UNDERSTANDING FREEDOM OF RELIGION: ENGENDERING THE ESSENTIAL RELIGIOUS PRACTICES TEST

Written by ***Poonam Bishnoi***

Research Scholar, Maharaja Ganga Singh University, Bikaner, India

ABSTRACT

Article 25 guarantees a fundamental right to all its citizens to religions practices. The Supreme Court of India has developed the Doctrine of Essential Religious practices ("ERP") to interpret the religious freedom clauses. The paper argues that the ERP doctrine is dysfunctional because as a legal dynamic it is leading to a desecularization process where in it breeds discrimination between genders through its approaches and methods. The paper also suggests alternative normative model. The model suggested by the author to be adopted in the interpretative attempt can be one that achieves the constitutional morality. The model will explore the meaning of constitution to situate the harmonious outlook that judiciary has failed to achieve in its constant attempt to resolving contestation between claims of religious nature by applications of the ERP doctrine. The doctrinal analysis of recent cases through the theoretical lens of constitutional values will lay bare the problem in the gender context. This paper brings out the analysis of Religious Freedom clauses and the Doctrine of Essential Religious Practices authored by the Supreme Court as a mechanism for interpretation of the extent of religion, its boundaries and scope for distinction of the religious form the secular and how these inquiries are not geared to design the cause of gender justice. The Triple Talaq case will be object of analysis to illustrate the ill impact of the doctrine of ERP, however noble the outcome may have been.

Keywords: Essential Religious Practices test, Constitutional morality, Gender Justice, Secularism.

INTRODUCTION

Religious Freedoms is not contingent only upon the laws of nation. The dull compulsion of social relations and informal pressures of conformity, exerted in a pervasive almost unconscious way, perhaps determine the extent, the limits of permissible religious reforms in a society. This paper brings out the analysis of Religious Freedom clauses and the Doctrine of Essential Religious Practices authored by the Supreme Court as a mechanism for interpretation of the extend of religion , its boundaries and scope for its distinction form the secular.

MEANING OF CONSTITUTION

The *transformativeness is the idea of constitution.*

At the outset I begin by exploring the meaning of constitution and what lies at the core of this concept called constitution that has become so intrinsic to modern polity. The Supreme court has observed in *Navtej Singh Johar v. Union of India in para 95*[i]:

"the purpose of having a constitution is to transform the society for better and this objective is the fundamental pillar of transformative constitution."

Gautam Bhatia argues that the Indian constitution is transformative because it sought to reconstruct the State and society. Explaining the Indian Society he said the Indian constitution is transformative in the sense because it recognised that State has never been the only locus of concentrated power in Indian society. Indian society has always been characterised by layered sovereignty. Hierarchies were established and maintained by self regulating communities taking multifarious forms, primarily caste. Thus the constitution sought to remedy this power imbalance by the Horizontal rights provisions which are enforceable against groups, and private parties, not just State. [ii]

There are two central features of constitution. The first important feature of constitution is that a constitution acts as limitation on power. It is clarified that the manner to describe power in this article is not power of state rather its very naïve to argue that constitution limits the power of State, naïve because implicit in this argument is the assumption that power of sovereign is

the only form of power worth considering, but it has been suggested by several scholars that power can manifest in several forms. Bhatia s states that the reality of India is that freedom and equality can be suffocated not just by governments but also traditional authority and religious practices.[iii] He explains that:

"*the Indian constitution is transformative in the sense because it recognised that State has never been the only locus of concentrated power in Indian society. Indian society has always been characterised by layered sovereignty. Hierarchies were established and maintained by self regulating communities taking multifarious forms, primarily caste*."

