

Doctrinal Inconsistencies in Essential Religious Practices’ Jurisprudence

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Abstract

Essential Religious Practices (ERP) doctrine under Article 25 and 26 of the Indian Constitution has become a significant yet contentious adjudicating tool in claims regarding religious freedom. The ERP test, which was created in the famous Shirur Mutt case, was meant to protect the autonomy of religious denominations by deferring to their own understanding of what constitutes essential practices. But in the last few decades, the judicial pronouncements have shown substantial doctrinal inconsistencies in interpretation and application of ERP.

This article explores the growth of the ERP through important court decisions and identifies patterns of inconsistencies that have emerged. These include the subjective determination of essentiality by the judiciary, the dilution of the deferential standard established in Shirur Mutt and the inconsistent treatment of the difference between religious and secular practices. The paper highlights how the doctrine has become the instrument of judicial theology and has become increasingly detrimental to the goal of religious autonomy. It also highlights that these inconsistencies result in unpredictable and fragmented jurisprudence which negatively affects constitutional legitimacy and the rights of minorities. It ends by making a case for a theoretical recalibration, it advocates a shift to a rights-based, minimally interventionist model, which would better correspond with India’s pluralistic-secular constitutional scheme.

Keywords: Essential Religious Practices, Article 25 and 26, Shirur Mutt, constitutionalism, Sabrimala.

1. Introduction

Religion is considered to be an imperative and indispensable part of the human existence. The presence of faith in form of religion has a major role to play in the life of an individual. The concept of religious freedom is enshrined under article 25 of the Indian Constitution, it is clubbed with the mandate that state can intervene in religious affairs if they go against the societal order. However, the governments have shown the inability to develop any mechanism that can balance the right of religious freedom of an individual to public law and order. This has led the judiciary to take remedial measures, which has eventually led to the development of ‘essential religious practices’¹ test by the apex court. This test was essentially formed to determine the immunity of religious practices from state intervention.

Back then, theological controversy was inevitable for the judges to avoid. The judges cannot in any case avoid the fact that religion is inscribed in routine social patterns in India. Considering the fact that religion plays a profound part in an individual’s life, it somewhat became necessary for the courts to inquire into the essentials of the religion. The judiciary considered this doctrine to be necessary to give effect to social reforms which would otherwise have been overshadowed by the complex religious practices. Since then, it has been a juridical journey of determining ‘essential religious practices’ to arrogating to itself the right to decide the ‘essentials of religion’. While embarking upon such a journey, the judiciary has more often than not been burdened by interpretive responsibilities that exceed their field of expertise. Such an attempt made by the Judiciary, even though necessary for guaranteeing the rights of people, has been criticized by many scholars as an interventionist approach². Several scholars believe that such an approach has led the court to become a seat of theological authority rather than constitutional authority.

India is country which is known for its pluralistic society living in consonance with each other. When the framers of the constitution refused to make India into a theocratic state and opted for the secular character of the constitution, it raised substantial questions has to the unity and integrity of the country. The main problem which stood before the judiciary was to balance the right of “freedom of religion” given under article 25³ with that of social reformation. Eradication of social evils which purports from certain religious beliefs was a challenge faced by the judiciary. The apex court formulated the doctrine of “essential religious practices” as an answer to this challenge. Although, the formulation of this doctrine was to eradicate social evils and propagate unity in the country, the inconsistent and irresponsible approach of the courts in application of this doctrine has created a threat to the very principle of ‘secularism’ enshrined in our constitution.

¹ Shrutanjaya Bhardwaj, “Individual Religious Freedom is subject to other Fundamental Rights” (2019) 7 SCC J-29.

² Shylashri Shankar, ‘A Juridical Voyage of “Essential Practices of Religion” From India to Malaysia and Pakistan’ American Behavioural Scientist 1-25 (2015).

³ The Constitution of India, art. 25.

2. Evolution of the “Essential Religious Practices” Test

The Constitution of India provides for a secular model of our country, however as we have discussed above that religion is an indispensable part of the Indian society. This mixture of two separate things has ultimately proved to be detrimental for attainment of social justice. India follows a model which seeks to bring parity between the issues of religion, tradition, culture and social reforms.

