THE SISYPHEAN DILEMMA: ANALYZING THE TRANSIENT LANDSCAPE OF ESSENTIAL PRACTICE DOCTRINE VIS-A-VIS SANTHARA

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ABSTRACT

India has been characterized by diverse religion and faith, which leads to various customary religious practices being challenged before the courts of law. These customary practices are either nullified or validated in the eyes of law, taking into consideration their impact on social welfare and morality. The courts had developed the Essential Practice Doctrine Test to solve sensitive questions of religion but gradually the non-interventionist dispensations of the Courts have deviated from, with the ultimate effect of concocting the inferno wherein the Court plays the role of the interpreter of religions. The paper analyses the Essential Practice Doctrine's development and intent while inception in light of the current usage of the doctrine and establishes that there has been unrestrained use of power by the courts and that the Test must be reconsidered with a further elaboration of the disastrous consequences that its continuance may incur after the judgement given in the Nikhil Soni case.

Keywords*:* Essential Practice Doctrine, Santhara, Religious Freedom, Suicide.

INTRODUCTION

The hagiographic exaltation of the Doctrine of Essential Religious Practice enshrined within the ambit of Article 25 of the Indian Constitution has oft raised eyebrows and initiated contentious conversations within the legal diaspora. The practice may seem idiopathic to the dissenters and imperative to the fundamentalists. The Test of Essentiality is controversial insofar as it seeks to delineate the customary dispensations of religion into two categories- those which satisfy one of the myriad conditions of essentiality and conversely, those which do not. In this precarious religious scenario, only the former warrants constitutional protection, while the others prevaricate any constitutional inoculation for reasons of establishing tenuous links with religious austerity.[i]

PERVASIVE PERSISTENCE OF ESSENTIAL PRACTISE DOCTRINE

The Constitution of India bestows adequate respect to an individual's right to freedom insofar as religious involvement is concerned. The importance attached to this particular freedom can be adduced from the extension of this right of liberality in matters of religion to not only Indians but also those who are residents of India.[ii] The seriousness attached to the right is also evident from the criminalization of certain actions aimed at belittling a religion by classifying those acts as 'offences against religion' in the Indian Penal Code, the landmark of substantive criminal law in the country.[iii] The Constitution envisages the country as a secular nature whose intervention in religion should extend to only peripheral issues of religion. However, that is the idyllic estimation of the Indian secular model[iv]; the reality can be quite challenging.

The concept of Essentiality finds no explicit mention, rather it has been construed in the context of exigencies.[v] Consequently, the Indian judiciary has to contend with certain major issues in order to ensure the protection of those practices that adhere to the principles of essentiality while simultaneously implementing the religious freedom of the different denominations' operative with the territorial boundaries of India. These challenges include the need to define and decipher the term 'religion' in order to determine which practices deserve constitutional protection, the resolution of appeals against legislative enactments that serve as a diktat for the maintenance of religious institutions, and finally determinate adjudication of the contours of independence conferred upon institutions with religious affiliations.[vi] The unifying link between all these difficulties is imperative to identify the core tenets of the religion's

essentiality[vii] empowering the Court to act as interpreters of faith and implement the dissolution of practices that are in contravention to the 'dispensation of Constitution'.[viii]

One of the fundamental flaws in the application of the doctrine is the ambiguity surrounding the connotations of 'religion' whose very instrumentalities it avows to protect.[ix] The definition of the term in itself traverses from the belief in the supernatural being,[x] the bond that individuals share with their professed Creator,[xi] or the affiliation to established doctrines and practices; rooted in the acknowledgement of religion existing extraneous to theism.[xii] The varied judicial opinions expressed on religion offer a perspicacious revelation about the idiosyncratic fallacy of the doctrine. If the term religion creates such differing speculation, then how can one undertake the mammoth task of conclusively determining the essentiality of the religion, which has led to an insouciant inconsistency as far as the judiciary's perspective is concerned. [xiii]

Evolution of Essential Practice Doctrine

The persistence of the Essentiality Test does betray some innate need for its continuance in the context of constitutional governance. The engenderment of this principle can be encapsulated in the words of Dr. B.R Ambedkar, who had opined that the extensive religious conceptualizations on several aspects of life had the potency to dismantle the legislature's efficacy in introducing social reform.[xiv] This was succeeded by a multiplicity of judicial pronouncements wherein a different factum of interpretation of the doctrine would be accepted as the modified cynosure of the controversial mien of the 'essential practice' principle. In the *Ratanlal* case,[xv] the word 'religion' had been pondered and deliberated upon with the final decision interpreting it as the existent bond between an individual and his conscientious moral and ethical prerogatives. In the context of this interpretation of religion, it was assiduously asserted, however, that religion has to maintain a sangfroid co-existence between the constitutional conferral of freedom and the inherent secularism confined within the idealistic encapsulations of the Preamble. However, the next important case in the evolution of the exiguously developed doctrine followed a starkly contrarian approach. The judgement of *Shrimur Mutt*[xvi]was congruous with a wider interpretation of the vital constituents that comprised religion. Digressing from the conventional ideation of religion as a tangible demonstration of an individual's veneration for his creator[xvii], the Court instead defined religion as a transgression of the limitations of purveying the term from a doctrinal perspective. It