This explanation that it's not only sovereign power that is important. because that is how we have understood part 3. For example if we read article 12 the entire edifice of part iii is premised on this public and private dichotomy, barring a few exception of article 15(2), 17, 23, 24, 21 of the constitution of India which can be seen as guaranteeing protection against violation of fundamental rights against the private entity rather the entire jurisprudence of fundamental right has been based on state v individual understanding of fundamental rights and this state v individual is what we call vertical application of fundamental rights. Now this public and private dichotomy became important to understand what is it that part III wants to limit? Does it want to limit the exercise of power by public or does it want to limit the exercise of power by private. because challenging this public/private dichotomy is very essential when we talk about engendering the essential religious practices test. It becomes very important to understand whether the public/private dichotomy prevents assertion of rights by women in part III and do we need to challenge this public private dichotomy in order to move beyond the structural inequality and discrimination suffered by women. So my first premise is an idea which is very intrinsic to the *idea of constitution is that constitution is aspirational*.[iv] So constitution is not supposed to reflect the practical social reality or mould itself in accordance with social reality. It does not mean that those realities don't impact the constitution making process. The task for the people is to use the constitution to elevate the reality to match the aspiration and not compromise with the aspiration. So that it may echo the social reality. So in that aspect the constitution is charged with resisting the culture of domination and of ensuring that the aspiration of marginalised are translated into tangle reality and if not translated at-least it is very foundational to the idea of constitution that it provides legitimacy to that aspiration, even if it fails to translate into reality. Now this charge of unpragmatic interpretation of

constitution needs to be taken up with caution. In the judgment of *Suresh Kaushal* [v]wherein one of the argument given by the judgement for not reading down 377 is that the claim affects miniscule minority and therefore discrimination is something that need not be considered by judiciary. A similar argument is being made both in the review petition of Indian *young lawyers association*[vi] and also in the dissenting opinion of J. Indu Malhotra when it was being argued that the individuals who have approached the court are not followers of that belief and that's why judiciary need not intervene in matters of religious practices. In her words she states:

"The right to move the Supreme Court under Article 32 for violation of Fundamental Rights, must be based on a pleading that the Petitioners' personal rights to worship in this Temple have been violated." [vii]

Her concern would open the floodgates for "interlopers" to question all kinds of religious beliefs and practices, something that would cause even graver peril for "religious minorities." Malhotra J. then sums up:

"The right to equality under Article 14 in matters of religion and religious beliefs has to be viewed differently. It has to be adjudged amongst the worshippers of a particular religion or shrine."[viii]

So, this charge of unpragmatic constitutional interpretation what it does is that it forces us to concede ground and when we concede we fail the aspiration of those who are making unpopular social claims. Now this is trap a we keep falling into and is to be avoided. We keep trying to justify the practical worth of constitution and justify that constitution should echo the social reality, instead of trying to project constitution as aspirational value something that social reality something that the social reality must try to match to. Now justifying that social reality and constitution mirror each other is a trap that one needs to avoid at all costs. And constitutional interpretation need not take up the task of ensuring that constitutional aspiration always go in which social reality. The gap will always exist. The aim is to bridge the gap and so the idea of constitution must also carry this critique of unpragmatism with pride.[ix]

Gautam Bhatia also responds emphasizing that "interpretation of constitution must go beyond the bare text of constitution, and recognize the transformative vision of constitution which is to a guarantee to repudiate gender discrimination."[x] So this is how I would like to introduce

the idea of constitution. That the idea of constitution is first that it is a limitation on power and power from anywhere whether found in public or private and second that Constitution is aspirational. Now we go to the two main questions around which this article's discussion would revolve. Both are simple yet complicated.

READING THE SCOPE AND EXTENT OF ARTICLE 13 AND ARTICLE 25

Before we delved into the two questions that will be addressed in this part it was essential to underline that for any attempt to understand the scope of religious freedom must be in the context of an understanding the Vision of constitution and the vision as I have argued above is that of tranformativness that is the core of how to make meaning of the rights and freedoms guaranteed under the constitution. Now here we take up our inquiry of two important questions that is

1) Whether Personal law is a law under article 13(1) of the constitution.

2) Whether ERP test is in conformity with article 25 of the constitution.

Now we will see the response to these two questions by judiciary. The response to these two questions by judiciary has influenced women religious rights to a large extent. This questions are understood by interlinking the above fleshed out transformative vision of constitution with the idea of religious freedom and idea of women equality rights. How do these three different overlapping ideas coincide with each other in our constitutional journey is something that can be understood by analysing the response of judiciary to these three questions.

