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**The "Essential Practice of Religion" Doctrine in India  
and its application in Pakistan and Malaysia \***

**SUMMARY:** 1. Introduction – 2. Understanding the complexity: the role of religions in the Indian, Pakistani and Malaysian contexts – 3. The discipline of the religious phenomenon in India: which influences from foreign models in the Constitution? – 4. The Supreme Court and the "essential elements of religion" doctrine – 5. The migration of the Indian essential practice doctrine in Pakistan and Malaysia – 5.1 Interpreting the essential practice doctrine in Pakistan: the long-lasting history of the Ahmadis (non)recognition – 5.2 Cloths and Words always matter. The essential doctrine in Malaysia – 6. Concluding Remarks

**1 - Introduction**

The Supreme Court of India progressively elaborated the "essential elements doctrine" to ascertain which elements are fundamental for a religious practice and which may be purged, considered as mere superstition, by the intervention of the State without infringing the principle of State neutrality in religious affairs. The doctrine has been discussed and in some cases applied also by constitutional interpreters in Pakistan and Malaysia, whose Constitutions recall the provisions on freedom of religion of the Indian Union, but also establish Islam as the religion of the State.

The application of the "essential elements doctrine" by the apical Courts of these three countries allows to propose some reflections relying on the theory of cross-fertilization, demonstrating that "recipient" Courts do not follow a mere mechanism of importation but they vastly debate it.

**2 - Understanding the complexity: the role of religions in the Indian, Pakistani and Malaysian contexts**

The history of the elaboration of the "essential practice" doctrine is an interesting case to study the migration of constitutional interpretation

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among legal systems<sup>1</sup>. The doctrine was elaborated by the Supreme Court of India and then considered and deeply discussed by its homologues in Pakistan and Malaysia. On the background, the inner religious pluralism of the societies these Courts have to deal with, and of which even constitutional framers seemed to be very aware of.

In India, after the independence from the British Empire (1947), founding fathers tried to face the presence of a huge variety of languages, and of ethnic and religious groups, through a long and very detailed Constitution (1949)<sup>2</sup>, entrenching secularism<sup>3</sup> and combining elements coming from different cultural and political system<sup>4</sup> in order to establish a new national order able to overcome the inequalities suffered by the population. Thus, in such a plural framework, freedom of religion acquired a very relevant role, as it was designed to overcome the discriminating castes system deriving from Hinduism<sup>5</sup> and to recognize and respect religious minorities, which are numerically fewer if compared to Hindus, but however very relevant from a political, economic and social point of view<sup>6</sup>.

This complexity led to the need to comply: with the principle of equality, pillar of the constitutional democracy, and consequently with the prohibition of discriminatory treatments among groups and minorities; with the neutrality of the State toward any religious belief, precondition of the pluralistic democracy able to protect religious belonging both individually and collectively; with the elimination of all the obstacles to the enjoyment of fundamental rights for people historically subject to traditional cultural and religious dogmas<sup>7</sup>.

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<sup>1</sup> See: **S. CHOUDHRY**, *The Migration of Constitutional Ideas*, Cambridge University Press, Cambridge, 2006.

<sup>2</sup> On the drafting of the Indian Constitution, see, among many others, **B.N. RAU**, *India's Constitution in the Making*, Allied publishers, Bombay, 1963; **B.S. RAO**, *The framing of India's constitution*, vol. 5, Indian Institute of Public Administration, Tripathi, Bombay, 1968; **S.C. KASHYAP**, *Our Constitution: An introduction to India's Constitution and constitutional law*, NBT India, New Delhi, 1994.

<sup>3</sup> See art. 1 Const.

<sup>4</sup> On the different foreign 'sources of inspiration' of the drafting of the Constitution of India, see **V.R. SCOTTI**, *India: a 'critical' use of foreign precedents in constitutional adjudication*, in T. Groppi and M-C. Ponthoreau (eds), *The Use of Foreign Precedents by Constitutional Judges*, Hart, Oxford, 2013.

<sup>5</sup> See G. Shah (ed), *Caste and Democratic Politics in India*, Anthem Press, London, 2004.

<sup>6</sup> According to the estimates of CIA Factbook, lastly surveyed in 2011, Indian population is religiously divided among Hindus (79.8%), Muslims (14.2%), Christians (2.3%) and Sikhs (1.7%).

<sup>7</sup> **F. ALICINO**, *Libertà religiosa e principio di laicità in India*, in D. Amirante, C. Decaro



Many elements of this complexity may be found even in Pakistan and Malaysia, which share with India some common grounds. They have a common history marked by the British colonialism and have a pluralistic composition of their population, where religions play a major role in the self-identification of groups<sup>8</sup>. From a constitutional point of view, finally, the discipline of the religious phenomenon is also significant. While India affirmed a secular legal system, explicitly set forth in the 1976 Constitutional amendment, in Pakistan and Malaysia Constitutions recognize an official role for Islam as religion of the majority of the population, although this recognition has led to some controversies. In Pakistan, after the separation from India and the consolidation of the independence (1947), the secularism stated in the 1956 Constitution was soon abrogated in favor of the provision of an Islamic State (1963), which deeply influenced the Courts in the interpretation of the rules on freedom of religion. In Malaysia, on the contrary, the Constitution recognized Islam as the official religion of the State since its entry into force (1957), but the interpretation of the provisions on Islam slowly changed from the recognition of a mere ceremonial role to the establishment of a real State religion.

Thus, the present paper focuses on the constitutional provisions disciplining the religious phenomenon in India, looking also at the influence of foreign models in their drafting as well as in their interpretation, in order to analyze the arguments leading to the establishment of “essential elements doctrine” elaborated by Indian judges. Because this doctrine deeply affected the debates of apical Courts in Pakistan and Malaysia, their interpretation and the related consequences on the protection of religious rights are also considered in order to propose concluding remarks relying on the theory of the migration of constitutional ideas.

### **3 - The discipline of the religious phenomenon in India: which influences from foreign models in the Constitution?**

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and E. Poestl (eds), *La Costituzione dell'Unione Indiana. Profili introduttivi*, Giappichelli, Torino, 2013, p. 196.

<sup>8</sup> According to the religious belonging, in Pakistan the population is divided among Muslims (96.4%; Sunnis 85-90%, Shia 10-15%), Christians and Hindus (3.6% together) and in Malaysia among Muslims (61.3%), Buddhists (19.8%), Christians (9.2%), Hindus (6.3%), Confucianism, Taoism and other traditional Chinese religions (1.3%) (CIA Factbook, 2010 estimates).