further stated that – '*A religion may not only lay down a code of ethical rules for its followers to accept, but it might also prescribe rituals and observances, ceremonies and modes of worship which are regarded as integral parts of religion.'* However, it is important to note that while attempting to preserve the precarious equilibrium of the dichotomous contradictions of religious essentiality and mandated secularism, the Court had opted for the imposition of stringent regulations upon the very institutions which would implement the novel inclusion of rituals and practices within the folds of the restrictive legality of religion. The essential practice doctrine was again discussed in *Sri Venkatramana Devaru v. State of Mysore*[xviii], a case concerning the question of whether the exclusion of untouchables[xix] from a temple can be considered as an essential practice. Although the court iterated the necessity of adherence to the principles of Equality, the Court also conceded the need to respect the founders of the temple i.e. the Brahmins who were desirous of conserving the practice of exclusion of the untouchables. The Court, taking cognisance of the intricacies of the religion and the believers' recognition of essentiality through the doctrine, had permitted the exclusion of the untouchables contingent upon the existence of special occasions despite the obvious optics of discrimination. Thus, the Court made the analogous estimation of 'essentially religious' with 'essential to religion'. The most important facet of the case, however, is the role of interpreter of religion assumed by the secular institution of the judiciary. Through an introspection of the available religious scriptures in order to determine the essentiality of the need to preserve the caste distinction, the Court sacrificed its neutral identity at the behest of identifying the core principles of Hinduism. The self-anointed role of the Supreme Court was further conflated in the case of *Durgah Committee*[xx], wherein the impugned legislation- Darga Khwaja Saheb Act 1955- was challenged on the grounds of violation of the fundamental rights of Sufi Chishti Muslims as the sole guardians of Moiuddin Chishti[xxi] in Ajmer. Although their religious rights failed to get constitutional sanction, it was the Court's contradistinction between secular and religious practices that contributed to the contemporary evolution of the doctrine. Apart from assuming the mantle of the interpreter of the subjective tendencies of religion, the case also evidenced the Court's self-indulgent dispensation towards bequeathing itself the gargantuan task of dissimilating religion into its rational components and identifying its distinctly religious components that fit with the majoritarian perspective. The case was portentous in the Court's metamorphosis from neutral adjudicator to conspicuous intervener with its role of rationalising religion to absolve it from superstitions.[xxii] The Court's eagerness to interject in matters of

religious sensitivity to fit the majoritarian perspective was further affirmed in the case of *Commissioner of Police vs Acharya J. Avadhuta*[xxiii] wherein the Court deliberated upon the qualification of tandava dance as integral to the sectarian interests of a religious denomination. The Supreme Court maintained that the doctrine is to be construed as per its ability to be coterminous with the core belief of a religion and the practices that adhere to the core belief. All others practices perpetuated in the name of essentiality of religion may be abnegated of any protection warranted by the grant of religious freedom. Thus, religion cannot be operative under the constrictive manacles of belief independently, it should also be interpreted so as to defer to those essential practices embedded within the familiar vicissitudes of religious dynamism.[xxiv]

This plethora of opinions expressed over the convoluted materialization of the substantiality of the devolution of Article 25 into the Essential Practice Test also reveals a clearly observable flaw that is the rubric of subjectivity that shrouds the determination of essentiality. Since religion itself is such a deeply individualistic entity, the lack of neutrality during the application of this doctrine is not only expected but also inevitable.[xxv] The perennial conflict between pluralism and constitutional morality cannot be salvaged by an incompatible instrument.

Curtailment of Religious Freedom

However, the protection is neither plenary nor unassailable. The right guaranteed under Article 25 can be availed on the contingency that the perusal of religious freedom should not undermine the principles of public order, morality, and health, as remarked by Shri Katrurianga Santhanam in the Constituent Assembly- '*Hitherto it was thought in this country that anything in the name of religion must have the right to unrestricted practise and propagation. But we are now in the new Constitution restricting the right only to that right which is consistent with public order, morality and health*'[xxvi] This statement was reiterated in the *T.M.A Pai Foundation*[xxvii] case, where it was held that the right provided under Article 25, is liable for curtailment if *'the exercise thereof is not in consonance with public order, morality and health'*[xxviii]. Hence, for a right to exist under Article 25 it has to satisfy the two conditions of essentiality and adherence to public order, morality, and health.

(a) Public order, Morality, and Health

The contingency of public order devolves from the acknowledgement that the subsistence of the protective shroud of constitutionally endowed rights is overtly reliant on an administration's ability to suffuse religious freedoms with peace and order. To ensure this, the State is empowered to regulate religious proceedings or even public gatherings as long as tangible evidence of virulent encroachment upon law and order exists.[xxix] The second restriction intended as an effective embargo on religious freedom is morality. Persistence of any religious practice anathematic to the ideal vignette of morality is onerous for democracy and should be exiled from any form of constitutional protection. Furthermore, the State's decision to not permit the unilateral exercise of religious freedom can be justifiably interpreted in the context of tumultuous Hindu Muslim relations within India. Both religions have the temerity to boast an impressive number of devout followers whose piety impresses upon themselves to perform religious celebrations and sacred functions which might manifest itself in the form of festivals or processions. However, the leadership for these religious denominations is localised and might be devoid of any form of effective leadership that emanates from a focal authority and thereby it might be difficult to regulate the proper conduction of such festivals. Furthermore, the fabric of Indian society is irrevocably woven with the ideals of idyllic secularism which demands equal respect for all religious affiliations.[xxx] In the case of *Public Prosecutor v. P Ramaswamy*[xxxi], the defendant had written articles that had adopted a pejorative appraisal of certain punishments permitted under the Quran such as being stoned to death for committing the offence of adultery. His criticism of Islamic traditions had distended to brandishing Allah '*a foolish and barbarous person'* and had subsequently invited the provisions of the aforementioned provisions of the Penal Code. The Court had opined that '*Courts have to be circumspect and pay due regard to the feelings and religious emotions of different classes of persons with different beliefs'* signalling the need for restraint on religious freedoms keeping in mind the multiplicity of religious identities in India. Therefore, the performance of all religious activities without any limitations is neither permissible nor practicable. Consequently, constitutional sanction has been superseded by penal provisions such as Chapter XV of the Indian Penal Code.[xxxii] One such practice that was morally reprehensible but perpetuated in the name of religion was the devadasi system that had prevailed in certain regions of India particularly South India. The practice involved dedicating young girls to the subservience of God by performing a spiritual marriage of the chosen girl with the deity of a temple. These girls would then be required to sing and dance to deities as

