# *Jainism Practice Of Santhara And Conflicting Constitutional Morality*

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***Abstract***

The Rajasthan High Court criminalized the Jain practice of ritual voluntary death, variously termed Sallekhana or Santhara in 2015. The petition that sought its criminalization, and the court judgment were both framed in the language of religious reform and invoked judicial memory of sati. The Jain defenders of the practice, insisted on its difference from sati on the one hand, and suicide and euthanasia on the other, which too continued to remain beyond the pale of legality. However, in setting it up as an 'essential practice', which would afford it the protection of Article 25, they simultaneously drew upon Jainism's ethical teachings – mobilizing a range of ancient texts, providing a list of their religious figures and historical personalities who met 'death with equanimity' – and the moral and legal arguments utilized by euthanasia advocates, in particular the debates around the Right to Life. This paper thus examines the anxieties that have framed the debate on both sides, and asks what happens when piety and belief enter, or rather, are dragged into the courtroom: when one party seeks its denunciation and another its validation, or indifference even, from modern, rational law? The paper also examines if the High Court judgment is the result of the Christian/colonial legal legacy, which abhorred and outlawed suicide, as claimed by many commentators, by scrutinizing the colonial attitudes to Sallekhana.

***Keywords:*** *Essential Practice, Religion, Right to Die, Santhara, Suicide.*

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*"Death is our friend, the truest of friends. He delivers us from agony. I do not want to die of a creeping paralysis of my faculties a defecated man"*

*-Mahatma Gandhi*

## I. Introduction

The Indian subcontinent is the birthplace of three great religions, namely Hinduism, Buddhism and Jainism, which is one of the oldest religions of the country. It is a pre-historic religion, dating back to 3000 BC, before the development of Indo-Aryan culture. Though there are many similarities that exist in the South Asian religions, certain parts of the belief systems are unique to each religion. According to Jain philosophy, the universe is composed of six substances which are indestructible. Two out of these six forms are the most important: Jiva (soul) and Ajiva (matter). The soul (Jiva) is either bonded or is liberated. It is a system of philosophy in which right conduct is a vital condition for spirituality as liberation can only be achieved by right conduct. Focus is on equanimity of thought and conduct. Fasting, meditation and other austerities are a part of the Jaina way of life. Penance occupies a unique place in Jainism. Perhaps, in the world religions, none parallels Jaina religion in the practice of penance, whose purpose is spiritual purification.[1]The supreme object of ethical code of Jainism is to show the way for liberation of the soul from the bondage of Karma by cultivating the three jewels (ratna-traya), namely Right faith, Right knowledge and Right conduct, which constitute the path to it. The highest importance in Jainism is attached to passionlessness. It teaches not only the art of a beautiful living but also the art of dying a dignified death. In Jainism, Sallekhana popularly known as "Santhara" is a kind of ritual suicide undertaken as part of the process of reverence for all life and has traditionally been seen as a spiritual zenith for all Jain monks. The word Sallekhana is actually "sat+lekhana "meaning making his death an immortal act by firmly fixing his entire focus on his soul at the time of departure. Santhara is a posture adopted by a practitioner of Sallekhana.

[1] Kokila H. Shah, The Jain Concept Of Sallekhana: A Loss or a Gain?, NATIONAL SEMINAR ON BIO ETHICS (2007), available at http://www.vpmthane.org/Publications (sample)/Bio-Ethics/Kokila% 20H.%20Shah%201.pdf (last visited Dec. 27, 2022).