Since the Preamble, the Constitution, as revised with the 42<sup>nd</sup> amendment in 1976, affirms that India is a secular State. This amendment was introduced in order to reaffirm the intent of the State to be neutral toward all the religious belongings, already stated in articles from 25 to 28 of the Constitution, grouped under a specific section denominated “Right to freedom of religion”<sup>9</sup>. The will to clearly affirm the absence of a State religion was based on the rationale of overcoming the strong influence religions traditionally have had in the public life of the country: the Hindu “way of life” strongly affected the social structure of the population all along the history of the country; during the Mughal Empire (1526-1720), when a Muslim elite dominated over the country<sup>10</sup>, Islam permeated in the law and the culture of Indian people; during the British colonization (1757-1947), though this had a minor influence on the decision-making processes and did not affected the sources of law, the Emperor merged the charge of King with that of Chief of the Church of England. Indeed, in defining the secular attitude of the State, the framers wanted to affirm that all the confessions would be equally treated and that religious belongings would not be relevant in the public sphere.

Furthermore, the Constitution affirms that the State shall not compel any person to pay taxes that shall be used to foster a particular religion (art. 27) and that no religious teaching shall be provided in any educational institution wholly funded by the State (art. 28). To confirm the neutrality of the State, article 60 of the Indian Constitution, mirroring the US non-establishment clause (First Amendment) and the tradition about oaths and affirmations established there, allows the President of the Union to quote or not the name of God in the oath they must pronounce before taking office. Actually, the non-establishment clause seems to influence the whole Constitution, where there is a total absence of references to an established Church or to a majoritarian religion.

The section on Right to freedom of religion opens to other considerations. The Constitution states that all persons are equally entitled to freedom of conscience and to the right to freely profess, practice and propagate religion, subject to public order, morality, health and to the existing or future laws made by the State to regulate or restricting any economic, financial, political or other secular activity associated to

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<sup>9</sup> See: **M. MOHSIN, M. ALAM**, *Constructing Secularism: Separating ‘Religion’ and ‘State’ under the Indian Constitution*, in (2009) 11 *Australian Journal of Asian Law* 29, 55, and **M. SANKHDHER**, *Secularism in India*, Deep&Deep Publication, Delhi, 2006.

<sup>10</sup> **I.M. LAPIDUS**, *A History of Islamic Societies* (3<sup>rd</sup> edn), CUP, New York, 2014, pp. 391-413.



religious practice or to provide for social welfare and reform or to opening Hindus religious institutions to all classes of Hindus (art. 25). Thus, freedom of religion is intrinsically individual and cannot be subject to any distinction between citizen and non-citizen or among individuals because of their social position; furthermore, it can be subject to restriction deriving from the other tasks the Constitution aims to perform. Even without considering the limits of public order, morality and health – directly deriving from art. 44, 2 of the 1937 Constitution of Eire – it is evident that the Indian Constitution wants to balance freedom of religion with its other goals, as the elimination of all discriminations according to the principle of equality (art. 16 Const.), by intervening on the Hindus traditional division of the believers in castes, which are abolished, with a particular reference to the caste of the untouchables (art. 17 Const.)<sup>11</sup>. Furthermore, the Constitution guarantees the freedom to manage religious affairs affirming the rights of any religious denomination or of any section to establish and maintain institutions for religious and charitable purposes, to manage its own affairs in religious matters and to acquire properties and administer them according to the law (art. 26). The reference to religious denominations and religious sections highlights the importance attributed to religious groups' internal divisions, but it also means that a group of believers has to obtain the legal identification as a religion before to be considered as a religious denomination or as a section of it. On the discipline of this legal identification, however, the Constitution remains completely silent, devolving this task to the Supreme Court.

#### 4 - The Supreme Court and the “essential elements of religion” doctrine

In effect, the Supreme Court had to face the difficult task to define what religion is in order to overcome three kinds of challenges. First, the Court had to define “religion” in order to state which practices may be eligible for constitutional protection. Second, the Court had to resolve the appeals against the legislation on the managing of religious institutions. Third, the

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<sup>11</sup> On untouchability, see, among many others, **M.K. GANDHI**, *The removal of untouchability*, (2<sup>nd</sup> edn), Navajivan, Ahmedabad, 1959, **M. GALANTER**, *Untouchability and the Law* (1969) *Economic and Political Weekly* 131-170, **G.S. SHARMA**, *Legislation and cases on untouchability and scheduled castes in India*, Allied Publishers, Bombay, 1975, **S. KUMAR LAL** and **U. RAJ NAHA**, *Extent of Untouchability and Pattern of Discrimination*, Mittal, New Delhi, 1990.



Court had to define the limits of the independence of religious denominations<sup>12</sup>. These three challenges have a common base: the Court had to decide which elements are essentially religious. A decision that effectively transformed the Court in an interpreter of the tenets of the faiths enabling it to “strike down those tenets that conflict with the dispensation of the Constitution”<sup>13</sup>. Thus, in its adjudications on the essentiality of religious tenets, the Court elaborated the so-called “essential practice doctrine”, a test used for the first time in the *Shirur Mutt* case<sup>14</sup> to draw a red line between what are matters of religion and what are not, even looking at the US and Australian case-laws. In fact, the Court rejected the definition of religion proposed in *Davis v. Beason*<sup>15</sup> by the US Supreme Court, stating a distinction between the relation of an individual with his Creator (religion) and the forms of worship (mere practice), because it is not consistent with the Indian context, where there are Buddhists or Janis who do not believe in God or in any Intelligent First Cause. Instead, the Indian Court, also recalling the influence of the Constitution of Eire in the drafting of articles 25 and 26 of the Indian Constitution, seemed to rely on the decision *Adelaide Company of Jehovah's Witnesses v. Commonwealth*<sup>16</sup>, where Australian judges affirmed that the Constitution protects both the religious opinion and the acts done in pursuance of a religious belief.

Therefore, according to the Supreme Court of India, “rituals and observances, ceremonies and modes of worship are regarded as integral parts of religion” and religious denominations behaviors must be considered in order to ascertain the essential practices of their own religion, which are protected by the State until they do not infringe the limits provided by articles 25 and 26 of the Constitution<sup>17</sup>. It was on these arguments that, in the same year of the *Shirur Mutt* judgment, the

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<sup>12</sup> R. SEN, *Legalizing Religion: The Indian Supreme Court and Secularism*, (2007) *Policy Studies* 30, 10.

<sup>13</sup> R. DHAVAN and F. NARIMAN, *The Supreme Court and the Group Life: Religious Freedom, Minority Groups and disadvantaged Communities*, in B.N. Kirpal (ed), *Supreme but not Infallible: Essays in Honour of the Supreme Court of India*, Oxford University Press, Delhi, 2000, p. 259.

<sup>14</sup> *Commissioner, Hindu Religious Endowments, Madras v. Sri Lakshimindra Thirtha Swamiar of Sri Shirur Mutt* (1954 SCR 1005).

<sup>15</sup> 133 U.S. 333 (1890).

<sup>16</sup> 67 CLR 116 (1943).

<sup>17</sup> C. MUDALIAR, *The Secular State and Religious Institutions in India: A Study of the Administration of Hindu Public Religious Trusts in Madras*, Schriftenreihe des Sudasien-Instituts der Universitat Heidelberg, Steiner Verlag, Stuttgart, 1974.