outward expressions of their innate faith. However, in reality, this practice devolved into the propagation of the derogatory practice of prostitution under the veneer of religious sanctimony.[xxxiii] To effectively curtail this desultory practice, the Indian Penal Code was amended to include the criminalisation of dedication of a girl as a devadasi.[xxxiv] This quest for abolition of devadasi system has been further aided by legislations such as Madras Devadasi (Prevention of dedication) Act, 1947.[xxxv] Even the Supreme Court has advised '*to strictly implement the directives to check such unethical practice*'[xxxvi] of devadasi. Therefore, religious freedom always has to subjected to the harsh and necessary implications of preservation of morality. The last limitation on religious freedom exists for the maintenance of health. All welfare states are burdened with the responsibility of striving for the optimum health of all its citizens. This is evidenced by the wide array of schemes that have been implemented by the present administration to counter any health-related challenges[xxxvii] This objective of the State cannot be compromised in the name of religion. The practise of Sati or sacrificial burning of widows at their dead husband's pyre[xxxviii] had posited similar hurdles insofar as the health of the practitioners were concerned. As a result, the practise of Sati has been outlawed[xxxix] despite being an established Hindu custom. Thus, for a practice to necessitate protection under Article 25, it first needs to ensure the non-violation of the above-discussed limitations.

Thus, the doctrine has morphed into a malleable instrument whose mutability as per the interpretations of the judiciary has contributed to its dynamism, rendering it incapable of consistency. The tortuous nature of its transition from a rudimentary principle to an instrument of imposition perseveres in the modern context as well. In the modern era, the microcosmic vignette of the doctrine offers multiple dimensions. It ranges from the inter-dependence of the religious exhibition of bursting crackers during Diwali[xl] to the attempt to criminalize a religiously mandated practice due to corrosive tendencies initiated by acts of avarice as seen in *Nikhil Soni v. Union of India*[xli]. The case of Nikhil Soni is particularly intriguing since it revolves around a recognizable Jain practice of santhara which speaks of gradual abstinence of food to inhibit the prolongation of life while simultaneously discussing the abrogation of the pietistic principles in a present-day practice. Through a thorough assimilation of religious texts and legal interpretations, this paper attempts to affix the position of santhara in Jainism as far as essentiality is concerned.

THE INTRACTABLE CONTROVERSY ENGULFING SANTHARA

The clash between judiciary and religious followers is a long old story as over the years, the judiciary has struck down numerous religious practices citing them to be not protected under Article 25 of the Indian Constitution[xlii] and also being against public order, health, morality. In recent time there has been a tussle over the vow of Santhara-Sallekhana, a religious practice in Jainism, where the person who observes this vow has to observe fast until death, against which a PIL was filed in the Rajasthan High Court for the case of *Nikhil Soni v. Union of India.*[xliii] The petitioner claimed that the practice of Santhara was is a direct violation of an individual's right to life under article 21[xliv] of the Indian Constitution because the person observing the vow of Santhara-Sallekhana was basically committing suicide by altering one's lifespan by unnatural means, and such practice is in violation of public order and health, cannot deem to be protected under article 25[xlv] of the Indian Constitution, instead, it shall be declared punishable under section 309[xlvi] of the Indian Penal Code, agreeing to petitioner's claim the Rajasthan High Court passed the order in the favour of petitioner and declared the practice of Santhara to be punishable under section 309[xlvii] of the Indian Penal Code. Following which a Special leave petition (SLP) was filed against the order in the Hon'ble Supreme Court, which was accepted and a stay order was passed against the Rajasthan High Court judgement. Now recently, the Hon'ble Chief Justice of India during the hearing of the on-going case Red Lynx Confederation v. Union of India has remarked that the attempt (in Santhara) is not to commit suicide but to liberate yourself from this miserable world.[xlviii]

This clear difference of ideologies and interpretation of religious practices among the Judges themselves is the very matter of concern which Justice M Rangnath very rightfully pointed it out way back in 1990 in his judgement of *Acharya Jagadishwaranand Avadhuta v. Commissioner of Police*[xlix], he observed that "*if the Courts started enquiring and deciding the rationality of a particular religious practice, then there might be confusion and the religious practice would become what the Courts wished the practice to be."* It is requisite for the Courts to understand the fundamental principles of the Jain religion and the rationale behind the actions of the followers of Jainism because dictating a religious practice to a punishable crime under Indian Penal Code just by what it prima facie looks like to be and not understanding the rationale and believes behind that practice is an injustice to the followers of Jain religion.

Affirmation of Santhara in Jain sutras

According to the text of 'Sarvarthasiddhi', which is the earliest extant commentary on Tattvarth-adhigama-sutra, also known as Moksha-shastra (is an ancient Jain text written by Acharya Umaswami, around 2nd – 5th century AD). The fundamental principle of Jainism is that 'Jiva' (soul) has consciousness and it is either in bondage (*samsarin*) or liberated (*mukta*). The means of achieving liberation is based on three different things.

सम्यग्दर्शन्ज्ञानचारित्राणि मोक्षमार्गः॥ १॥

Samyagdarśanajñānacāritrāni mokşamārgak (1)

Right faith, right knowledge and right conduct, these three jewels (*ratna-trayat*) together constitute the means of liberation. A pure liberated soul in its pure from is possessed of infinite faith, knowledge, power and bliss. The entire ethical code of Jainism is directed towards the attainment of liberation by cultivating on these three jewels (*ratna-trayat*), which are based on the five primary vows of the Jainism: ahimsa or non-violence, satya or truthfulness, asteya or non-thieving, brahmacharya or celibacy and aparigraha or non-possessiveness.[li] These 5 vows are to be followed by all the followers of Jainism, whether one is ascetic or a house-holder, he/she has to abide by them. In the case of an ascetic, they are to be observed with greater rigour. The vow of Santhara is based on these five primary vows and fundamental beliefs of the Jainism.