To promote the model of secularism, the judiciary in the initial years had to face hardships in defining what practices would be eligible for constitutional protection considering the fact that these practices are followed by people since time immemorial but do not stand with the scheme of the constitution. The judiciary also had the task of managing religious institutions affairs and define their domain. While deliberating on such issues, the court subsequently assumed the role of an interpreter of the tenets of any religion. The court struck down several such tenets which did not fulfil the mandate provided by the constitution. Thus, this led the courts to frame the highly debatable test of essential religious practices. The judiciary has frequently resorted to this doctrine to adjudicate as to what constitutes an essential part of religion.

The term ‘essential’ was coined because the Courts had to make distinction between matters of religion and matters of secular activity amenable to state regulation⁴. The attempt was made by the Supreme Court in order to undertake ameliorative action to address the inequalities meted out against the lower caste Hindus and to the indigenous tribes⁵. It is not evident since when the Supreme court started interpreting the tenets of religion but the driving force behind this approach was the legal challenges faced by the State while taking action for the purpose of fulfillment of social justice. The court also intervened in reforming the social practices such as abolishing untouchability and for curbing the offences against the women.

Dr. B.R. Ambedkar in his constituent assembly speech related to freedom of religion said that “...there is nothing extraordinary in saying that we ought to strive hereafter to limit the definition of religion in such a manner that we shall not extend beyond the beliefs and such rituals as may be connected with ceremonials which are essentially religious.”⁶

The Supreme court has given a literal interpretation to these words of Dr. B.R. Ambedkar and has indirectly gathered the idea of resorting to a doctrine such as ‘essential religious practices’. The court however failed to appreciate the rationale behind the statement and behind the fact that the framers of the constitution themselves left open the debate on religious freedoms by providing the power to the State under article 25 of the Constitution to make legislations “*regulating or restricting any economic, financial, political or other secular activity which may be associated with religious practice.*”⁷ The interesting point to note is that the Court preferred to lay down essential practices test rather than simply subjecting the practices or impugned legislations to the test of public order, morality and health, to which Articles 25 and 26 are already subject⁸. Instead of denying the impugned

⁴ *Supra* note 2.

⁵ *Ibid.*

⁶ Constituent Assembly Debates on December 02, 1948 available at: <http://parliamentofindia.nic.in/ls/debates/vol7p18b.html> (last visited on October, 2019).

⁷ The Constitution of India, art. 25.

⁸ Justice Aftab Alam, “The Idea of Secularism and the Supreme Court of India”, The Gandhi Foundation 2009 Annual Lecture at The Honourable Society of The Inner Temple, Temple Church,

practice on the basis of constitutional protection given in article 25, that it violates public order, health or morality, the court preferred to resort to the doctrine of essential religious practices. The court empowered itself to declare that a certain practice is an essential part of a particular religion or a non-essential part of the religion.

The doctrine was first articulated in the *Shirur Mutt case*⁹, the court held that the term 'religion' in article 25 covers all rituals and practices that are integral to the religion.¹⁰ From this case, the judiciary took it upon itself to determine the integral part of a religion. However, it did not address the fact about where a line is to be drawn between what are matters of religion are and what are not. Over the years it has led court to curtail religious freedoms, especially when it comes to minorities. A seven judge bench observed:

In the first place, what constitutes the essential part of a religion is primarily to be ascertained with reference to the doctrines of that religion itself. If the tenets of any religious sect of the Hindus prescribe that offerings of food should be given to the idol at particular hours of the day, that periodical ceremonies should be performed in a certain way at certain periods of the year or that there should be daily recital of sacred texts or ablutions to the sacred fire, all these would be regarded as parts of religion and the mere fact that they involve expenditure of money or employment of priests and servants or the use of marketable commodities would not make them secular activities partaking of a commercial or economic character; all of them are religious. practices and should be regarded as matters of religion within the meaning of article 26(b). What article 25(2)(a) contemplates is not regulation by the State of religious practices as such, the freedom of which is guaranteed by the Constitution except when they run counter to public order, health and morality, but regulation of activities which are economic, commercial or political in their character though they are associated with religious practices.”