Let's begin by analysing the legal provisions from two points of view by doing a textual and the contextual analysis. Firstly, we will concentrate on the text of the constitution Both in case of Article 13 and 25 of the constitution

- ***Whether Personal law is a law under article 13(1) of the constitution:***

We shall address the first question: whether personal law is a law under article 13?. Now this has been a matter of discussion for a long time and it started with Bombay high court decision *State of Bombay v. Narasa Appa Mali*[xi] which was in response to a claim challenging the validity of Bombay prevention of Hindu Bigamous Act 1946. It's a 1951 Judgement court conducted an extremely interesting analysis of article 13. It explained that Article 13 defines what is law and that definition of law under article 13 does not include the term personal law.

Now both Article 13(3) clause (a) and clause (b)[xii] do not explicitly include personal law though it is an inclusive definition. Inclusive definition means it can include something apart from what is mentioned. But there is an omission of personal law. So what we need to understand is how this entire relationship of personal law *vis a vis* PART III of the constitution emerged. It emerged in the *narasa appu mali* case wherein what the court held was that the term article 13(3) doe-not include personal law because if constituent assembly would have wanted to include personal law expressly it could have been stated therein. The omission or absence of personal law from article 13(3) implies that the intention of constituent assembly was not to make personal law a subject matter of part III and because it was not a subject matter of part iii of constitution therefore what happens is that you cannot challenge these personal laws for violating part iii of constitution. Because article 12 and 13 are like the gatekeeper of part iii of the constitution that is in order to prove that there is a violation of fundamental right, you either have to prove that the violating entity is a 'state'. Or prove that 'Law' in question are within the fold of article 13. Now by excluding Personal Law from article 13 of constitution, what the judiciary did in *Narasu appa mali* was that it removed a very big chunk of laws from being challenged on grounds of being in violation of article 13 and this is something which is being reiterated and reinforced until 2020 in *Triple Talaq Case*. Now the biggest example how judiciary has kept out Personal laws from ambit of article 13 can be seen *in shayara banu judgement*[xiii]. Shayara Banu judgement is an extremely interesting judgement because while there is concurrence in the outcome there is no concurrence in ratio, which is invoked to arrive at this decision. The court's opinion was divided by 3:2 majority. J kehar and S.Abul Nazeer formed the dissenting opinion .

Nariman and **Lalit JJ** agreed that the 1937 Act codify triple talaq under statutory law and not personal law and so concluded triple talaq (as codified by the 1937 Act) violate the Constitution because 1937 Act which included the statutory sanction of triple talaq) *"would be hit by Article*

13(1) unless triple talaq was saved by article 25. And J Kurian states that under Indian jurisprudence, Article 25 only protected "integral" or "essential" aspects of religion and trple talaq was not considered an essential religious practise.

While Kurien Joseph J., and Khehar and Nazeer JJ pronounced that 1937 Act did not codify triple talaq under statutory law, J Kehar and J Nazeer ruled then is triple talaq part of Muslim personal law– that is, is it uncodified Muslim personal law and so concluded it cannot be tested under the Constitution and also held that it any event triple talaq is protected under the Article 25 as an essential religious practice of Islam. while J kurian said that it is not a part of personal law and not protected as essential religious pratise and thus would not be protected under Article 25. Thus there is a majority in terms of outcome (3:2), a different majority on the interpretation of the 1937 (3:2) Act, but no majority for the reasoning leading up to the outcome.

The minority Judgment delivered by J Kehar focussed excessively on idea that personal law is not a law under articel13 of constitution and therefore this law can't be challenged for violating part III. This enunciation of Supreme Court was noted by Mustafa and Sohi as an appreciation of the diversity and plurality of India. [xiv]They said that

"*[shayara Bano] judgment is indeed the high-water mark of freedom of religion in India. The Chief Justice explicitly held that 'personal law' has constitutional protection. This protection is extended to 'personal law' through Article 25 of the Constitution. It needs to be kept in mind, that the stature of personal law is that of a fundamental right."*

However Gautam Bhaita critiques the opinion of J Kehar wherein he raised the Personal Law to the stature of Fundamental Right because the effect of holding that "personal laws" are protected under the Constitution's religious freedom guarantee is would compel the supreme court to be the custodian of personal law and defender of those laws along with the other constitutional rights that are aimed at a more egalitarian order which may be in stark conflict with the personal law system. This seems to be a negation of the very basic meaning of secularism.[xv] He states how can "personal law" have the "stature" of a "fundamental right"? Rights under Article 25 belong to individuals, not to "laws". As per Bhatia Article 25 does not confer constitutional protection upon personal laws. [xvi]