According to *Ratna-karandaka sravakacara*, which is one of the earliest Jain text, composed by Aacharya Samantbhadra Swamy, around second century CE. In simpler terms Sallekhana-Santhara is facing death voluntarily when one is nearing his/her end and when normal life is not possible due to certain specific situation such as old-age, incurable disease, severe famine, etc. one needs to subjugate all passions and abandon all worldly pleasures and attachments when one takes undergoes the vow of Santhara-Sallekhana. The basic concept underlying the vow is that a man is the master of his own destiny and should face death in such way that in his last moments of life, he prevents any influx of new karmas and simultaneously liberate his soul from the bondage of karmas, that he may still be clinging onto, by the observance of austerities gradually abstaining food and water also, and simultaneously meditating on the actual nature of oneself until the soul departs from the body.[lii] Following are the excerpts from the text of *Ratna-karandaka sravakacara,* which deals with Santhara-Sallekhana:

मारणान्तिकी सरनेनां जोषिता ।[liii]

"*The vow of Sallekhana should be adopted with pleasure when death is near at hand.*"

उपसर्गे दुर्भिक्षे नरसि रुजायां च निःप्रतीकारे ।
अर्मा तनु विमोचन माहुः सल्लेखना कार्याः ॥१२२॥[liv]

"*The holy men say that Sallekhana is giving up the body (by fasting) when there is an unavoidable calamity, severe drought, old age or incurable disease, in order to observe the discipline of religion*."

अन्तक्रियाधिकरणं तपः फलं सकलदृशिनः स्तुते ।
तस्माद्यावद्विभवं समाधिमरणे प्रयतितव्यम् ॥१२३॥[lv]

"*All systems of faith praise that it is the fruit of penance to control one's mind and conduct at the time of death; therefore, one should try to the best of one's ability to attain the glory of Sallekhana*."

स्नेहं में सङ्ग परिग्रहं चाप हाय शुद्धाः
स्वजनं परिजनमाप च क्षान्त्या क्षमथेत्प्रयैवचनैः ॥१२४॥[lvi]

"(*Prior to adoption of the vow), one should give up all love, hatred, companionship and attachment to possessions, with a pure mind, and obtain the forgiveness of one's own kinsmen and of others by sweet words while also forgiving them oneself*."

आलोच्य सर्वमेनः कृतकारितमनुमतं च निव्ण्याजम् ।
आरोपवेन्महानतमामरणस्थाथि निश्ोषम् ॥११५॥[lvii]

"*One should adopt the great vow (of Sallekhana) for the rest of one's life, after discussing with an open mind with one's Guru (preceptor) all acts of sins either committed by oneself or committed with one's consent or at one's instances*."

Jainism is a practical religion and it understands the idea of the process, therefore, a vow such as Santhara was not made mandatory for everyone to follow it rather it was optional and there were certain requisite conditions that needs to meet for one to observe the vow of Santhara-Sallekhana. Ancient religious leaders of Jainism such as Aacharya Umaswami, himself in his text of *Tattrvarthadhigamasutra* (which is a compendium of Principles of Jainism), laid down

that the vow of Sallekhana should be adopted most willingly or voluntarily when death is very near.[lviii] The vow of Sallekhana-Santhara is adopted for seeking liberation of the soul from the body during extreme times such as natural calamity, severe famine, old age or illness against which there is no remedy, and so it is prescribed both for ascetic and as well as the house-holder also. The purpose of Sallekhana is not giving up life rather it is much more like taking the death in its own stride.[lix]

During the period when one observes the vow of Santhara-Sallekhana, one needs to free his mind from all sorts of grief, fear, regret, hatred, affection, etc. and one shall be in an enthusiastic spirit in his mind. It is requisite that during the observance of the vow, one should avoid wishing for speedy death; or entertain the thought that death should come a little later; or entertain the fear as to how he would endure death; or entertain the thought of affection for friends and family; or wish for a particular kind of fruit as a result of penance. Every religious text that mentions Santhara-Sallekhana, gives references to the mental attitude of the person observing the vow of Sallekhana. One should be pure in thoughts and must have severed all connections from friends and family, he should have forgiven everybody and asked for everybody's forgiveness. A person observing the vow with right faith and right knowledge, would himself acknowledge that any attachments to family and friends would only entangle the soul with new karmas, therefore, it is essential to restrict oneself from performing any action that would fail the purpose of the vow.

LEGAL EXPOSITION OF SANTHARA

The aforementioned scriptures establish beyond doubt that the practice of Santhara has been an essential part of Jainism. The Rajasthan High Court in the judgement of Nikhil Soni[lx] interpreted the practice as an optional one in spite of the overwhelming amount of evidence suggesting otherwise. The Bench took upon itself to define the practice in its own terms and refused to consider Santhara as an essential religious practice in Jainism. This was one of the main reasons behind the stay put by the Hon'ble Supreme Court on the Rajasthan High Court judgement soon after it was passed. The religious practice of Santhara had also been challenged under Section 306[lxi] and 309[lxii] of the Indian Penal Code, for the attempt to commit suicide and its abetment but the challenge of the ancient practice of Santhara also raises important

constitutional questions under Article 21[lxiii] which deals with the mother of all rights that is the 'Right to Life'[lxiv]. The challenge of Santhara once again raises the fundamental question of whether 'Right to Die' is incorporated in 'Right to Life' under Article 21 of the Indian Constitution. In the light of Article 25[lxv] and the constant tussle between religious freedom of the Jains and judicial intervention in restricting religious practices which are supposedly under public health, order or morality. The analysis of the validity of the practice would be possible only by taking into consideration the religious texts along with the legal documents and precedents and further the implications of the practice on the society or the Jain community as a whole.