According to Jainism, all lives are sacred, based on which an ideal, of the refusal to do anything which would harm life at all. This embodies undertaking extreme steps such as the refusal of food and water to avoid killing anything, even microbes. Santhara is a slow method, whereby an individual slowly decreases his/her intake of food and liquids, ultimately leading to death. It is undertaken as a form of sacred vow. These vows were singularly named as "Sallekhana" in the rock inscriptions at Sravana Belagola, a city located near Channarayapatna of Hassan district in Indian state of Karnataka, where the work called Retna Karvadakagives the directions translated as follows:

> *"When overtaken by portentous calamity, by famine, by old age or by disease for which there is no cure, to obtain liberation from the body for the sake of merit that Aryas call Sallekhana. He who is perfect in knowledge possess the fruit of all penance, which is the source of power; therefore should one seek for death by the performance of some meritorious vow, so far as his means will permit....."*[2]

With the meditation of the five salutation mantras (pancanamaskara-mantra), he should avoid the five transgressions: (1) a feeling that it would have been better if death would come a little later; (2) wishing for a speedy death; (3) entertaining fear as to how he would bear the pangs of death; (4) remembering friends and relatives at the time of death; (5) wishing for a particular kind of fruit as a result of penance.[3]The basic concept underlying the vow is that, man who is the master of his own destiny should face death in such away so as to prevent the influx of new Karmas, even at the last moment of his life and at the same time liberate the soul from the bondage of Karmas that may be clinging to it then.

## II. Hypotheses

- Right to Life is the Supreme Fundamental Right.
- Basic religious practices must be protected under Right to freedom of Religion.

[2] Lewis Rice, Jain Inscriptions at Sravana Beloga, THE INDIAN ANTIQUARY:A JOURNAL OF ORIENTAL RESEARCH 323-324(1874).
[3] *Supra*

## III. Research Questions

- Whether the essential religious practices are superior to other fundamental rights?
- Whether the Jainism Practice of Santhara is an Essential Religious Practice?
- Whether the practice of Santhara is an criminal offence of Attempt to Commit Suicide?

## IV. Research Methods

Doctrinal method of research, is known to be the most traditional and usual method of study in the context of legal research. So, the researcher uses this method in order to discuss different aspect relating to the research, from statutory framework to ground reality.

## V. Defining The Essential Religious Practice Doctrine

The first traces of the "essential practices" doctrine dates back to the times when the makers of the Constitution were undergoing assembly debates while drafting the Constitution of India. It was Dr. B.R. Ambedkar, who mentioned this phrase in the Constituent Assembly Debates stating that:

*The religious conceptions in this country are so vast that they cover every aspect of life, from birth to death. There is nothing which is not religion and if personal law is to be saved, I am sure about it that in social matters we will come to a standstill. I do not think it is possible to accept a position of that sort. There is nothing extraordinary in saying that we ought to strive hereafter to limit the definition of religion in such a manner that we shall not extend beyond beliefs and such rituals as may be connected with ceremonials which are essentially religious. It is not necessary that the sort of laws, for instance, laws relating to tenancy or laws relating to succession should be governed by religion.*[4]

[4] Constituent Assembly Debates, Volume VII, *available at* http://parliamentofindia.nic.in/1s/debates/vol7p18b.html

He had anticipated the need to differentiate between „religious activities" and secular activities" in light of India's deeply ingrained religious beliefs and therefore had attached the word „essential" to only religious activities, thereby leaving only the secular activities under the scrutiny of the judiciary. He was of the opinion that secular activities undertaken behind the veil of religion shall hamper the progress of the society. It is for this sole reason that the starting lines of Article 25 and Article 26 of the Indian Constitution lay down the restrictions to which an individual's right to freely practice, profess and propagate and manage the affairs of his religion is subjected to. Although not inscribed in any of the articles, the word "essential" plays an important role in drawing a line between what is religious and what is secular.

In the case of ***S.R. Bommai v. Union of India***,[5] Justice P. B. Sawant gave a very clear distinction between what was religious and secular. He stated that notwithstanding the attitude of the state towards any religion, religious sects or denominations, religion could not be mixed with any of the secular activities of the state. He further stated that an individual's freedom of religion only extended to his activities done in pursuit of his spiritual life which is distinct from secular life. The activities undertaken in pursuit of spiritual life shall come under the exclusive domain of the affairs of the state. The word "essential" was used to draw the thin line between secular and religious. Indian Courts have time and again attempted to determine what practices and activities have been or are fundamental to a religion. Such endeavours by the courts took the form of a doctrine and thus the name "essential practice doctrine".