Supreme Court overturned the 1953 decision taken by the Bombay High Court in *Ratilal*<sup>18</sup>, where Justice Changla observed that the Constitution intends as religion only “whatever binds a man to his own conscience and whatever moral and ethical principles regulate the lives of men”. This decision overturned the previous judgment of the Supreme Court of India, in *Saraswathi Ammal*<sup>19</sup>, where the wives practice to set up a perpetuity to have worships at the burial places of their husbands, but relied on the Hindu scriptures to affirm that a practice to be defined as a “religious practice” has to be recognized by the society.

Furthermore, *Shirur Mutt*, recognizing, with minor remarks, the constitutional legitimacy of the Madras Act regulating Hindus temples and institutions, became landmark case for deciding on the following appeals on the consistency with the Constitution of the acts regulating religious affairs<sup>20</sup>.

The essential practice doctrine came into relevance even in *Sri Venkatramana Devaru*<sup>21</sup>, when the Court had to decide whether the exclusion of some people, the untouchables, from entering in a Hindu temple may be an essential part of Hinduism. Clearly, the case originated from the castes division provided by Hinduism and put in question the attempt of the State, affirmed here and there in the Constitution and particularly in the section on Freedom of Religion, to implement concretely the principle of equality. In its decision, the Court relied on a precedent decided by the Privy Council, *Sankarlinga Nadan v. Raja Rajeswara Dorai*<sup>22</sup> as well as on religious scriptures.

In particular, the Court deeply analyzed Hindus traditions coming to affirm that, although the worship in a temple was not an essential part of this religion according to the Upanishads<sup>23</sup>, it became an obligatory duty of the believers during the Puranic period<sup>24</sup>. Besides, it is in the 28

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<sup>18</sup> *Ratilal Panachand Gandhi v. State of Bombay case* (1954 SCR 1035).

<sup>19</sup> *Saraswathi Ammal v. Rajagopal Ammal* (1953, 2 MLJ 63).

<sup>20</sup> **P.K. TRIPHATI**, *Secularism: Constitutional Provisions and Judicial Review*, in G.S. Sharma (ed), *Secularism: Its Implications for Law and Life in India*, N.M. Tripathi, Bombay, 1966.

<sup>21</sup> *Sri Venkatramana Devaru v. State of Misore* (1954 S.C.R. 1046).

<sup>22</sup> *Sankarlinga Nadan v. Raja Rajeswara Dorai*, 5 I.A. 176 (1908).

<sup>23</sup> Upanishads are collection of texts, whose author/s is unknown, which contain the philosophic tenets of Hinduism. Probably collected between 800 and 300 b. C., for long time they have been orally transmitted.

<sup>24</sup> Traditionally, the history of Hinduism is divided in different periods of development: the period of the historical Vedic religion, started from about 1750 b. C.; the formative period of Hinduism, between 800 b. C. and 200 b. C.; the Puranic period, from



Agamas<sup>25</sup> that the Court found the rules prescribed to the believers on how a temple is to be built, where the idols are to be placed and, particularly relevant for the decision to issue, where the believers should stand.

This distinction among worshippers was also sanctioned in the mentioned decision of the Privy Council, where judges affirmed that “under the ceremonial law pertaining to temple, who are entitled to enter them for worship and where they are entitled to stand and worship and how the worship is to be conducted are all matters of religion”. Indeed, clarified the essentiality of the distinction among believers according to Hindus religious practices and the related need to protect it according to the provisions on freedom of religion, the Court had to balance them with the abolition of the untouchability (art. 17 of the Constitution) and with the right of the State to open public temples to all Hindus (art. 25). Supreme judges affirmed that art. 17 does not apply to denominational temples, distinguishing

“between excluding persons from temples open for purposes of worship to Hindu public in general on the ground that they belong to the excluded communities and excluding persons from denominational temples on the ground that they are not object within the benefit of the foundation”;

on the contrary, according to judges, art. 25 is to be applied to all Hindus religious institutions, including denominational temple. Thus, the Court states the unconstitutionality of the exclusion of the untouchable from the temple, but, recognizing a minor concession to the Brahmins who founded the temple, admitted their exclusion during specific ceremonies to safeguard the distinction among believers whose essentiality has been recognized through the essential practice test. On this decision, it is noteworthy the role of interpreter of the religion the Court recognized to itself, deeply analyzing and debating on the content of the Hindus scriptures when defining whether the distinction among worshippers is essential or not for Hinduism, and the responsibility it took charge of when deciding on the ceremonies from which untouchables may be excluded.

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c. 200 b. C. to 500 A.D., also known as the ‘Golden Age’ of Hinduism, coinciding with the Gupta Empire; the Middle Ages, from roughly 650 to 1100, when the Islamic domination began.

<sup>25</sup> It is a collection of essays of Hindu devotional scholars, concerning philosophy as well as the religious practices believers have to follow in many field, such as meditation, yoga, mantras, temple construction and deity worship.



The “essential practice doctrine” was applied also in cases concerning other religious groups, which however the Court decided not relying on scriptures but following a secular perspective. For instance, in *Durgah*<sup>26</sup>, the appellants, the Sufi Muslim Khadims of the shrine of Moinuddin Chishti in Ajmer<sup>27</sup>, acted against the Durgah Khawaja Saheb Act of 1955, affirming that it took away their rights to manage the properties of the Durgah and to receive offerings from pilgrims, violating the religious rights of the Muslim Sufi Chishtia order. Justice Gajendragadkar looked at the history of the Ajmer shrine and, even recognizing the Chishtia order as a religious denomination, affirmed that since the pre-Mughal period its administration had always been conducted by officials appointed by the State and thus the appealed act was declared consistent with the Constitution and the violation of the religious rights was not recognized.

For the discourse conducted here, the note of caution introduced in the majority opinion is very important: the Court affirms that sometimes there are practices, even secular ones, usually considered as part of a religion, which actually are just superstitions, unessential to the religion and hence excluded from the protection of the Constitution. Here the Court moved an interesting step forward in its role of interpreter of the religious phenomenon, because it not only confirmed its role in defining what is essential or not to the religion, but also recognized to itself the ability to rationalize religion and to purge it from mere superstitions.

A Muslim community was involved also in *Sardar Syedna*<sup>28</sup> concerning whether excommunication can be considered an essential practice for the Shia sect Dawoodi Bohra. The Court, deeply reading Koranic provisions together with the principles affirmed in the 1948 Universal Declaration on Human Rights, argued that this kind of practice is contrary to both and also “out of date in modern times”; moreover, considering that excommunication may endanger the civil rights on property management of the excommunicated, the Court confirmed the legitimacy of the challenged Bommay Act prohibiting excommunication and rejected the appeal of the petitioner.

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<sup>26</sup> *Durgah Committee v. Hussain Ali* (1961 AIR 1402).