For the better understanding and testing of the religious practice, it is essential to establish a proper definition of the practice as such an ancient practice can have many variations and ambiguities. After a proper study of various Jain religious texts and Jain religious leaders, one of the most appropriate definitions of Santhara and Sallekhana has been developed. Santhara or Sallekhana can be defined as, *"Santhara or Sallekhana is a voluntary vow which can be taken either by a Jain ascetic or householder, where an individual facing imminent death due to old age, incurable disease, severe famine or natural calamity etc., subjugates all passions, abandons all worldly attachments and observes austerities and simultaneous meditation while gradually giving abstaining from food and water."*[lxvi] Deliberating on the philosophy of the religion, Jainism believes in rebirth and so the consequences of one's Karmas are dependent upon one's own good and bad thoughts, words and deeds alike.[lxvii] The basic logic behind the vow is that an individual is the master of his own destiny and must face death without any fear or worldly emotions and to prevent the influx of karmas even at the last moment of his life and thus taking a step towards the liberating the soul from the karmic bondage that it clings to.[lxviii]

Santhara against the backdrop of Constitutional provisions

The claim that gradual abstinence from food and water by an individual who has taken the vow of Santhara is in violation of Article 21 is baseless and legally unfounded. Article 21 of the Indian Constitution which ensures that no person shall be deprived of his life and personal liberty except according to the procedure established by law is in no way in violation to the Jain practice of Santhara.[lxix] An individual taking the vow of Santhara doesn't hope or wish for death or voluntarily wishes to die in any way, it is taken by an individual to whom death is

imminent due to old age, incurable disease, severe famine or natural calamity etc., and the individual only voluntarily decide to free himself from all worldly passions and karmic bondage and decides to spend his remaining days abstaining from food and spending the last days in meditation. Since the vow of Santhara doesn't deprive the individual of his life or personal liberty in any way and it is a religious vow taken voluntarily by the individual and the individual even has the choice of opting out of the vow,[lxx] the practice is in no way in violation of Article 21 of the Indian Constitution. The individual taking the vow of Santhara has no intent or wish for death, has death is imminent and the individual simply liberates his soul from the fear of death or the various worldly emotions and instead decides to spend his remaining days in meditation.[lxxi] The vow is a voluntary choice exercised by the individual and can in no way questioned as in it engrained in the religion of Jainism.

The above argument can be further advanced and analysed as, that denying a Jain from taking the vow of Santhara would be in violation of Article 21.[lxxii] Every citizen has the right to personal liberty under Article 21 of the Constitution, and every individual has the right to voluntarily decide his lifestyle unless it is against public health, order or morality. Under Article 21 of the Indian Constitution, 'Personal liberty' means the liberty of an individual to behave as one pleases except for those restraints imposed by laws and codes of conduct of the society in which one lives to safeguard the physical, moral, political, and economic welfare of others,[lxxiii] as held in the case of *Francis Coralie Mullin* v. *The Administrator, Union Territory of Delhi and Ors*.[lxxiv] The abstinence of taking food or fasting isn't an act prohibited by law if not done with the intention of suicide or death. The vow of Santhara is not done to induce death and thus restricting it would be violating the personal liberty of an individual and hence, violative of Article 21 of the Indian Constitution.

The practice of Santhara is further not in violation of the right to a dignified life under Article 21 of the Indian Constitution. The Right to a Dignified Life is enshrined under Article 21 as laid down in *Maneka Gandhi v. Union of India*[lxxv] where the Hon'ble Court stated that '*is not merely a physical right but it also includes within its ambit, the right to live with human dignity.*' Also, in the case of Francis Coralie Mullin v. The Administrator, Union Territory of Delhi and Ors[lxxvi], the Hon'ble Court held that '*right to life' includes the right to live with human dignity with bare necessities of life such as adequate nutrition, clothing and shelter.*' Dignity is a subjective term, in common parlance, the right to live with dignity includes the right of an individual to adequate nutrition, clothing and shelter, however, religious

communities have age-old strongly rooted belief systems with maybe contradictory to common practices in the society. While clothing is an essential element to maintain the dignity of any individual but for a Digambar monk wearing clothes is in violation of his dignity due to his religious beliefs.[lxxvii] This shows dignity can be subjective and sensitive and thus varies from person to person and this subjectiveness must be respected by the court unless it in violation of public health, order and morality.

Article 25 of the Indian Constitution ensures that, "*all persons are equally entitled to freedom of conscience and the right to freely profess, practice and propagate religion subject to public order, morality and health.*"[lxxviii] The various Jain Sutras mentioned above along with archaeological evidences establishes Santhara as an essential part of Jainism which has been practised both by ascetics and households alike since time immemorial.[lxxix] The Jain practise of Santhara in southern India is known as Nishidhi or Nishadiga and such Nishidis gives us in detail the names, dates and other austerities about the individuals taking the vow of Santhara.[lxxx] The single site of Shravanabelgola located in Karnataka has as many as 93 Nishidis ranging from 6th century to 19th century showing the practice of Santhara has been prominent throughout history and is indeed an essential practice in Jainism. Historians like R.K. Mookerjee as brought out several inscriptions indicating famous historical characters like Chandragupta Maurya who took the vow of Santhara at Chandragiri Hill in Karnataka.[lxxxi] As the practice doesn't violate public health, order or morality and can be clearly established as an essential religious practise it must be validated. The misinterpretation of the practice by the Bench resulted in it been declared an optional and hence was invalidated which was in direct contravention to the right guaranteed under Article 25 to the Jain Community.

Santhara against the backdrop of Penal Provisions

Commenting on the argument raised in the Nikhil Soni Judgement, Santhara has been equated with suicide and its support and practice as abetment to suicide. Suicide has become a common phenomenon throughout the world. The act of suicide has a great impact on the surviving family members of the individual. Their family, friends and close acquaintances are overwhelmed with the strong feelings of loss, mourning, anger, guilt or even shame. The argument against Santhara can be esterified by analysing suicide under four main heads:

i) Intentions

ii) Situation

iii) Means Adopted

iv) Outcome or Consequences

Analysis and comparison of suicide with the religious practice of Santhara under each of the following heads would establish that the practice of Santhara is not suicide. The sole ***intention*** of a person committing suicide is to put an end to one's life by using some violent or dangerous means to end the temporary sufferings or sorry of life.[lxxxii] The intention of committing suicide is to escape from the feelings of shame, frustration or emotional sorrow.[lxxxiii] On the other hand, the intention of the person adopting the vow of Santhara is purely spiritual and not temporal. The intention of the person is not to end one's life but for the purification of mind and liberating oneself from the karmic bondage and spend time in meditation. The vow has been very clearly defined and further verse 129 of the Jain Religious text, *Ratnakaranda śrāvakācāra* clearly states that "*During the observance of the vow, one should not commit any of the transgressions like, entertaining a desire to live, wishing for a speedy death, exhibiting fear, desire to meet friends and family.*"[lxxxiv] This clearly establishes that an individual adopting the vow of Santhara has no intention to have speedy death rather wants purification, liberation and meditation to be the way in which he would accept death when it comes.