In the *Sri Venkataramana Devaru v. State of Mysore*¹¹, the apex court laid down a crucial precedent relating to the courts approach in the matter of religion. The court changed its stance to a more determinative authority in determining whether the impugned practice forms part of the essential character of a religion. After this decision the test to determine what is 'essentially religious' promoted its position to determine what is 'essential to the religion'. In this case the essential practice doctrine played a rather progressive part to decide upon matters of religion and to also maintain an essential facet of our constitution i.e. secularism. A constitutional bench observed:

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London available at <https://gandhifoundation.files.wordpress.com/2009/10/justice-atab-alam-2009-gf-annual-lecture2.pdf> (Last visited on October 25, 2019).

⁹ *Commissioner, Hindu Religious Endowments, Madras v. Sri Lakshmindra Thirtha Swamiar of Sri Shirur Mutt*, A.I.R. 1954 S.C. 282.

¹⁰ *Ibid.*

¹¹ AIR 1958 255 (CB).

would be regarded as parts of religion and the mere fact that they involve expenditure of money or employment of priests and servants or the use of marketable commodities would not make them secular activities partaking of a commercial or economic character; all of them are religious practices and should be regarded as matters of religion within the meaning of article 26 (b).

The Supreme Court adopted the doctrine of essential religious practice in the year 1954 which was way before the forty second amendment. The forty second constitutional amendment came in force in 1976, among other things it added the word 'secular' to the preamble. As a matter of fact, this term was inserted due to the constant hustle between the religious freedom guaranteed to an individual and the state intervention to bring on social reformation. To accomplish the task of reaffirmation that the state is secular in nature the apex court must have opined that the only possible way is to assume the role of a determining authority that segregates between essential and non-essential notions of a religion.

Subsequently, the supreme court went one step ahead in the case of *Durgah Committee v. Syed Hussain Ali*¹², the court drew a distinction between religious activities which are essential to a religion and activities which though has sprung out religion can merely be classified as superstitious beliefs. The court further observed that the protection given by the constitution under article 25 and article 26¹³ was confined to practices which form an essential and integral part of a religion. This gave a two fenced test to prove that an activity is an essential part of religion. The first fence is to prove that an activity is essential part of religion, the second fence is to prove that it is not a product of superstition. This empowered the court to not only determine the essentiality of an activity in the religion but to also determine what activity of the religion is a superstition. The constitutional bench observed:

Similarly, even practices though religious may have sprung from merely superstitious beliefs and may in that sense be extraneous and unessential accretions to religion itself. Unless such practices are found to constitute an essential and integral part of a religion their claim for the protection under Art. 26 may have to be carefully scrutinized; in other words, the protection must be confined to such religious practices as are an essential and an integral part of it and no other.

A leading example of where the judiciary used the power abovementioned will be the case of *Mohd.Hanif Qureshi v. State of Bihar*¹⁴. In this case a group of Muslim butchers challenged the constitutional validity of the acts on the ground that they infringe the fundamental rights of the petitioners guaranteed by part III of the constitution. The petitioners claimed that these laws infringe fundamental rights guaranteed under article 14, 19(1)(g) and 25¹⁵ of the Indian constitution. The apex court upheld the validity of the impugned acts and among other things also held that cow slaughter is not an essential part of Islam. The constitutional bench observed:

While the petitioners claim that the sacrifice of a cow is essential, the State denies the obligatory nature of the religious practice. The fact, emphasised by

¹² AIR 1961 1402.

¹³ The Constitution of India, art. 26.

¹⁴ AIR 1958 731.

¹⁵ The Constitution of India, arts. 14, 19(1)(g), 25.

the respondents, cannot be disputed, namely, that many Mussalmans do not sacrifice a cow on the Bakr Id Day. It is part of the known history of India that the Moghul Emperor Babar saw the wisdom of prohibiting the slaughter of cows as and by way of religious sacrifice and directed his son Humayun to follow this example. Similarly Emperors Akbar, Jehangir, and Ahmad Shah, it is said, prohibited cow slaughter. Nawab Hyder Ali of Mysore made cow slaughter an offence punishable with the cutting of the hands of the offenders. Three of the member of the Gosamvardhan Enquiry Committee set up by the Uttar Pradesh Government in 1953 were Muslims and concurred in the unanimous recommendation for total ban on slaughter of cows. We have, however, no material on the record before us which will enable us to say, in the face of the foregoing facts, that the sacrifice of a cow on that day is an obligatory overt act for a Mussalman to exhibit his religious belief and idea. In the premises, it is not possible for us to uphold this claim of the petitioners.