<sup>27</sup> Moinuddin Chishti (1141 - 1236) was an Islamic scholar who worked as an Imam in South Asia and finally settled in Ajmer. He introduced the Chishti Order of Sufism in India and had, among his followers, several Mughal emperors.

<sup>28</sup> *Sardar Syedna Taher Saifuddin Saheb vs. State of Bombay* (1962 SCR Supl. (2) 496).



The specific issue of the distinction between superstition and religion came again into question in *Tilkayat Sri Govindlaji*<sup>29</sup>, where supreme judges stated that, when there is a contention on competing religious practices, the Court may not solve it looking at what the community considers an integral part of its religion because the community itself may speak with more than one voice, so it is a duty of the Court to analyze if the practice is an essential part of the religion, extricating religious practices from secular ones. This statement seems to show how the Court felt self-confident on its ability in distinguishing secular and superstitious practices from religious ones, as it even more evidently appeared when the majority opinion rejected the argument of the appellants quoting the Australian case *Adelaide Company*, already mentioned here, that what is religion to one is superstition to another. A fortiori, in *Shastri Yagnapurushdasji v. Muldas*, the Court affirmed that the claim of this Satsangis group to be recognized as an independent denomination following the teaching of Swaminarayan was “founded on superstition, ignorance and complete misunderstanding of the true teaching of Hindu religion and of the real significance of the tenets and philosophy taught by Swaminarayan himself”<sup>30</sup>.

However, as an effect of the consolidation of its case-law, the self-attributed role of the Court to ascertain what is a religion resulted in a conservative attitude, able to exclude some religious groups from obtaining the official identification as religion. It was evident in *S.P. Mittal*<sup>31</sup>, when the majority opinion ruled that “the teaching of Sri Aurobindo represented only his philosophy and not a religion”, therefore denying to his followers the religious denomination status.

The position of the Court was put in the pillory by the minority opinion of Justice Chinnappa Reddy, who argued that the concept of religion cannot be “confined to traditional, established, well-known and popular religion”, explicitly referring to Hinduism, Islamism, Buddhism and Christianity, but must be interpreted in an expansive way. Despite

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<sup>29</sup> *Tilkayat Sri Govindlaji v. State of Rajasthan* (1964 SCR (1) 561).

<sup>30</sup> 1966 SCR (3) 242. Etymologically, *satsang* means meeting for seeking the truth. As in Hinduism the convention of group for common meditation and prays is considered among the means to reach the salvation, the establishment of several groups following the teaching of a specific leader seems to represent a common practice among the believers. In the case discussed here, therefore, the Court seems to not recognize any religious authority to Swaminarayan at the point of judging the content and the adequacy to Hinduism of his teaching.

<sup>31</sup> *S.P. Mittal v. Union of India* (1983 SCR (1) 729).



this objection, in subsequent cases the Court continued to follow the conservative approach.

In *Jagadishwaranand*<sup>32</sup>, the Court recognized to Ananda Margis<sup>33</sup> the religious denomination status and affirmed that its typical dance, the tandava<sup>34</sup>, is part of the related rites but, because of the recent affirmation of this worship, the dance cannot be considered among its essential element. This decision generated a long controversy. In 1990 the Calcutta High Court asked the Supreme Court to reconsider the decision, taking into account that the tandava was mentioned in Hindus literature, which the Court should carefully consider to avoid that “religious practice would become what the courts wish the practice to be”. Then, in *Commissioner of Police vs Acharya J. Avadhuta*<sup>35</sup>, the Supreme Court discussed again the issue denying once more to tandava the qualification of essential element. Particularly, the majority opinion stated that the essential part of a religion is composed by the core belief and by those practices fundamental to follow the belief, a character not recognized to tandava, considered as a simple superstructure. However, the dissenting opinion highlighted the crevices in such a rigid application of the “essential practice doctrine”, Justice Lakshmanan stating that, since essential practices are those “accepted by the followers of such a spiritual head as a method of achieving their spiritual upliftment, the fact that such practice was recently introduced cannot make it any the less a matter of religion”.

While the controversies over the Ananda cases went on, the Court also used the “essential practice doctrine” to enlarge the State’s influence on the management of religious institutions through judgments affirming that this activity is not an essential part of religious practices. In *Bramachair Sidheswar Bhai*<sup>36</sup>, the Court stated that the establishment of educational institutions for the Ramakrishna Mission is not an essential practice of this religious denomination as well as the customary procedures to nominate the head of the said educational institutions, so that the State may intervene in the selection procedures without infringing the constitutional

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<sup>32</sup> *Jagadishwaranand v. Police Commissioner, Calcutta* (1984 SCR (1) 447).

<sup>33</sup> Spiritual community, whose name roughly means ‘for the diffusion of the bliss path’, founded during the first half of the fifties by Prabhat Ranjan Sarkar in the Indian State of Bihar.

<sup>34</sup> The name indicates the dance Shiva did to begin the circle creation, preservation, dissolution. In its Ananda version, it commemorates the creation of the universe.

<sup>35</sup> *Commissioner of Police vs Acharya J. Avadhuta* (case n. 6230 of 1990, decided by the Supreme Court on 11 March 2004).

<sup>36</sup> *Bramachair Sidheswar Bhai vs State of West Bengal* (1995 SCC (4) 646).



provision on freedom of religion. Similarly, in *A.S. Narayana Deekshitulu*<sup>37</sup>, the Court affirmed that the appointment of the head of a Hindu temple according to hereditary rules does not represent an essential part of the worship; hence the State's intervention in this field must be considered consistent with the Constitution. Finally, following the same reasoning, in *Pannalal Bansilal Patil*<sup>38</sup> the administration of religious institutions was defined as secular activity, out of religious practices.

This attitude of the Court in deciding on very controversial cases by self-attributing the competence in ascertaining the content of a religious belief and the interpretation believers have to have remains constant in the case-law and it is followed still in the judgments issued in 2000s. The most recent case remount to 24 July 2015, when a three-judge bench rejected a public interest litigation (PIL), filled by a catholic nun excluded from taking a test because of her refusal to take off the veil, by affirming that "faith will not disappear" if one does not wear the veil for a short period with the aim of respecting rules established to ensure the fairness of a selection procedure. Contextually and with the same arguments, the Court rejected a PIL by the Students Islamic Organization of India.

## **5 – The migration of the Indian essential practice doctrine in Pakistan and Malaysia**

The apex Courts of Pakistan and Malaysia discussed the essential practice doctrine when deciding on the protection of rights of religious minorities. Thus, in the following paragraphs, the relevant constitutional provisions on freedom of religion and on the rights of religious minorities in force in Pakistan and Malaysia are discussed before considering how the Courts used, interpreted and adapted the Indian "essential elements doctrine" to their national contexts.