The essential religious practice doctrine as prescribed by Dr. B.R. Ambedkar was first used by the Supreme Court in the ***Shirur Mutt[6] case***. A petition was filed by the mahant of the Shirur Mutt monastery challenging the Madras Hindu Religious and Charitable Endowments Act, 1951 contending violation of Article 26 of the Indian Constitution. The Supreme Court laid down the following guidelines:

- The doctrines of the religion itself shall be used to determine whether a practice constitutes an essential practice in that religion or not.
- Complete autonomy shall be granted to a religious denomination or organisation in determining as to what rites and ceremonies are essential to their religion. Further, no interference shall be allowed by any outside authority to decide on such matters.

[5] S.R. Bommai, AIR 1994 SC 1918.
[6] Commissioner, Hindu Religious Endowments, Madras v. Sri Lakshmindra Thirttha Swamiar of Shri Shirur Mutt, AIR 1954 SC 282

- The state shall have a right to regulate religious practices when such practices are in contradiction to "public order, health and morality" or are economic, commercial or political in nature.

Thus, the Supreme Court's interpretation of the doctrine is in line with what was propounded by Ambedkar. The judgment is significant because it clearly states that the authority of determination of an essential practice in a religion vests in the religious denominations and organisations. This led to the official inception of the 'essential practices doctrine' in the jurisprudence of religion in India. Subsequently, matters under this doctrine were given protection under Article 25 and Article 26 of the Indian Constitution which provide protection to acts done in pursuance of religion, rituals and ceremonies observed.

The Supreme Court adjudicated upon the constitutionality of Bombay Trusts Act, 1950 which was alleged to have violated an individual's fundamental right under Article 25 and Article 26 of the Constitution of India in the case of ***Ratilal Panachand v. The State of Bombay and Ors.***[7] Justice Mukherjea reiterated the principle as was laid down in the Shirur Mutt[8] case. It was held that the religious acts and practices done in pursuit of religious beliefs were as much a component of religion as were faith and belief in the particular religious philosophy or doctrines. It was also stated that no outside authority had the right to declare any practice of religion as essential or non-essential. Further, no unconditional right was vested with any of the authorities of the state to discard, restrict or limit any religious practice, that they consider beneath the pretence of administering a verity estate.

Further, while comparing the Indian Constitution with the American and the Australian Constitutions, Justice Mukherjea stated that the Indian Constitution was an improvement over these constitutional texts, as Article 25 and Article 26 clearly states as to what can be regarded as religion. There were no limitations on the right to freedom of religion in the constitutional texts of United States of America and Australia. The limitations relating to public health, morality and social protection were laid down by the Australian and American courts through judicial pronouncements. The beauty of Indian Constitution lies in the fact that the constitution makers embodied these very restrictions in the constitution itself under Article 25 and Article 26, which have evolved through judicial pronouncements in other nations.

[7] RatilalPanachand, AIR 1954 SC 388.
[8] *Ibid.*

These two judgments played an essential role in defining a relationship between the state and organised religion. Sufficient amount of free play was given to religious denomination in regulating the matters of their religion. The approach of the Supreme Court in these two judgments was to use the "essential practices doctrine" as a means to determine whether a particular practice was religious or secular, rather than determining whether the practice was essential to a religion. However, the doctrine with its original meaning could not last long. In the early 1960's, judicial interpretation began to circumscribe the scope of religion, and judges took into their hands, the task of determining those crucial questions that were quite internal to a religion, there by attempting to define the nature of religion itself. The seeds of such shift in the interpretation of the „essential practices doctrine" were sown in the case of Shri ***Venkatrama Devaru v. State of Mysore***.[9] The case dealt with the applicability of the Madras Temple Entry Authorisation Act , 1947 and the right of Harijans to enter the Sri Venkatrama Temple which was founded by the Gowda Saraswath Brahmins,who restricted the entry of Harijans into the temple. The Court, deciding the matter, went on to refer religious scriptures and case laws in order to examine the practice of restricting Harijans from entering the temples. It was held in this case that on certain special occasions and ceremonies ,the temple authorities had the right to exclude certain persons.