The ***situations*** under which a person commits suicide is when the individual is going through mental trauma, frustration, deep sorrow, shame or guilt. The act of suicide is committed to put an end to these temporary emotions and escape from the sufferings and pain of life. Whereas, the practise of Santhara the situations under which the vow must be adopted are well defined. The vow of Santhara must be adopted only when death is imminent.[lxxxv] Verse 122 of the Jain Religious text *Ratnakaranda śrāvakācāra* states that *"Santhara is adopted by fasting only when there is an unavoidable calamity, severe drought, old age or incurable disease in order to observe the discipline of religion."*[lxxxvi] Santhara is only adopted when there is no escape and death is imminent. One adopting Santhara doesn't hasten or delay but simply waits for the hour calmly, engrossed in meditation and concentration. Hence, as Santhara isn't adopted to induce death or invite death but rather meditate and face the imminent death without fear while meditating, it is clearly different and can in no way be equated with suicide.[lxxxvii]

The ***means adopted*** to commit suicide are violent in nature and objectionable in society, they include the means of hanging, taking poison, stabbing, shooting, drowning or jumping from high places. These means are violent and have a high potential of causing instantaneous death

to the individual.[lxxxviii] The vow of Santhara on the other hand doesn't induce death and there is absolutely no violent or objectionable means involved with the practice. The procedure of Santhara has been very well-defined, the individual has to fast according to well-regulated principles. One must increase his days of fasting gradually from leaving solid food to liquid food and to spend time meditation, self-introspection and reading religious scriptures. Verses 127 and 128 of the Jain religious text *Ratnakaranda śrāvakācāra,* states that "*One should gradually give up all solid foods, increase the intake of liquids like milk, then give up even liquids gradually and take warm water. Following which one should slowly give up water and observe fast to the best of one's ability and spend time repeating namokarmantra until there is breath in the body.*"[lxxxix] There is absolutely nothing in common between suicide and Santhara except that in both cases there is death. In case of suicide, the death is brought by objectionable violent means whereas in Santhara the death comes naturally.

The ***consequences*** of death by suicide are devastating for the family and as well as society. The family goes into extreme trauma and sorrow, they feel guilty and shameful, similarly, it has an adverse impact on the society as a whole. Whereas, in the case of Santhara the consequences are neither sorrowful nor traumatic as all kinds of ties with family and friends have already been terminated with mutual consent. There is no mourning as the death is treated as a religious festival and celebrated with puja and bhajans.[xc]

It would be legally wrong and morally unfounded to categorize death by Santhara as a suicide. The distinction between suicide and Santhara clearly establishes that both are fundamentally different and Santhara can't be equated with suicide. In Jain religious commentary, *Tattvartha-Sutra,* Shri. Pujyapada writes, "*A person who kills himself by means of poison, weapons etc. swayed by attached, aversion or infatuation, commits suicide. But he who practices holy death is free from desire, anger or delusion. Hence, it is not suicide.*"[xci] Where a person commits suicide frustrated by mundane considerations, Jain scriptures and commentaries make it clear that the vow of Santhara is a conscious and well-planned penance for self-realization.

Santhara or Sallekhana which is prevalent in Jainism a pan Indian religion was unknown to the Europeans and western culture. Any kind of death caused by self-destruction irrespective of the intentions was termed as 'suicide'. This led to the word 'suicide' being used loosely to cover the religious vow of Santhara which declared it as suicide by fasting and meditation. The drafters of the Indian Penal Code were European or Western Jurists who were brought up under the Christian philosophy which says that the world and men and creations of the Almighty and

death by fasting as they view it, though in accordance with the ancient Jain philosophy is against the will of God. The Indian Penal Code, 1860 doesn't provide a proper definition of 'suicide' and hence there is no basis to declare the practice of Santhara as suicide. It is wrong to equate an ancient Indian religious philosophy based on contradictory Christian philosophy and declare it invalid. The constitution of India guarantees the freedom to practice, preach, and preserve one's own religion.' The practice of Santhara is one of the cardinal principles of Jain philosophy[xcii] and restricting an individual to practice it would be against the constitutional values that a democratic country envisages. Even if the Indian Penal Code doesn't refer to this freedom of religion, the provision of Article 25 in the Indian Constitution overrides the law in the Indian Penal Code.

CONCLUSION

The Jain practice of santhara has drawn up consternation from the laity in terms of the supposed perceptible nature of its immorality. However, due to limited and exhaustible research on the inter-relationship between the practice and the existing legislative framework, the legal sphere exhibits a visible dichotomy insofar as the legal appraisal of santhara is concerned. While one trajectory of thought displays an affronted animosity, the other is characterised by veneration for the practice while ensuring the subsistence of both constitutional and penal provisions. By wading into the legally nebulous territory, the paper has attempted to provide a definitive analysis of the extant opinions on the santhara debate while simultaneously extrapolating evidence from the Jain religion to conclusively prove that the practice is neither antithetical nor subversive of either the Constitution or the Indian Penal Code.

The concept of Right to Life remains firmly ensconced in Article 21 of the Constitution. But the right's munificence has extended to include the right to live with dignity. A devolution into the particulars of the religious practice of santhara reveals that the vow is to be undertaken under certain calamitous conditions of ailment or natural disasters wherein the right to live with dignity has already reneged. In those circumstances, adopting the vow is not an encumbrance to the fundamental right of living with dignity but rather an organic extension of it. Acceptance of santhara includes distension of the Right to Life so as to include the Jain sensibilities as well.