### **5.a - Interpreting the essential practice doctrine in Pakistan: the long-lasting history of the Ahmadis (non)recognition**

Pakistan became an independent State from India in 1947 because of the will of the leaders of the All India Muslim League (AIML)<sup>39</sup> to create a

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<sup>37</sup> *A.S. Narayana Deekshitulu v. State of A.P.* (1996 SC 1765).

<sup>38</sup> *Pannalal Bansilal Patil v. State of A.P.* (1996 SC 1023).

<sup>39</sup> Founded during the political section of the Congress of the All India Muhammadan Educational Conference (30 December 1906), the AIML aimed at representing Muslims



separate homeland for India's Muslims, which in that area were the majority of the population, in order to avoid them to become a mere minority inside the Union of India. Despite this overwhelming Muslim majority, since the partition from India AIML leaders ensured the new State would respect religious minorities accordingly with the Islamic tradition<sup>40</sup>. Thus, when the first Pakistani Constitution entered into force (1956), art. 18 guaranteed the right of all citizen to freely profess, practice and propagate any religion. National courts were then asked to interpret this article defining what religion is, but, very differently from their Indian homologues, they seemed to prefer to take the State out of the dispute. Indeed, in *Moula Bux*<sup>41</sup>, the Chief Court of Sind affirmed:

"It is not permissible to any Court to enquire further into the state of the mind and the beliefs of a person who professed to belong to a particular faith and inquire whether his actual beliefs conformed to the orthodox tenets of that particular faith".

In 1954, the Court of Inquiry, constituted to enquire into the disturbances occurred in Punjab in 1953 because of the clashes between Sunni ulama and the pretended-to-be Muslim sect of Ahmadis<sup>42</sup>, used almost the same reasoning. The Court stated "it is not our business to give findings whether Ahmadis are or are not within the pale of Islam [...] because no two ulama have agreed before us to the definition of a Muslim"<sup>43</sup>.

To support its decision, the Court of Inquiry also discussed the evolution of fundamental rights in the international law, specifically considering freedom of thought, conscience and religion, and affirmed

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during the British Empire and, meanwhile India defined its independence, it also supported the idea of creating a Muslim motherland separated from the Indian State.

<sup>40</sup> Muhammad Ali Jinnah made a specific reference to the toleration of Islam toward religious minorities on 18 August 1947, just few days after he sworn as Pakistan's first Governor-General, while celebrating the end of the Ramadan.

<sup>41</sup> *Moula Bux v. Charuk* (1952 PLD Sind). On the protection of religious minorities, see: **M. TAYYAB**, *Freedom of Religion and Religious Minorities in Pakistan: A Study of Judicial Practice*, (1995) *Fordham International Law Journal*, 1.

<sup>42</sup> Founded in 1889 by Mirza Ghulam Ahmad in the Indian State of Punjab, this religious movement self-attributes the duty of renovating Islam by purging it by any justification of hate and professing peace and concord among people. The very controversial point, which distinguish Ahmadis from all the other Muslim groups, is their attribution to Mirza Ghulam Ahmad of the epithet of Prophet and their belief that Allah periodically has sent and will send prophets even after Mohammad, instead considered as 'the seal of Profethood' in the classical, Sunni and Shia, Muslim belief.

<sup>43</sup> Lahore Government Print, Report of the Court of Inquiry, 1954.



that taking a decision on the religious qualification of Ahmadis would infringe those rights and ostracize Pakistan from international society. Thus, a context where leading forces were secular allowed courts to take the distance from religious questions affirming the equality of all religions in front of the State and the consequent need that it does not interfere in the definition of the content of beliefs.

Become an Islamic Republic since the 1963 first constitutional amendment to the 1962 Constitution<sup>44</sup> and confirmed in its Islamic belonging after the approval of the 1973 Constitution<sup>45</sup>, Pakistan formally continued to protect freedom of religion and the concerned provisions – still in force in 2015 – seem to be very similar to the Indian ones. In fact, even if secularism has no room in the country as “Pakistan shall be a Federal Republic to be known as the Islamic Republic of Pakistan” (art. 1) and “Islam is the State religion” (art. 2), the provisions on freedom of religion recall – with minor but sometimes relevant differences – the Indian ones<sup>46</sup>. Particularly, art. 20 states that, subject to law, public order and morality, every citizen shall have the right to profess, practice and propagate his religion and every religious denomination and every sect thereof shall have the right to establish, maintain and manage its religious institutions. The provision seems to use almost the same wording of art. 25 of the Indian Constitution, but the reference to citizenship turns the recognition of the right to all the individuals, as it is in India, in a recognition granted only to Pakistanis. Similarly again to the Indian provisions, art. 21 prohibits to compel people to pay any special tax the proceeds of which are to be spent on the propagation or maintenance of any religion other than their own.

These provisions broadly protect religious freedom, even though such protection become controversial when concerning religious

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<sup>44</sup> Because of the beginning of political troubles, in October 1958, the then President Iskander Mirza abrogated the Constitution. Shortly afterwards General Ayub Khan deposed Iskandar, declared himself President and, on 17 February 1960, appointed a Commission to draft a new fundamental law for the country. The draft was presented on 6 May 1961 and came into effect on 8 June 1962. The Constitution contained 250 articles divided into twelve parts and three schedules.

<sup>45</sup> The second martial law was imposed on 26 March 1969, when President Ayub Khan abrogated the Constitution of 1962 and handed over power to the Army Commander-in-Chief, General Agha Mohammad Yahya Khan. On assuming the presidency, General Yahya Khan acceded to popular demands by abolishing the one-unit system in West Pakistan and ordered general elections on the principle of one man one vote.

<sup>46</sup> See: **B.M. CHENGAPPA**, *Pakistan: the Role of Religion in Political Evolution*, (2008) *Strategic Analysis*, 12.



minorities, particularly after the approval of the 1974 Constitution (second amendment) Act. Modifying art. 260 of the Constitution defining the terms used therein, the amendment explicitly defined Muslimhood, stating that a person who does not believe in the absolute and unqualified finality of the Prophethood of Muhammad [...] is not a Muslim for the purposes of the Constitution or law.

Once again, the reasons for the approval of this Act are based in the controversy between Sunni ulama and Ahmadis, but this time the Parliament strongly intervened and complied with the ulama's requests, probably to bind this lobby to the new constitutional order. Relying on the definition provided in art. 260, in *Mobashir*<sup>47</sup> ulama asked the Lahore High Court to limit the practices of Ahmadis distinguishing them from Muslims. The Court declared that "it is a policy of the State to protect all religions but to interfere with none", but could not question the legitimacy of the second amendment the *stare decisis* principle obliging it to follow the Supreme Court of Pakistan previous decision in *State v. Zia-ur-Rahman*<sup>48</sup>. Therefore, the Court could not help but made the ulama's wish to exclude Ahmadis from the group of Muslim sects.