Similarly you find the Majority opinion focussing on different **ratio** to arrive at conclusion that Triple Talaq is unconstitutional. Mustafa and Sohi point to the opinion of J Kurian and state that "*Justice Kurian went a step ahead and said that subject to restrictions, the freedom of religion under the Constitution of India is absolute on this point*."[xvii]

In other words J. Kurian expressed that that Triple Talaq is not recognized in the shariat and not recognised by Quran and therefore because it is not part of Personal Law, therefore it is unconstitutional.[xviii] In the J Nariman opinion though J Nariman only opined but did not use it as Ratio to conclude that Triple Talaq is unconstitutional. However what J Nariman definitely did was to lead open this question of need to revisit the ideas that personal laws is not law. In Justice Nariman's judgment though his refusal to consider the question of whether personal laws are subject to the Constitution although, in paragraph 22, he specifically casts doubt on the correctness of *Narasu Appa Mali*, and opines that it might need to be reviewed. [xix] Under article 13 of the constitution. Ratio of J. Nariman rather said that Shariat act is codification and because it is codified it's a state action and every state action/(mind you not religious law/pl) is subject to application of part iii. So that's how he made Shariat act amenable to challenge of article 14. So even the he did not take the route of arguing that Personal Laws are laws in article 13 rather he took the legislative route that because shariat act is a legislation and legislations are amenable to part III of the constitution.

Gautam Bhatia argued that a judgment invalidating triple talaq could either do it narrowly, through the 1937 Act and the essential religious practices test, or by taking a broad route, and reversing *Narasu Appa Mali*. Justice Nariman chose the narrow route, and in that sense, there is a feeling of a remarkable opportunity missed[xx]

But none of the judgements in Triple Talaq case delved into the question whether Personal Laws are laws under article 13 and therefore *Shayara Banu* is considered a missed opportunity because just by arguing that Personal Laws are laws under article 13, a lot of issues that arise with respect to applicability of part iii to Personal Law or religious personal law because personal law are intrinsically linked to religious law would have been resolved. And this would have given an avenue to women to challenge the structural discrimination that is perpetuated in the name of religion against women. They could have used this avenue to challenge the secondary position that is accorded according to religion to the women. So this golden

opportunity was lost in *Shayara Banu*. As a ray of hope there is a small para in *Shayara Banu* where in this question is led open that there is a need to revisit the ghost as J Chandrachud calls it *in Indian Young lawyers Case*.[xxi]He refuted the judgement of *Narasu Appa Mali* in *Sabrimala Judgment* to state that the *definition of law under Article 13(3) is an inclusive definition in its true sense and it would be insensitive to put a rigid and restrictive interpretation upon terms of wider connotation.*[xxii]

Now what is the benefit of this kind of interpretation. How can this small change interpretation of understanding of personal as law under article 13 of constitution change the entire dimension of women rights especially with respect to religion. This can happen because then all personal law would be subject to and questioned for violating part III of the constitution. This understanding is very much in sync with the manner in which article 25 is also drafted. We will come to that later as to How the text of article 25 has been drafted and how article 25 has been interpreted. So what we find in Article 13 of constitution by refusing to acknowledge personal laws as laws under part III, closes a lot of option which would be open to women challenging the discrimination aspects of religion.

- ***Whether ERP TEST is in conformity with article 25 of the constitution:***

Now having said about the text of article 13 lets go to text of article 25 now a very interesting development has happened over time a doctrine has been made a part of article 25 of the constitution and there are claims whether this doctrine should be part of 25 or not. Now for that we observe the text of article 25[xxiii] and 26[xxiv].

i. Understanding the Text of Article 25:

Now what article 25 says in clause 1 in isolation , a plain simple reading is that it says four important things and its only provision in entire part III that starts with “Subject to” Clause. That’s the beauty of article 25. And we need to understand why did constitution framers insert subject to in article 25:- “public order, morality, health and other provision of part III. So article 25 is subject to 4 aspects, there are 2 important points to understand of reading article 25. One is the limitations of article 25 that are in form of public order, morality health and other provision of part III of constitution. The text of article 25 seems to imply that article 25 is

subordinate to part III rights of constitution. Thus implying that Part III rights are going to determine how religious rights within the fold of art 25 operates.