The case of *Hanif Quereshi*¹⁶ was a milestone in the jurisprudence further developed by courts in the cow slaughter laws. However, eventually the courts upheld the laws proposing complete ban on cow slaughter. This is certainly considered to be a matter of concern as it has been rightly pointed out by senior advocates, Rajeev Dhawan and Fali S Nariman that “this is an undesirably unsafe way of examining and pronouncing on faith. Judges become theologians and are forced to make roving inquiries about all or any religious texts, beliefs or practices. Once the door is opened, there is no limit to which the Court cannot go.”¹⁷

Several troubling aspects of this doctrine can be seen in a plethora of cases. The apex court has in itself given the authority to decide on matters of faith. It has given itself the authority to decide on what forms part of an essential tenet of the religion. However, one cannot deny the fact that the courts have applied this doctrine rather inconsistently.

In the case of *Sardar Syedna Tahir Saifuddin Saheb v. State of Bombay*¹⁸, the court on the question of whether an excommunication can be considered to be an essential religious practice practiced by the Dawoodi Bohra community, answered in the positive and said that the legislature was not permitted to “reform a religion out of existence or identity”. Ayyangar J., stated:

In my view by the phrase "laws providing for social welfare and reform" it was not intended to enable the legislature to "reform", a religion out of existence or identity. Article 25 (2)(a) having provided for legislation dealing with "economic, financial, political or secular activity which may be associated with religious practices", the succeeding clause proceeds to deal with other activities of religious groups and these also must be those which are associated with religion. Just as the activities referred to in Art. 25(2)(a) are obviously not of the essence of the religion, similarly the saving in Art. 25(2)(b) is not intended to cover the basic essentials of the creed of a religion which is protected by Art. 25(1).

¹⁶ AIR 1958 731..

¹⁷ B.N. Kripal, *et.al.*, *Supreme but not Infallible* (Oxford University Press, 2011).

¹⁸ AIR 1962 853 (CB).

In another case of *Shastri Yagnapurushdasji v. Muldas*,¹⁹ the principal question which arose in this case was whether the Bombay High Court right in holding the Swaminarayan sect is not a religion separate and distinct from the Hindu religion. A constitutional bench in supreme court held that Swaminarayan sect was a part of 'Hindu' religion. The court went on to define the term 'Hindu' by referring to several philosophical text of Hinduism. This case brought a positive social change as it upheld the validity of Bombay Hindu Places of Public Worship (Entry-Authorisation) Act, 1956 that prohibited Hindu temples from refusing entry to Harijans.

Thus, it can be clear that the earlier approach of courts was to eradicate social evils and this doctrine was formulated to bring reform to certain social and religious practices, it is at present evident that this approach of court has now come to become interventionist rather than reformist.

The mischief of essentiality test is evident in the *Gram Sabha of Village Battis Shirala v. Union of India*²⁰ case²¹. In this case, members of a particular sect claimed that capturing and worshipping a live cobra during the festival of *Nagpanchami*, was an essential part of their religion. The plaintiffs relied on the text of a local religious text *Shrinath Lilamrut*, which prescribes the practice, whereas judiciary relied on the general religious texts of Hindus known as *Dharma Shastra*. Rather than basing its reasons on the religious text as was the practice, the court relied on the scholarly interpretation of *Dharma Shastra* and held that the act of capturing and worshipping a live cobra was not an essential religious practice. The High Court observed:

Essential practice means those practices that are fundamental to follow a religious belief. It is upon the cornerstone of essential parts or practices that the superstructure of a religion is built, without which a religion will be no religion. Test to determine whether a part or practice is essential to a religion is to find out whether the nature of the religion will be changed without that part or practice. If the taking away of that part or practice could result in a fundamental change in the character of that religion or in its belief, then such part could be treated as an essential or integral part.

Another interesting case which came before the High Court, *Fasi v. Superintendent of Police*²², where a Muslim police officer challenged a regulation that prohibited him from growing a beard. The petitioner relied on the religious text of Islam, specifically on the *Sahih Al-Bukhari*²³ which is the teachings and practices of the Prophet Muhammad, also known as *Hadiths*. The Kerala High Court without considering the Hadith, which is the second most important source of the Islamic Law, rejected the petition. It based its opinion on the fact that several Muslim dignitaries did not sport a beard in the previous years. This way the court parted away from the conventional method of going into the religious texts and relied on anecdotal evidence.