The ruling in this case only partially applied the doctrine of essential practices. The Court accepted that religion encompassed rituals and practices but failed to appreciate the autonomy of a religious denomination or organisation to decide which ceremonies were essential. The Court"s approach of referring to scriptures and validating the restriction upon Harijans was not only contradictory to the essential practices doctrine but was also not in consonance with the objective of the state to eliminate caste based discrimination.

It would not be wrong to mention that the original definition of the essential practices doctrine could not survive over a decade. The next case in line which gave a new direction to the doctrine was ***The Durgah Committee, Ajmer v. Syed Hussain Ali and Or.***[10] In this case, The Durgah Khawaja Sahet Act, 1955 was constitutionally challenged by the Khadims of shrine in Ajmer contending that the alleged Act abridged their right to manage the properties of the Durgah and also to receive aids and offerings from the pilgrims.

[9] Shri Venkatrama Devaru, AIR 1958 SC 255.
[10] The Durgah Committee, Ajmer,AIR 1961 SC 1402.

Justice Gajendragadkar, by associating a secular history to the shrine upheld the validity of the Act. A note of caution was also issued which emphasized the role of the courts in determining as to what constituted an essential and integral part of religion and also distinguishing for the first time between irrational belief and religious practices. Thus, now the court had started acting as a gatekeeper, keeping a check on what practices qualified as religion.

A comparison of the cases of ***Shirur Mutt[11] and Ratilal[12]*** shows that the word "essential" was used to determine whether the practice was religious or secular. A paradigm shift in outlook was witnessed and the doctrine was now being used to determine the importance of a practice within a religion.

Judgments of relevance to this shifting interpretation are delivered by Justice Gajendragadkar, which enhanced the authority of court in rationalizing religion, are ***Sri Govindlalji v. State of Rajasthan[13]*** and ***Yagnapurushdasji v. Muldas***.[14] The ruling in these cases stated that the question of determining a practice as religious or secular and further determining the importance of a practice in a religion will always have to be decided by the courts. Thus, these series of rulings, over the decade, established that the questionsrelating to religious practice would always be subject to interpretation. However, these rulings were in contradiction to what was the original meaning of the "essential practices doctrine" as envisaged by Dr. B.R. Ambedkar and as held in ***the Shirur Mutt and Ratilal Panachand*** cases.

We can see that the present form of "essential practices" doctrine does not hold the original meaning that was intended by the Constitutional drafters. The court should only have the authority to ask whether a particular religious ritual or practice is "sincerely held" by the followers of the religion which can be ascertained by the conduct of the adherents and the regularity with which the practice has been followed over ages. The authority to question the substantive nature of the practice itself should not be vested with the courts.

[11] *Ibid.*
[12] *Ibid.*
[13] Sri Govindlalji,AIR 1963 SC 1638.
[14] Yagnapurushdasji,AIR 1966 SC 1135

## VI. The Right To Die

The high court in ***Nikhil Soni v. Union of India and Others***[15] very categorically asserted that "No religious practice, whether essential or non-essential or voluntary can permit taking one's own life to be included under Article 25. The right guaranteed for freedom of conscience and the right to freely profess, practice and propagate (religion) cannot include the right to take one's life, on the ground that right to life includes the right to end the life. Even in extraordinary circumstances, the voluntary act of taking one's life cannot be permitted as the right to practice and profess the religion under Article 25 of the Constitution of India."[16] It basically emphasises the fact that right to life is a right on a higher pedestal vis-à-vis the right to religious freedom guaranteed under the constitution. It is submitted that right to life can never be interpreted to include right to die even if backed by justification rooted in religious practice or belief. Any religious practice cannot be allowed to supersede right to life by simply giving such a practice trappings of a religious act as it happens in case of Santhara. The house of the person who takes the vow of Santhara becomes a kind of a place of pilgrimage. An air of reverence "pervades" the ambience. But even then the question remains: can all these religious trappings justify the death of a person who generally is an old (and sick) person?