Now article 25 (2a)[xxv] seems to do is it tries to bring about a disjunction between secular and religious practices. So it says secular acts are subject to regulation of state. But religious activities are not subject to regulation of state. At this point I suggest that we need to read clause 2(a) of article 25 not in isolation but along with clause (2b) .

To understand the Difference in clause 2a and Clause 2b is that state will not be prevented from implementing social reform or through opening of hindu religious institution of public character to all classes. And there does not seem to be a distinction being made in article 25 (2b) vis-a vis religious action and secular action. So while clause 2a of article 25 makes a distinction between religious practices and secular practices, 2b doesn't provide that distinction in the form of state not interfering with certain kind of religious practices , So state can interfere in religious practices, provided that the act of state is in pursuance of social welfare and reform.

Now let's go further and understand how art 25 and 26 have been understood by judiciary. Now let's start with art 25 (1) and 25 (2). In the *shirur mutt* [xxvi]a very interesting doctrine was brought into picture ERP. Now what ERP does is that it argues a that there is no perse difference between religious beliefs and practices. Religious beliefs are often manifested in form of religious practices.

So I don't think it would be proper to argue that religious practices and beliefs can be segregated, because many times it is the belief that are manifested in the form of practices. Now having said so lets see what ERP in *Shirur mut* judgement does. It makes a distinction between religious and secular and this distinction is very much apparent in clause 2a.Because 25 (2a) makes a distinction between secular and religious and that distinction is apparent in text but the manner in which this distinction of Religious and secular unfolded over years now guides the interpretation of article 25. Now this distinction which was part of 2a not just guides our understanding of 2a but is also included in the realm of clause 2b and 25(1.) Thus it means that State regulation is not only decided by culling out the distinction between religious and secular as permitted by text of constitution but state regulation is also decided by ERP test wherein state can regulate individual practise in 25(1**).** The next important question that arises is does Religious and Secular distinction doesn't matter for 2b of Article 25. Here also ERP

comes in. This is how ERP manifested: that is ERP will be immune from interference of judiciary. So as soon as you call a belief or practice ERP, judiciary will refrain itself, not only in context of clause (2a) but also in context of clause 2b and 25(1). A large part of argument in both *Shayara Banu* and Indian young lawyers association are premised on the fact that in *Shayara Banu* Triple talaq is an ERP and in *IYLA* denial of entry to women between age of 10-50 in Sabrimala temple is ERP so the entire argument is based on the claim that something which is erp will not be interfered with by the judiciary and will not be subjected to limitations put by constitution. So it's a very interesting development that has happened that something that is ERP Doctrine that was a distinction of Religious and Secular only under 2a, converts itself into an all permeating principle that guides not just article 25 (2a) but also 25(1) and 25 (2b).

ii. Understanding the text Article 26 and implication of absence of other provision of part III:

Now this becomes an extremely important question since article 26 doesn't include subject to does that mean that Art 26 stands in equal footing to art 14 and 21. This is a very interesting question, which the courts have answered in very clear terms.

So text of Article 26[xxvii] unlike the text of article 25 seems to say that while Article 25 is subject to part 3 provision of the constitution, art 26 is not . Now this is the textual reading of the Article 25 and 26.

I would attempt to answer the question does the absence of other provision of part 3 in art 26 imply it is not subject to part III. Now the manner in which we understand part III of constitution. This is how the interpretation has successively evolve is that we don't look at any provision in isolation. We understand part 3 as a fluid part III not water tight wherein each and every provision guides the interpretation of the other provision. As per Sen reading Justice Chandrachud held in Sabarimala that fundamental rights should be read as *cluster of rights* and not in isolation .[xxviii]

Now this is very relevant in how the entire debate of Article 14 has emerged and how this jurisprudence of anti discrimination laws has emerged where in what we argue is article 15,16 and 17 are nothing but the reiteration of the principle of article 14. So even if art 15/16/17

were not there the interpretation of Article 14 would have been in consonance with 15/16/17 because art 14 becomes the umbrella provision that guides the interpretation of 15/16/17, now a similar interpretation has been given by court where in it tries to harmoniously reconcile the apparent textual conflict in Art 25 and 26 , in *Devaru case*[xxix] in the manner in which courts have interpreted article 25 and 26 is that both are regulated by (2b).