It is not the evidence of the petitioner that is in question here. The main issue pointed here is that the courts have been inconsistent in its approach to apply essential religious

¹⁹ AIR 1966 1119 (CB).

²⁰ 2014 SCC OnLine Bom 1395.

²¹ *Supra* note 1.

²² (1985) ILLJ 463 Ker.

²³ *Id.*

practices. The mischief in this doctrine given by the supreme court is that the court has been inconsistent in applying it.

Another interesting case that highlights the shortcomings of this doctrine is the *Tandava Dance* case.²⁴ In this case, supreme court overruled the decision of Calcutta High Court that found *tandava* dance performed by the Ananda Margi faith to be an essential practice of this religion. The reasoning given by the court is based on the fact that the Ananda Margi faith came into existence in 1955 but the *tandava* dance was adopted only in 1966. The court claimed that the faith had existed without the practice in question for ten years. The court observed:

The question for consideration now, therefore, is whether performance of Tandava dance is a religious rite or practice essential to the tenets of the religious faith of the Ananda Margis. We have already indicated that tandava dance was not accepted as an essential religious rite of Ananda Margis when in 1955 the Ananda Marga order was first established. It is the specific case of the petitioner that Shri Ananda Murti introduced tandava as a part of religious rites of Ananda Margis later in 1966. Ananda Marga as a religious order is of recent origin and tandava dance as a part of religious rites of that order is still more recent.

Such an approach by the apex court could lead to stagnation of the religion. Such regressive logic will stop any reform or evolution of the religion. The dissent given by A.R. Lakshmanan, J. highlights the absurd logic of the court. He observed that "...essential practices are those that are accepted by the followers as a method of achieving their spiritual upliftment and the fact that such a practice was recently introduced cannot make it any less a matter of religion".²⁵

In *S.P. Mittal v. Union of India*²⁶, a constitutional bench dealt with the validity of the Auroville Act, 1980. The court held that Sri Aurobindo Society preaches and propagates on the ideology and philosophy of Sri Aurobindo. It held that because the nature of the denomination was such that it cannot be constituted as a separate religion. This decision was criticized because the judiciary took upon itself the task of separating religion and philosophy. The dissent opinion of Chinnappa Reddy, J. holds certain relevance. He in his dissent observed, "The question is not whether Sri Aurobindo refused to claim or denied that he was founding a new religion or a new school of religious thought but whether his disciples and the community thought so."²⁷

This observation is very pertinent in the wake of the issue at hand. It is not the function of the judiciary to decide on the religious matters or to go into detail in matters of faith. The supreme court is considered to be an upholder of rights and it should only get into the matters of religion if any such practice goes against the safeguards given under article 26 that is if it's against "public order, morality and health". Any question of what constitutes a religion should not be decided by the judiciary because it's a matter of individual faith. Religion is not decided on what one person thinks, rather it is what the whole community or a sect thinks. It is not the job of the judiciary to decide on whimsical doctrines with

²⁴ *Commissioner of Police v. Acharya J. Avadhuta* (1983) 4 SCC 522.

²⁵ *Ibid.*

²⁶ AIR 1983 1.

²⁷ *Ibid.*

several inappropriate and inconsistent concepts. It does not suit that a constitutional court to decide on fundamental rights issues which affects several billion people.

In contrast to privileging the protection only of essential religious practices in the *Ananda Margi Case*²⁸, the court emphasized the sincerity of belief in a case dealing with Jehovah's Witnesses-a Christian denomination. In this case²⁹ three children, Bijoe, Binu Mol and Bindu Emmanuel were expelled from their government school because they did not sing the national anthem as it was against their tenets of faith. Their father filed a writ petition in the High Court of Kerala seeking to restrain authorities from preventing their school attendance. The High court dismissed the petition on the ground that no word of the national anthem offends any religious belief. The appeal in Supreme Court found their expulsion in violation both of both article 19 and article 25 of the Indian Constitution. The Court held that expelling the children based on their "conscientiously held religious faith"³⁰ violated the Constitution of India.