Achieved this, ulama continued to pressure against Ahmadis on Government of General Zia-ul-Haq<sup>49</sup>, which, on 26 April 1984, issued the Ordinance XX<sup>50</sup>. This act amended article 298B and 298C of the Penal Code criminalizing the practices of Ahmadis' religion, included the simple use of the epithet "Muslim" to qualify themselves. As a consequence, Ahmadis filed the Constitutional petition n. 2309 of 1984 to the Lahore

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<sup>47</sup> *Mobashir v. Bokhari* (1978 PLD Lah.).

<sup>48</sup> (1973 PLD S.Ct.). According to the Court, as long as the procedure to amend the Constitution was followed, the Judiciary cannot question the substance of an amendment. This decision clearly rejects another doctrine elaborated by the Supreme Court of India, the basic structure of the Constitution doctrine, forbidding the Parliament to amend those provisions representing the basic structure of the Constitution, represented by a main core whose modification would change the whole content of the legal system. The doctrine was elaborated in *Kesavananda Bharati Sripadagalvaru v. State of Kerala* (1973, 4 SCC 225) and henceforth evolved adapting and modifying the content of the basic structure. See: **T.R. ANDHYARUJINA**, *The Kesavananda Bharati case: the untold story of struggle for supremacy by Supreme Court and Parliament*, Universal Law Publishing Co., Delhi, 2011.

<sup>49</sup> General Zia was the author of the coup d'état which subverted the government of Zulfikar Ali Bhutto on 5 July 1977; on the same day the martial law was declared and the Constitution was suspended sine die. On 16 December 1978, General Zia officially became the President of Pakistan.

<sup>50</sup> The Ordinance is officially named "The Anti-Islamic Activities of the Quadani Group, Lahori Group, and Ahmadis (Prohibition and Punishment) Ordinance".



High Court pretending the Ordinance violated their religious rights. The Court quickly dismissed the petition affirming that the Constitution was suspended with the declaration of the Martial Law on 5 July 1977, and so legislative power was not bound to any constitutional limit. The appeal to the Federal Shariat Court<sup>51</sup> was also dismissed because, according to this Court, Ordinance XX was a direct consequence of the 1974 constitutional amendment declaring Ahmadis as non-Muslims<sup>52</sup>. It is noteworthy that this Court did not avoid to discuss the possible violations of article 18 of the 1948 Universal Declaration of Human Rights deriving from the Ordinance, although, according to a very contestable interpretation, it stated “there is nothing in this charter to give to the citizens of a country the right to propagate or preach his religion”. As a last resort, in 1988, Ahmadis appealed the Supreme Court of Pakistan, whose decision is pivotal for the discourse on the judicial interpretation of a foreign doctrine proposed in this essay.

In *Zaheeruddin*<sup>53</sup>, Ahmadis claimed that Ordinance XX violated their fundamental right to freedom of religion as protected by art. 20 of the Constitution. The majority opinion, delivered by 4 judges of the 5 composing the bench, deeply discussed the arguments put forward by the petitioners, but finally affirmed that some terms are peculiar of Islam and the State have the duty to protect them from being used by other religious groups. Furthermore, being an Islamic State, Pakistan must protect Islam from religious communities wrongly claiming to be Muslim and so Ahmadis, not fitting with the definition of Muslim provided by the 1974 constitutional amendment, cannot use symbols and terms connected with Islam. Moreover, because in an Islamic State Islamic law is the positive law of the land, the right to freedom of religion can be limited when it infringes Islamic precepts. Finally, the Court discussed the extent of freedom of religion, calling into question the essential practice doctrine in order to affirm that such a freedom only protects integral and essential parts of the religion and that it is a duty of the Court itself to determine whether some practices are integral and essential parts of a religion. Then,

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<sup>51</sup> This Court was established by the Presidential Order n.1 of 1980 to determine whether laws comply with Sharia, the Islamic Law and to revise criminal courts jurisdiction in *hudud* cases (cases concerning what is forbidden according the Sharia). It is composed by 8 Muslim judges, 3 of which are required to be Ulema, appointed by the President of Pakistan for a 3 years term, which may eventually be extended by the President.

<sup>52</sup> *Majibur Rehman v. the State* (1985 PLD, FSC).

<sup>53</sup> *Zaheeruddin v. the State* (1993 SCMR 1718).



the Court went further stating that even when there are constitutionally protected essential elements, they can be limited if their exercise leads to law and order problems.

Explicitly quoting the Indian case *Duragh*, the Court noted that being such limitations to freedom of religion consistent with the Constitution of a secular State as India, a fortiori they are consistent in an Islamic State, where the protection of Islam is a fundamental task of the institutions. However, the Court did not entirely base its decision on Indian case-law, which is sometimes cited *a contrario*. In this decision, in fact, the Court quoted also the Indian case *Syedna* on excommunication, but in order to declare excommunication as an integral part of the religion. Coupling this declaration with Ahmadis constant affirmation that they are different from any other Islamic group, the majority opinion stated that once Ahmadis had affirmed their difference from the Islamic majority they cannot pretend to use symbols, terms and practices typical of Islam, which could induce confusion in the believers and realize a proselytism based on the misunderstanding of worshippers.

#### **5.b - Cloths and Words always matter. The essential doctrine in Malaysia**

When obtaining the independence from Great Britain in 1957 with the official denomination of Federation of Malaya, Malaysia had to manage a population whose traditional religion was animism but whose 60% declared itself as Muslim, while the rest was divided among Buddhists, Christians, Hindus, Sikhs, Baha'is and practitioners of the traditional Chinese religions. The Constitution entered into force in the same year seemed aware of this pluralism as well as of the majoritarian presence of Muslims. Thus, according to the Constitution, "Islam is the religion of the Federation; but other religions may be practiced in peace and harmony in any part of the Federation" (art. 3) being recognized the right to profess, practice and propagate any religion (art. 11, 1) and the prohibition to compel believers in paying taxes the proceeds of which are specially allocated in whole or in part for the purposes of a religion other than their own (art. 11, 2).

Nevertheless, religious freedom is bound to the respect of public order, health and morality (art. 11, 5) and to the prohibition of propagating "religious doctrine or beliefs among persons professing the religion of Islam" (art. 11, 4). Finally, every religious group has the right to manage its own religious affairs, to establish and maintain religious institutions and to acquire and own properties (art. 11, 3). Interestingly,



Islam represents a connotative element to define a Malay person as well, who in fact is conceived as an individual professing the religion of Islam, habitually speaking the Malay language and conforming to the Malay custom (art. 160)<sup>54</sup>.

Finally, Islam directly influences the functioning of the institutions, and particularly of the Judiciary, providing the Constitution for Syariah Courts (sharia courts)<sup>55</sup> competent in judging on disputes among Muslims in matters such as family law and property rights. An influence affecting also the internal cohesion of the law and possibly the legal certainty, as 13 systems of Islamic administration and Islamic law, one for each member state of the Federation, have been established<sup>56</sup>.