Having said so another argument and which is in line with this idea of harmoniously construing and of upholding the interlink between different constitutional provisions of part III and not in isolation is that Article 25(1) is the clause that guides the interpretation of right to religion in subsequent clauses. So the umbrella provision being Art 25(1) where in the core of right to religious freedom is to be found in Article 25(1) and subsequent provisions have to be understood in the context of Article 25(1) and not in isolation of Article 25(1).

Thus I am arguing that article 25(1) would guide the interpretation of both 25(2) and 26. And this becomes extremely relevant in hoe we understand rather contextualise the text of art 25/26 vis-vis this ERP test. Thus so as I have already stated that that ERP test was used in *shirur mutt case* as a distinction of religious and secular matters but what happened subsequent to *shirur mutt case* is that a distinction which was just a distinction of religion and secular in text of Article 25(2a) was made overarching principle which guides our entire understanding of Article 25.

In conclusion it can be said that in a series of judgement unfolding subsequent to *Shirur mutt*, ERP test has been invoked time and again by courts in order to immunize certain parts of religion from the applicability of part III of the constitution.

INTERPLAY OF ARTICLE 13 AND ERP DOCTRINE

As we have seen above that there are two manner in which your religious codes of conduct and religion law and religion belief/practise are being immunized from part III. Firstly is not reading Personal Law as part of Article 13. What you do is you immunize an entire group of Personal Law from applicability of part III and secondly is by considering something as essential therefore limit scope and applicability of restriction of Article 25 and 26. And so that

is second way in which you immunize this sphere of religion. So the right under Article 25 operates as a parallel institutional structure at par if not supreme to the constitution. Such that constitution interpretation is not supposed to interfere with rights of religion being enjoyed by the community, especially those rights which are essential religious practices. And the aspiration of the constitution will not be implemented when it comes to ERP and Personal Law irrespective of the structural discrimination and structural lack of autonomy that it creates for marginalised within the fold of community itself. That is the problem with the ERP test that if right to religion was made subject to part iii , what ERP tries to is to elevate the ERP of religion to a status where in even part III becomes completely inapplicable. So personal laws can't be challenged under art 13(1) for violating FR. Now the interesting point is that almost all the decisions including *Shayara Banu* and *Sabrimala* rely on ERP to disapprove the claims that either Triple Talaq is not a part of Muslim law and to dispute the claim that disallowing women of 10-50 is something which is not ERP and by saying it is not ERP what they have done is legitimized ERP so despite the fact that there seems to be an inherent problem and contradicting in the ERP if you try to understand the ERP doctrine vis a vis the test of constitution. And also *vis a vis* the context of the idea of constitution the problem is that ERP test has been legitimized again and again by judiciary and also the lawyer who invoke the ERP to lay the claim that specific religious practice must be immunized form judicial intervention .

RESOLVING THE CLASH BETWEEN PERSONAL LAW, ERP AND CONSTITUTION: WHAT IS TO BE DONE

This is the problem when you don't read personal law as part of Article 13, part III becomes inapplicable. If something is considered ERP, part iii becomes inapplicable. So what we imply to say is that if something is Personal Law irrespective of the structural discrimination or violence it perpetuates against women that will be given legitimacy by the constitution. The constitution will legitimise discrimination and violence against women if that structural discrimination and violence can be proven to be Personal Law and can be proven to be a part of ERP so once you identify as ERP/Personal Law there is nothing much you can do by way of part III of constitution. Part III becomes redundant for a women asserting her right by arguing that her Personal Law is discriminatory or ERP is discriminatory so this is the inherent

problem of not recognising Personal Law as part of 13 because it leave a large domain of religion completely immune to part III of constitution.

Now one of the reasons that is generally advanced in order to not subject and not make personal law as part of III and to argue in favour of ERP is that if we implement Part III of constitution on all matters of religion including ERP we would be negating the right to religion because then constitution will determine what is legitimate and what is not legitimate in a religion. And a very valid argument can be made that when judiciary decides what is ERP, it doesn't negate the idea of religion by keeping the essence of religion protected..