Moreover, the concept of Right to freedom of religion has also been debated upon while discussing santhara. A constitutional pledge to secularism had led the Indian Judiciary to

develop the Essential Practice Doctrine i.e. the Court will have the power to intervene only in trivial or ancillary matters of religion. Insofar as santhara is concerned the core tenets of Jainism appear to be consonant with the practice of santhara to the extent that it warrants constitutional inoculation against arbitrary intrusions. Furthermore, the exposition of the glaring inconsistencies of the Essential Religious Practice doctrine raises vital concerns over the pragmatisms of its persistence.

Finally, the biggest opposition to santhara lies in its tacit approval of suicide, the attempt and abetment of which has been penalised in the provisions of the Indian Penal Code. However, existing religious texts show that the analogy drawn between santhara and the conventional suicide not only lacks substantive basis but is also fundamentally fallacious. The termination of life through violent means to hasten death is reprehensible to the ideation of santhara where the intention, adopted means, circumstances and consequences is distal to the requisites of traditional suicide.

Thus, the tradition of santhara has been thoroughly interpreted by the paper in an attempt to dispel all suppositions of its digressions from the prevailing law of the law in an attempt to eliminate any misgivings about the revered Jain practice before the unresolved issue is finally debated upon by the apex adjudicating body – the Supreme Court.

ENDNOTES

[i] Vineet Gupta, 'Rise of Religious Unfreedom in India: Inception and Exigency of the Essential Religious Practices Test' 3 RGNUL Student Research Review, 126, (2016).
[ii] Neha Chauhan, 'Religious Conversion and Freedom of Religion in India: Debates and Dilemmas' 1 Indian Law Institute Law Review, (2017).
[iii] Indian Penal Code 1860.
[iv] Chauhan (n 2).
[v] Gupta (n 1).
[vi] Ronojoy Sen, Legalizing Religion: The Indian Supreme Court and Secularism (East-West Center Washington 2007).
[vii] Valentina Rita Scotti, 'Gli elementi essenziali delle religioni nella giurisprudenza delle Corti' (The essential elements of religious in the jurisprudence of the Courts) 2015.
[viii] R. Dhavan and F. Nariman 'The Supreme Court and the Group Life: Religious Freedom, Minority Groups and disadvantaged Communities' [2000] Supreme but not Infallible: Essays in Honour of the Supreme Court of India 259.
[ix] M.P. Jain, Indian Constitutional Law, vol 2 (8th edn, Lexis Nexis 2018).
[x] P.M.A. Metropolitan v. Moran Mar Marthoma [1995] Supp (4) SCC 286.
[xi] A.S. Narayana Deekshitulu v. State of A.P [1996] 9 SCC 548.
[xii] Commissioner, Hindu Religious Endowments v. Sri Lakshmindra Thirtha Swamiar of Sri Shirur Mutt [1954] AIR 1954 SC 282: 1954 SCR 1005.

[xiii] Aankhi Ghosh, 'Essential Religious Paradox? The Supreme Court's interpretation of Article 25' (Bar and Bench, 1 November 2017) <https://www.barandbench.com/columns/essential-religious-practices> accessed 18 October 2020.
[xiv] 7 Constituent Assembly Debates, 781 (1948). The essence of what Dr B. R Ambedkar was trying to relate is that the definition of the religion and concomitantly, the scope of religious activities should be limited in an attempt to not extend beyond ceremonies and practices that are 'essentially religious.' He justified the impositions of restrictions on religious freedom on grounds of mitigating the evils of our social system characterised by inequities and discrimination.
[xv] Ratilal Panachand Gandhi v. State of Bombay [1954] SCR 1035.
[xvi] *Sri Lakshimindra Thirtha* (n 12).
[xvii] Davis v. Beason [1890] 133 U.S. 333.
[xviii] [1954] S.C.R. 1046.
[xix] Untouchability was a religiously mandated practice that prevailed within the Hindu religion and was assigned to low caste groups. Hinduism divides its faithful into four categories depending upon the karma and purity that they have accrued which is to be determined as per the supposed conduct of individuals in their past lives. Untouchables can be considered a fifth caste. They are literal outcasts who have been deemed so unworthy that they do not even deserve induction within the recognized caste distinctions.
[xx] Durgah Committee, Ajmer & Anr. vs. Syed Hussain Ali & Ors [1961] AIR 1961 SC 1402.
[xxi] Moinuddin Chisti was a Persian Muslim preacher who eventually settled in the Indian subcontinent. He is revered for promulgating the Chisti order of Sufi mysticism after settling in India in the 13th century.
[xxii] Valentina (n 7).
[xxiii] [1990] AIR Cal 336.
[xxiv] Swarup Singh v. State of Punjab [1959] AIR 860.
[xxv]Sen (n 6) 29.
[xxvi] Constituent Assembly of India Debates (Proceedings) vol 8 (Constituent assembly, 31 May 1949) <http://loksabhaph.nic.in/writereaddata/cadebatefiles/C10061949.html> accessed 18 October 2020.
[xxvii] T.M.A Pai Foundation v State of Karnataka, 8 SCC 481 (2002).
[xxviii] *Ibid.*
[xxix] Dr. Amit Kumar Ishwarhai Parmar, 'Exercise of Religious Freedom Subject to State Restriction under the Indian Constitution' [2015] International Journal of Applied Research 97.
[xxx] Donald Eugene Smith, India as a Secular State (first published 1963, Princeton University Press 2018).
[xxxi] AIR [1964] Mad. 258.
[xxxii] Indian Penal Code 1860.
[xxxiii] Nash Colundalur, 'Devadasis are a cursed community' (The Guardian, 21 January 2011). <https://www.theguardian.com/lifeandstyle/2011/jan/21/devadasi-india-sex-work-religion> accessed 18 October 2020.
[xxxiv] Indian Criminal Law (Amendment) Act 1924, s 372.
[xxxv] The Madras Devadasi (Prevention of dedication) Act 1947, s 3(3).
[xxxvi] Krishnadas Rajagopal, 'Act against Devadasi system, SC tells States' <https://www.thehindu.com/news/national/act-against-devadasi-system-sc-tells-states/article8229560.ece> accessed 18 October 2020.
[xxxvii] Press Information Bureau, 'Expenditure on Social Services increased by more than one percentage points as proportion of GDP during last five years: Economic Survey' (GOI, Ministry of Finance, 04 July 2019) <https://pib.gov.in/Pressreleaseshare.aspx?PRID=1577032> accessed 19 October 2020.
[xxxviii] R.C. Majumdar, The History and Culture of the Indian People, vol 10 (first published 1955, Bhartiya Vidya Bhavan 2003) 268-275.
[xxxix] The Commission of Sati (Prevention) Act 1987.
[xl] Arjun Gopal V. Union of India [2018] SCCOnline SC 2118.
[xli] [2015] Cri LJ 4951, Nikhil Soni. One of the petitioner's main contentions with the religious practice in question was that the practice was often glorified within the Jain community for economic privileges or bolstering of social standing.
[xlii] Constitution of India 1950, s 25.
[xliii] Nikhil Soni v. Union of India [2015] Cri LJ 4951.
[xliv] Constitution of India 1950, s 21.
[xlv] Constitution of India 1950, s 25.
[xlvi] Indian Penal Code 1860, s 309.
[xlvii] Ibid.