There is a moral aspect to all this also. How far such a practice is in consonance with the constitutional morality? Can the subjective morality of the few trump the objective morality that remains deeply embedded in the letter and spirit of the Constitution of India? Moreover, One of the duties that Constitution casts upon us is "to abide by the constitution"[17] and the same constitution vests the power to deprive a person of his or her life to a procedure established by law. A person cannot deprive either himself or any other person of right to life enshrined under article 21 of the Indian Constitution. Therefore, the high court rightly observed that "It does not permit nor include under Article 21 the right to take one's own life, nor can include the right to take life as an essential religious practice under Article 25 of the Constitution."[18]

[15] 2015 Cr. L.J 4951 (Raj). [hereinafter referred to as Nikhil Soni]
[16] *Ibid*.
[17] See, Article 51A, Constitution of India, 1950
[18] Nikhil Soni, *Ibid.*

The Court further observed that:

*We have earlier held that "right to die" is not included in the "right to life" under Article 21. For the same reason, "right to live with human dignity" cannot be construed to include within its ambit the right to terminate natural life, at least before commencement of the natural process of certain death.*

It needs to be emphasised that "Sanctity of life" … has been understood historically as excluding freedom of choice in the self-infliction of death and certainly in the involvement of others in carrying out that choice. At the very least, no new consensus has emerged in society opposing the right of the State to regulate the involvement of others in exercising power over individuals ending their lives.[19]

## VII. Religious Freedom Vis-À-Vis Right To Life

One of the major arguments raised in the above case was that a practice, however, ancient it may be to a particular religion, cannot be allowed to violate the right to life of an individual.[20] It was further argued that the right to freedom of religion under article 25 of the constitution of India is subject to public order, morality, and health and to other provisions of Part III of the constitution which includes article 21. In defence of the practice of Santhara, it was argued that Santhara was inter alia saved by article 25 of the Constitution of India. Therefore, few questions crop up necessitating a searching analysis in this regard, especially the issue of Santhara from the perspective of the constitution.

Religious freedom under the constitution is a qualified one. There are certain limitations that hedge the exercise of freedoms as envisaged under article 25 of the constitution. And taking cue from the high court judgment, it can be logically argued that the expression "subject to the provisions of this Part" does limit the scope and nature of the right that is protected under article 25. The expression aforementioned does include article 21 of the constitution as pointed out by the high court. Therefore, article 25 should be read vis-à-vis article 21. However, such an exercise is to be preceded by understanding the crux of religious freedom that is permissible to be constitutionally protected.

[19] Rodriguez v. B.C. (A.-G.) [107 DLR (4th Series) 342]
[2020] Nikhil Soni, *Id.*

The freedom of religion under Articles 25 and 26 of the Constitution is not only confined to beliefs but extends to religious practices also.[21] However, the rights guaranteed by Articles 25 and 26 are circumscribed and are to be enjoyed within constitutionally permissible parameters. The Supreme Court in Nala Sangam very pertinently observed:

*"Often occasions will arise when it may become necessary to determine whether a belief or a practice claimed and asserted is a fundamental part of the religious practice of a group or denomination making such a claim before embarking upon the required adjudication. A decision on such claims becomes the duty of the constitutional court. It is neither an easy nor an enviable task that the courts are called to perform. Performance of such tasks is not enjoined in the court by virtue of any ecclesiastical jurisdiction conferred on it but in view of its role as the constitutional arbiter. Any apprehension that the determination by the court of an essential religious practice itself negatives the freedoms guaranteed by Articles 25 and 26 will have to be dispelled on the touchstone of constitutional necessity."*

Therefore, once it is decided that a particular practice is an essential part of religion without which "the religion itself does not survive", then the obvious question is whether the practice is so essential to religious freedom that it may even override the right to life protected under article 21.

