom* (Princeton, Princeton University Press, 2005). The most evident proof of this assumption is represented by the case-law of the European Court of Human Rights on the wearing of the Islamic headscarf.

[48] See: S. Choudhry, *The Migration of Constitutional Ideas* (Cambridge, Cambridge University Press 2006).

[49] I discussed this migration in V.R. Scotti, The 'Essential Practice of Religion' Doctrine in India and its application in Pakistan and Malaysia (2016) *Stato, Chiese e pluralismo confessionale* 5.

[50] See A. Slaughter, 'A Global Community of Courts' (2003) *Harvard International Law Journal* 44; A. Slaughter A., *A New World Order* (Princeton, Princeton University Press 2004).

[51] A. Brudner, *Constitutional Goods* (Oxford, Oxford University Press 2004), viii.

[52] On the foreign models 'inspiring' the Constitution of India, see V.R. Scotti, 'India: a 'critical' use of foreign precedents in constitutional adjudication', in T. Groppi and M-C. Ponthoreau (eds), *The Use of Foreign Precedents by Constitutional Judges* (Hart, Oxford 2013).

Conclusively, it may be argued that, though passible of some criticism, the 'essential elements of religion' doctrine is another sign, together with the renowned 'basic structure of the Constitution' doctrine, of the activism of the Indian Supreme Court and of its contribution to the definition of the pillars of the independent India's legal system.