[xlviii] Shruti Mahajan, 'Mental Healthcare Act: Supreme Court Seeks Explanation from The Centre on The Validity of Provision Decriminalising Attempt to Commit Suicide' (BAR & BENCH, Sept. 11, 2020)<https://www.barandbench.com/news/litigation/supreme-court-centre-notice-mental-healthcare-act attempt-suicide> accessed 19 October 2020.
[xlix] [1990] AIR 1990 Cal 336 (8).
[l] S.A. Jain, Reality: English translation of Sarvarthasiddhi (2nd edn, JMT 1992).
[li] Justice T.K. Tukol, Sallekhana is not suicide (1st edn, L.D. Institute of Indology 1976).
[lii] Ibid.
[liii] *Reality*, Canto VII, Sutra 22.
[liv] *Ratna-Karandaka Sravakacara*, Verses 122.
[lv] *Ratna-Karandaka Sravakacara*, Verses 123.
[lvi] *Ratna-Karandaka Sravakacara*, Verses 124.
[lvii] *Ratna-Karandaka Sravakacara*, Verses 125.
[lviii] Prof. S.A. Jain, *Reality (English Translation of Srimat Pujyapadacharya's Sarvathasiddhi)* [1960] Canto VII, Sutra 22.
[lix] Champat Rai Jain, Jainism and World Problems: Essays and addresses (Jaina Parishad, 1934).
[lx] Nikhil Soni v. Union of India [2015] Cri LJ 4951.
[lxi] Indian Penal Code 1860, s 306.
[lxii] Indian Penal Code 1860, s 309.
[lxiii] No person shall be deprived of his life or personal liberty except according to the procedure established by law.
[lxiv] Constitution of India 1950, s 21.
[lxv] Subject to public order, morality and health and to the other provisions of this Part, all persons are equally entitled to freedom of conscience and the right freely to profess, practise and propagate religion.
[lxvi] Tukol (n 51).
[lxvii] Padmanabhan S. Jain, The Jaina Path of Purification (first published 1979, Motilal Banarsidass Publisher 1988).
[lxviii] Ibid
[lxix] Whitney Braun, 'Sallekhana: The ethicality and legality of religious suicide by starvation in the Jain religious community' [2008] Vol 27(4) Medicine and Law 913, 924.
[lxx] Vijay K. Jain (ed), Acharya Umasvami's Tattvarthsutra (Vikalp printers 2011).
[lxxi] Sudhir Kakar, Death and Dying (Penguin UK 2014).
[lxxii] The Constitution of India 1950, s 21.
[lxxiii] Dr. Gyanendra Kumar Sahoo, 'An overview of article 21 of the Indian constitution' [2017] Vol 3(3) International Journal of Law 98-100.
[lxxiv] [1981] AIR 746.
[lxxv] [1978] 1 SCC 248.
[lxxvi] [1981] AIR 746.
[lxxvii] Paul Dundas, The Jains (2 edn, Routledge 2002).
[lxxviii] The Constitution of India 1950, s 25.
[lxxix] Padmanabhan S. Jain, *The Jaina Path of Purification* (first published 1979, Motilal Banarsidass Publisher 1988).
[lxxx] Lewis Rice, 'Jain Inscriptions at Sravana Beloga' [1874] The Indian Antiquary: A Journal of Oriental Research 323-324.
[lxxxi] Whitney Braun, 'Sallekhana: The ethicality and legality of religious suicide by starvation in the Jain religious community' [2008] Vol 27(4) Medicine and Law 913, 924.
[lxxxii] Seena Fazel, Bo Runeson, 'Suicide' [2020] The New England Journal of Medicine <https://www.nejm.org/doi/10.1056/NEJMra1902944> accessed 20 October 2020.
[lxxxiii] Ibid.
[lxxxiv] Justice T.K. Tukol, Sallekhana is not suicide (1st edn, L.D. Institute of Indology 1976) 107.
[lxxxv] Supra 7-8.
[lxxxvi] Tukol (n 78) 107.
[lxxxvii] Tukol (n 78) 10-14.
[lxxxviii] Fazel, Runeson (n 77).
[lxxxix] Tukol (n 78) 107.
[xc] Peter Flugel, Studies in Jaina History and Culture (Routledge 2006).
[xci] Vijay K. Jain (ed), Acharya Umasvami's Tattvarthsutra (Vikalp printers 2011).
[xcii] Champat Rai Jain, The Ratna Karanda Sravakachara (The Central Jaina Publishing House 1917).