Given this set of provisions, the interpretation of the role of Islam in the public sphere and the definition of who a Muslim is become a very important task also for the Malaysian Supreme Court. In *Che Omar Che Soh*<sup>57</sup>, the Supreme Court stated that the Constitution provides for a ceremonial role of Islam and that it is the civil law – intended as opposite to the religious one – that governs Malaysia, also relying on art. 4 of the Constitution according to which “the Constitution is the supreme law of the Federation”. Despite this decision, Courts progressively recognized a preeminent role for Islam. In *Kamariah*<sup>58</sup>, the Federal Court justified its refusal to allow conversion out of Islam stating that being Islam the religion of the Federation it has a special status. Lower courts followed this approach, as evident in *Lina Joy*<sup>59</sup>, when the High Court of Kuala Lumpur relied on art. 160 of the Constitution to affirm that since the plaintiff is a Malay, by that definition she cannot renounce her Islamic religion.

While declaring its preeminence, Courts debated on the essential elements of Islam as well, deeply arguing on the doctrine elaborated by the Indian Supreme Court. Thus, when art. 11, 4 of the Constitution was

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<sup>54</sup> See **J. LING-CHIEN NEO**, *Malay Nationalism, Islamic Supremacy and the Constitutional Bargain in the Multi-ethnic Composition of Malaysia*, (2006) *International Journal on Minority and Group Rights*, 13.

<sup>55</sup> See: 1988 Constitutional Amendment Act n. A704 of 10 June 1988, and 1994 Constitutional Amendment Act n. A885 of 24 June 1994

<sup>56</sup> **A. HARDING**, *The Keris, the Crescent and the Blind Goddess: the State, Islam and the Constitution of Malaysia*, (2002) 6 *Singapore Journal of International and Comparative Law*, 154-180, p. 169.

<sup>57</sup> *Che Omar Che Soh v. Public Prosecutor* (1988, 2 MLJ 55).

<sup>58</sup> *Kamariah bte Ali dan lain-lain v. Kerajaan Negeri Kelantan, Malaysia dan satu lagi* (2002, 3 MLJ 657).

<sup>59</sup> *Lina Joy v. Majlis Agama Islam Wilayah* (2004, 2 MLJ 119).



challenged because of the dress codes related to some religious groups, Courts affirmed the competence of the State to limit religious practices concerning their non-essential elements. In *Hjh Halimatussaadiyah*<sup>60</sup>, the Federal Court rejected the appeal of a woman asking to wear the purdah<sup>61</sup> at work, adumbrating for the first time the use of the essential practice test, but naming it “integral part test”. Discussing the reasons that should allow the woman to wear the purdah, the Court affirmed that this garment is not an essential part of her religion and thus it may be prohibited by the State in the public interest, as a non-essential religious practice. According to the same reasoning, in *Meor Atiqulrahman*<sup>62</sup>, the Court rejected the appeal of Muslim boys claiming a right to wear turbans at school infringed by a 1997 School Regulation excluding these cloths, among some other traditional ones, from the school’s uniform<sup>63</sup>.

In this second case, the discussion on the use of foreign precedents seems to have a great momentum. When the pupils were expelled from schools for not complying with the regulation, their fathers appealed the High Court and, referring to art. 25 of the Indian Constitution to define what religion is and relying on Indian case-law on the topic, argued that a religion may provide for forms of worship that are an integral part and may include food and dress prescriptions. Accepting this reasoning, the Court stated that wearing a turban is an integral part of the Hakum Syarak religion and ordered the school to readmit the expelled pupils. Consequently, the school appealed the Court of Appeal, which applied again the essential practice test and quoted several Indian judgments and other foreign precedents the Indian Court had referred to, such as the US and the Australian ones. The Malaysian Court of Appeal explicitly used the essential practice test elaborated in India to affirm that what constitute an integral part of a religion has to be ascertained by the Court itself “with reference to the doctrine of a particular religion and include practices, which are regarded by the community as a part of the religion”. Relying on the *Syedna* case, judges also clarify that the fact that a practice is

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<sup>60</sup> *Hjh Halimatussaadiyah bte Hj Kamaruddin v. Public Service Commission, Malaysia* (1994, 3 MLJ 61).

<sup>61</sup> Literally, it means "curtains". It is the veil Malaysian women use to wear in order to respect the social practice imposing them to completely cover their face and body when they are not at home.

<sup>62</sup> *Meor Atiqulrahman bin Ishak v. Fatimah Sihi* (2006, 4 MLJ 605).

<sup>63</sup> **L-A. THIO, J. LING-CHIEN NEO**, *Religious Dress in Schools: the Serban Controversy in Malaysia*, (2006) *International and Comparative Law Quarterly*, 3.



integral to a religion has to be proved with “relevant and admissible evidence”.

Indeed, considering that the fact that wearing a turban is an integral part of Islam had not been consistently proved, the Court dismissed the appeal and considered lawful the school regulation forbidding pupils to wear it. The final decision was taken by the Federal Court, whose majority opinion, even dismissing their appeal, confirmed the arguments of the plaintiffs and stated that the Court of Appeal was too strongly influenced by Indian case-law and had not considered that as for the Preamble of its Constitution India is a secular State, while in Malaysia Islam has a specific constitutional recognition. Thus, Justice Mohammad, author of the judgement, formally rejected the essential practice doctrine but an echo of it can be perceived in his reasoning. In fact, he affirmed that in order to consider a practice protected by the provision on freedom of religion, one must prove that there is a religion, that there is a practice, and finally that the practice is a practice of a religion. Only after such demonstrations, according to Justice Mohammad, one has to prove that the religion considers the practice compulsory. On this ground, the judge affirmed that the wearing of turban is not mandatory for Islam, so the appeal was dismissed.

The Federal Court came again on the dangerousness of the use of foreign precedents when deciding in *Menteri Dalam Negeri*<sup>64</sup>. The case originated from the Cabinet ban of the Catholic newspaper “The Herald” for having used the word “Allah”, according to the Cabinet, willing to arouse the sensitivity of Muslims<sup>65</sup>. The appeal of The Herald in front of the High Court in 2009 resulted in a dismissal of the ban because, relying on the mentioned case on turbans and using the essential practice test, the Court affirmed that the use of the word “Allah” is “an essential part of the worship and instruction in the faith of the Malay speaking community of the Catholic Church in Malaysia”. The Home Ministry appealed against this decision and the Court of Appeal, highlighting the dangerousness in deciding inter-faith questions looking at foreign precedents, confirmed the Cabinet’s ban. Even in this case, a formal rejection of the essential practice doctrine was followed by a practical use of the test it consists of. The Court of Appeal affirmed that the use of the Word “Allah” is not necessary for the worship of Malay Christians, which should decide to use other words to indicate God, in addition because even in the Bible the word does not

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<sup>64</sup> *Menteri Dalam Negeri v. Titular Roman Catholic Archbishop of Kuala Lumpur* (2013, 6 MLJ 468)

<sup>65</sup> See: Home Minister order of 7 January 2009.



appear. After another appeal of the Christian community, the Federal Court had the final say on the issue and confirmed both that the reliance on foreign precedent may heighten rather than defuse tensions when adjudicating an intra-religious dispute and the decision of the Court of Appeal on the legitimacy of the ban.