Now there is some logic to this argument but the question is very simple. As a constitutional adjudicator what is the responsibility of judiciary. It is not to sit as theologist trying to answer and interpret what is religion. The obligation that has been cast on judiciary is very singular in nature apply the principle of constitution and not principles of religion. And a very valid argument can be made that when judiciary decides what is ERP, it doesn't negate the idea of religion. Again I say this is not the task of judiciary to understand what is religion. This goes back to the ideas of constitution. The two ideas of constitution: to act as aspiration to legitimize social claims howsoever unpopular it may be, howsoever against religion it may be, not worry about whether or not it will translate into reality because the translation of constitutional principles into realty would take a long amount time but the start begins from atleast legitimizing those unpopular social claims. And not denying them because they are not practical or not accepted by social practicability so we don't need to denounce constitutional aspirations due to impracticability of implementation. The validity and legitimacy of law cannot be challenged by efficacy of law.

- ***Constitutional morality a tool to limit the scope of religious freedoms:***

Constitutional morality must be the pedestal against which we determine the essentiality of the Religious Practices. J Chandrachud arrives at a formulation of constitutional morality which would include the precepts of 'justise, liberty, equality, fraternity and secularism, while J Malhotra formulation of constitutional morality is underlined by religious plurality.[xxx]

But What I'm arguing is completely different? I am arguing that there is no need of ERP test. The task of judiciary as adjudicator of constitution is not to go into essentiality of religious

practices. As the methodology of ERP they resort to is not resorted by theologist. Judiciary need to apply constitutional principles not religious principles in order to determine what law is. Rather the task be for them is very simple to determine the legitimacy of an act or omission on basis of constitutional principles. So we don't need to go into the essentiality of religious practices. It is not something that constitution should be bothered with. When there is contestation of a right within the fold of art 25 the task before judiciary is very simple:- to determine whether that religious practice is in conformity with the ideas of constitution. If they are both extreme ends of pole and no way of reconciling them then court will have to allow the constitutional aspirations and values to trump over religious rights and that is the task of judiciary. So yes constitutional morality is the only morality we are talking about and we don't need to go into the question of essential religious practices. Both because text of art 25 is very clear subject to part III. Though there has hardly been any analysis of the subject to other provisions of part III but in J. Chandrachud opinion in *IYLA* you will find a discussion on how art 25 is subject to part III of the constitution. But in most of judgments including *IYLA case* concurring opinion you don't find invocation of subject to part III to validate or invalidate the issues in question/ so judiciary will always answer via whether it is a part of ERP or not or whether it is violating public order, morality health but not " subject to part III". Is not invoked to legitimize or delegitimize a religious practise. So Constitutional Morality can be the only morality when it comes to applying constitutional principles when it comes to entertaining religious issues.[xxxi] Because judiciary is not a theologist. The religious community must decide what is essential or not. What the task however is to apply constitutional principles even if it comes to delegitimizing certain religious practices because it is very important argument in feminist Debate that while Law tries to remove discrimination in public it hardly removes any discrimination in private and by maintaining that public private debate it reinforces gender inequality. It is the private that is the root of all discrimination that are perpetuated against all women. They are only manifested in public. So we don't need to move from pubic to private but we need to remove discrimination form private in order to ensure that public is free from structural discrimination. Now what this ERP test reinforces is that because ERP is private sphere of religious community, the constitution cant apply its principles. So only when those structural discriminations that operate in public then constitution applies. So that is problematic if understood from assertion of right of women because most of the inequalities/discrimination against women are perpetuated in private. Now this brings us to important critique of law that

limited in is scope. I am not saying that law is panacea of all wrongs. Many times law itself perpetuates social inequalities. But law can be sued for legitimizing unpopular social claims. But we need to understand this entire argument of using law towards emancipation must be used with a disclaimer/rider that role of law is limited as we need to find other avenues to such prejudices and law can be one of the tool.

- ***Is Uniform Civil Code a Solution to the conflict of personal law and part III of Constitution:***

Keeping in mind the constant tussle between Personal Law and Freedom of Religion UCC as solution: as a solution. One of the major reasons why a claim for Uniform Civil Code is made is to address gender inequalities of personal law. This purpose can be achieved by simply reading Personal Law as part of 13.so since judiciary is keen on overcoming the ghost of *Narasa appa mali* as put by J. chardachud in *Sabrimala case* of reading Personal Law as part of 13 then the legislature must bring about a constitutional amendment inserting Personal Law in Article 13. So answer is simple. Make personal law amenable to Article 13 then all Personal Law becomes subject to part III so all discrimination perpetuated by Personal Law can be over some by simple solution by reading personal law as law Article 13. This would also take into consideration the diversity of practices in India.