## VIII. Constitutional Morality Vis-À-Vis Public Morality

In ***Aarushi Dhasmana v. Union of India***[22] it has been held by the Supreme Court that "Every life has an equal inherent value which is recognised by Article 21 of the Constitution and the Court is duty-bound to save that life." Therefore, if there is a conflict between rights under article 21 and 25, the courts should favour protecting life rather than upholding a religious practice that promotes "fasting to death". Be that as it may, ***in Mr 'X' v. Hospital 'Z'***[23], the Supreme Court observed

*...where there is a clash of two Fundamental Rights, ... the right which would advance the public morality or public interest, would alone be enforced through the process of court, for the reason that moral considerations cannot be kept at bay and the Judges are not expected to sit as mute structures of clay in the hall known as the courtroom, but have to be sensitive, "in the sense that they must keep*

[21] Adi Saiva Sivachariyargal Nala Sangam v. State of T.N., (2016) 2 SCC 725 at 752.[hereinafter Nala Sangam
[22] (2013) 9 SCC 475
[23] (1998) 8 SCC 296

*their fingers firmly upon the pulse of the accepted morality of the day".*

The "accepted morality of the day" may be the popular morality among the people or certain section of the people, in the present context the Jain community, but Delhi High Court ***in Naz Foundation case***[24] had rightly observed that "Popular morality ... is not a valid justification for restriction of the fundamental rights under Article 21. Popular morality, as distinct from a constitutional morality derived from constitutional values, is based on shifting and subjecting notions of right and wrong." Constitutional morality must outweigh the argument of public morality, even if it be the majoritarian view.

As regards Part III of the Constitution, it comprises of strands of constitutional moralities, each strand getting represented in respective articles that comprise Part III. Often, there may be a situation where two such strands get entangled leading to problematic repercussions like the one we see in case of Santhara where article 21, one such strand, seems to be entangled with another strand, namely article 25 that recognises and protects religious freedom.

The norm emanating from article 21, in view of ***Aarushi Dhasmana***, implies that courts ought to save life, and such a norm, therefore, arguendo mandates that no practice or act or conduct should be protected and promoted to an extent that it becomes a threat to right to life. There is o denying the fact that whether it is the public morality or the "accepted morality of the day", adjudicating questions of moral dilemma requires adhering to constitutional morality which "basically means to bow down to the norms of the Constitution."[25] Such a norm forming part of "constitutional morality" need to be respected and guarded. Any consideration, moral or religious, must bow down to the constitutional morality, which should be the guiding light in situations that demand a firm negation of certain freedoms in favour of rights that are inviolable and sacrosanct.

[24] Naz Foundation v. Govt. (NCT of Delhi), (2009) 111 DRJ 1
[25] Manoj Narula v. Union of India, (2014) 9 SCC 1

## IX. Conclusion

The first Hypothesis that is Right to Life is the Supreme Fundamental Right. Stands PROVED but the Second Hypothesis that is Basic religious practices must be protected under Right to freedom of Religio stand PARTIALLY PROVED. There are inherent problems with the practice of Santhara when seen from the perspective of the constitutional norms and spirit. The freedom for religion cannot extend to an extent that it undermines the very principles the constitutional edifice relies upon. Right to life and sanctity of life are so sacrosanct that they cannot be snatched away by a practice performed under the trappings of religion and religious freedom. The practice of Santhara suffers from certain inherent problems: first one being the questionable nature of voluntariness of the act of Santhara, second one being its fallibility as regards the touchstone of constitutional morality of which right to life is an integral component. Therefore, when seen from a constitutional perspective, the practice of Santhara should be impermissible