## 6 - Concluding remarks

The definition of a “correct meaning of religion” seems to be an important topic for the making of the decolonized India since the constituent debates, where the recognition of a public role for religions was deeply discussed in the lack of consensus on the way to conceive secularism.

Different positions arose: Ambedkar<sup>66</sup> proposed to leave little room for religions in the public sphere; Munshi<sup>67</sup> constantly suggested taking into account the strong relevance of religions for Indian people; Nehru<sup>68</sup>, whose position finally prevailed as already noted, proposed the equal respect of all religions and defined the secular State as a State recognizing a free play for all religions, until they do not interfere with each other or with the basic conception of the State itself.

Even the essential practice doctrine was foreshadowed during constituent debates as Ambedkar said:

“there is nothing extraordinary in saying that we ought to strive hereafter to limit the definition of religion in such a manner that we shall not extend it beyond beliefs and such rituals as may be connected with ceremonials which are essentially religious”<sup>69</sup>.

Henceforth, the Supreme Court elaborated the doctrine according to subsequent waves of evolution. During the Fifties, the Court seemed to strictly follow Nehru’s idea of a free play for all religions, rejecting a too

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<sup>66</sup> Bhimrao Ramji Ambedekar (14 April 1891 – 6 December 1956), was a jurist and an economist actively participating in the drafting of the Indian Constitution. He was also the first Law Minister of the independent India.

<sup>67</sup> Kanaiyalal Maneklal Munsh (30 December 1887 – 8 February 1971), educationist and lawyer, he was member of the Indian Constituent Assembly.

<sup>68</sup> Probably the most know of the three Indian politician mentioned, Jawaharlal Nehru (14 November 1889 –27 May 1964) was political and spiritual heir of Gandhi and was the first Prime Minister of the independent India. He also served as a member of the Indian Constituent Assembly.

<sup>69</sup> See: *Constituent Assembly Debates*, 507-8, cit. in **G.J. JACOBSON**, *The Wheel of Law: India’s Secularism in Comparative Constitutional Context*, Princeton University Press, Princeton, 2009, p. 98.



narrow definition of religion and allowing each religious denomination to define the essential practice of its worship. In the following decade, however, the Court seemed to recognize protection only to those practices suitable to make religion as a tool of modernization, thus stating a strong distinction between religion and superstition notwithstanding the opinion of the concerned religious denominations. During this period, the consistency with constitutional provisions of the acts regulating the intervention of the State in the administration of temples was also affirmed. Such interpretation consolidated during the Eighties and the Nineties, probably because of the increasing political influence of Hindu nationalism, which shifted the Court's role from the interpretation of the content of religion and the purge of irrational elements to the legitimization of the State intervention in religious affairs<sup>70</sup>.

The Pakistani and Malaysian Courts followed almost the same path, with some differences from India that are worth considering. In the Union of India, the essential practice doctrine was introduced to manage the difficult task of individuating the limits of religious autonomy and of State intervention. On the contrary, in Pakistan and Malaysia the Courts used the doctrine to decide on issues concerning the control on the State and on religious minorities by the majoritarian religion.

To justify these differences there are some elements linked to the legal and socio-historical contexts of the countries. In Pakistan, the Ahmadis controversy had become a reason of cleavages among the population so that judges justified a decision – the prohibition for Ahmadis to use the epithet of Muslim – grounded on the need to safeguard public order using the legal escamotage that Ordinance XX was issued during the martial law period. In Malaysia as well, judges issued decisions aimed at not altering the social context in a period of “fragility”. In fact, by declaring Islam as the State religion but not Malaysia as an Islamic Republic, framers surely intended to respect the secular nature of the State avoiding the establishment of a theocratic regime<sup>71</sup>, but, as the political debate became more and more focused on the role constitutionally provided for Islam, judges probably considered inappropriate to deal with such a sensitive issue starting from a foreign point of view.

Some considerations to explain the decisions of the Courts may pertain to the personal experiences of judges. In Pakistan, Chief Justice

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<sup>70</sup> See: **R. SEN**, *Legalizing Religion*, 29.

<sup>71</sup> **J.M. FERNANDO**, *The Position of Islam in the Constitution of Malaysia*, (2006) *Journal of Southeast Asian Studies*, 2, 266.



Chaudhary wrote the majority opinion after having seen his predecessor quickly dismissed for having previously taken a decision contrary to the wills of the military regime. In Malaysia, it could not be a mere coincidence that, in the turban case in front of the Court of appeal, the references to Indian case-law and the proposal of the argument that Islam should not be privileged in front of religious minorities were introduced by a judge with Indian origins.

From a broader point of view, the “essential practice doctrine” as applied in India, Pakistan and Malaysia offers the opportunity to add some hints in the debate on cross-fertilization. Those who argue against cross-fertilization, citing the Montesquieu’s theory according to which each rule serves its community, should consider the impact of globalization on this theory<sup>72</sup>. The increasing affirmation of a global community sharing the same point of view on the management of some fundamental rights may allow legislators and judges to use the same framework. It is evident in the cases discussed. In all the three countries examined, there is the same problem of dealing with a pluralistic society, but characterized by a strong religious majority, where constitutional provisions, almost with the same wording, express the same attitude toward the phenomenon. Indeed, judges’ interpretation tends to follow the same legal doctrine, the “essential practice doctrine” (whatever the used denomination of the theory may be in concrete). This happens because probably “those who interpret local constitutional traditions take a lively interest in how their counterparts in other jurisdictions interpret their own traditions”<sup>73</sup>. Nevertheless, the interpreters are not prone to a simply reception nor they merely cherry-pick only those decisions that may fit with their point of view.

Judges demonstrated that they deeply discuss foreign interpretations and, when deciding to follow them, there is always an effort of adapting them to domestic situations. Finally, this adaptation could represent an argument against the theory that the use of foreign precedents as to be conceived as contrary to the democratic rules. In fact, Supreme Courts, even entitled to judge on constitutional matters, are selected according to the procedures defined by the Constitution and interpret it according to a competence specifically attributed. We may then discuss on the general adherence to democracy of the constitutional texts

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<sup>72</sup> See: **A. SLAUGHTER**, *A Global Community of Courts'*, (2003) *Harvard International Law Journal*, 44; **A. SLAUGHTER**, *A New World Order*, Princeton University Press, Princeton, 2004.

<sup>73</sup> **A. BRUDNER**, *Constitutional Goods*, Oxford University Press, Oxford, 2004, p. VIII.



of the countries analyzed, but once this point is overcome, cross-fertilization cannot be conceived as undemocratic, as it represents just one of the interpretative tools at the disposal of judges.