To conclude it is not the task of judiciary to decide essentiality of religious practices rather the task of judiciary is to subject religious practices to public order, morality health and part iii as simply spelt out in Article 25. ERP impedes the progressive march of the constitution and impedes the materialization of constitutional aspiration which are suppose to progress in nature by immunizing a sphere form applicability of Part III of constitution. Review petition is pending.[xxxii] The issues are framed but these questions are not addressed. But I say the understanding of both these question is Personal Law is part of article 13 and whether ERP needs to be legitimised or reinforced by arguing the legitimacy of religion actions on the basis of ERP is important.

ENDNOTES

[i] Navtej Singh Johar v. Union of India, AIR 2018 SC 4321.
[ii] Gautam Bhatia, The Transformative Constitution: A Radical Biography in Nine Acts, HarperCollins, 2019.
[iii] Ibid.
[iv] Ibid.
[v] Suresh Kumar Koushal v. Naz Foundation, (2014) 1 SCC 1.
[vi] Indian Young Lawyers Association & Ors. v. The State of Kerala & Ors., 2019 11 SCC 1.
[vii] Id
[viii] Id
[ix] https://youtu.be/yo1PMMehBjU
[x] Gautam Bhatia, Supra Note 2.
[xi] AIR 1952 BOM 84.
[xii] Article 13 of Constitution of India 1950
[xiii] Shayara Bano v. Union of India, (2017) 9 SCC 1.
[xiv] Faizan Mustafa and Jagteshwar Singh Sohi, Freedom of Religion in India: Current Issues and Supreme Court Acting as Clergy, 2017 BYU L. Rev. 915 (2018), available at: https://digitalcommons.law.byu.edu/lawreview/vol2017/iss4/9
[xv] Gautam Bhatia, The Supreme Courts' Triple Talaq Judgement, INDIAN CONSITUTIONAL LAW AND PHILOSOPHY, August 22,2017, available at, https://indconlawphil.wordpress.com/2017/08/22/the-supreme-courts-triple-talaq-judgment/ (Last visited at March 6,2023)
[xvi] Ibid.
[xvii] Faizan Mustafa and Jagteshwar Singh Sohi, Supra Note 14.
[xviii] Shayara Bano v. Union of India, (2017) 9 SCC 1.(Kurian J).
[xix] Ibid.
[xx] Gautam Bhatia, The Supreme Courts' Triple Talaq Judgement, INDIAN CONSITUTIONAL LAW AND PHILOSOPHY, August 22,2017, available at, https://indconlawphil.wordpress.com/2017/08/22/the-supreme-courts-triple-talaq-judgment/ (Last visited at March 6,2023)
[xxi] Supra Note 6.
[xxii] Ibid.
[xxiii] Article 25, Constitution of India 1950
[xxiv] Article 26, Ibid.
[xxv] Article 25(2a), Ibid.
[xxvi] Hindu Religious Endowments, Madras v. Shri Lakshmindra Thirtha Swamiar of Sri Shirur Mutt, AIR 1954 SC 282.
[xxvii] Article 26 Constitution of India 1950
[xxviii] Sen, Aparajito, "Interpreting group-based religious freedoms: Sabarimala and the movement from definitions to limitations", NALSAR Student Law Review, (2021) 15. pp. 1-26, available at https://nslr.in/wp-content/uploads/2021/09/Vol-XV-Pgs.-25-50.pdf
[xxix] Sri Venkataramana Devaru and Others v. The State of Mysore and Others, 1958 SCR 895.
[xxx] Supra Note 6.
[xxxi] Anup Surendranath, 'Essential Practices Doctrine': Towards an Inevitable Constitutional Burial, Journal of the National Human Rights Commission (2017), https://nhrc.nic.in/sites/default/files/nhrc_journal_2017.pdf
[xxxii] Kantara Rajeevaru v. Indian Young Lawyers Association (2020) 2 SSC Online 158.