2.1 Sabrimala Temple Entry Case³¹

This case has been a centrestone of debate on the doctrine of essential religious practices. The constitutional bench with 4:1 majority allowed the petition and declared that the custom that barred the entrance of women within the age group of ten to fifty is discriminatory and against the constitutional provisions. The PIL was filed by The Indian Young Lawyers Association on the main issue that whether such exclusion of women constitutes an essential practice of the religion. Adding on to the jurisprudence of essential religious practices the court in this case held that essential practices cannot be decided on a straight jacket formula. An essential religious practice cannot be decided on the basis of precedents. It can only be taken from religious scriptures and books which represent the core of the particular religion. Further Mishra J. relied on the test of 'proximate evolution'³² and 'continuity in practice'³³. He concluded that the alterable part of a religion or any alterable practice of a religion does not form an essential practice of the religion. The core of Mishra J. reasoning of allowing the petition is based on the findings that the activity does not have 'unhindered continuity'. He observed: "Nobody can say that essential part or practice of one's religion has changed from a particular date or by an event. Such alterable parts or practices are definitely not the 'core' of religion where the belief is based and religion is founded upon. It could only be treated as mere embellishments to the non-essential part or practices."³⁴

Nariman J. affirmed the validity of the essential religious practices but did not reach on any findings about the practice in question. While making a reference to the *Durgah Committee case*³⁵ he expanded on the formulation given by Gajendragadkar J. that the extraneous and unnecessary accretions cannot be considered as an essential part of religion. He observed:

²⁸ *Commissioner of Police v. Acharya J. Avadhuta* (1983) 4 SCC 522.

²⁹ *Bijoe Emmanuel v. State of Kerala* 1986 SCR (3) 518.

³⁰ *Ibid.*

³¹ *Indian Young Lawyers Association v. State of Kerala*, 2018 SCC OnLine SC 1690.

³² *Ibid.*

³³ *Ibid.*

³⁴ *Id* at 121.

³⁵ AIR 1961 1402.

Similarly, even practices though religious may have sprung from merely superstitious beliefs and may in that sense be extraneous and unessential accretions to religion itself. Unless such practices are found to constitute an essential and integral part of a religion their claim for the protection under Art. 26 may have to be carefully scrutinised; in other words, the protection must be confined to such religious practices as are an essential and an integral part of it and no other. In the present appeal we are concerned with the freedoms guaranteed under Art. 26(c) and (d) in particular.

3. Identifying Doctrinal Inconsistencies

India, a country with remarkable religious diversity and deep-rooted faith traditions, has continually wrestled with the balance between the freedom of religion and constitutional governance. The judiciary, in attempting to mediate this tension, has relied extensively on the Essential Religious Practices Test (ERP). Originating in *The Shirur Mutt Case* (1954)³⁶, this test empowers the judiciary to determine whether a religious practice is “essential” to a given faith, thus warranting constitutional protection under Articles 25 and 26 of the Indian Constitution.

While intended to create a framework for assessing the legitimacy of religious claims, the ERPT has been increasingly critiqued for being reductive, intrusive, and jurisprudentially incoherent. This part of the paper delves into those criticisms and aims to contribute to the growing discourse on the need for judicial restraint and a more nuanced approach to religious freedom in India.

3.1 The Judiciary’s Incompetency in Theological Matters

The foundational critique of the ERP Test lies in the recognition that courts are ill-equipped to adjudicate theological questions. As observed by Justice Iacobucci of the Canadian Supreme Court in *Syndicat Northcrest v. Amselem*,³⁷ the State should not become “the arbiter of religious dogma.”³⁸ The Indian judiciary, however, has repeatedly ventured into theological terrain, interpreting scriptures and religious customs through a legalistic lens.

This practice is problematic on two levels i.e. firstly due to lack of competency, Judges are trained in the interpretation of secular laws, not theological doctrines. Religious texts are nuanced, context-dependent, and often symbolic. Judicial officers, no matter how erudite, lack the doctrinal training to pronounce what constitutes the “core” of a religion. Secondly on the basis of violation of religious autonomy, by assuming interpretative authority, the

³⁶ *Commissioner, Hindu Religious Endowments, Madras v. Sri Lakshmindra Thirtha Swamiar of Sri Shirur Mutt*, A.I.R. 1954 S.C. 282.

³⁷ 2004 SCC 47

³⁸ *Id.*

judiciary displaces the role of religious scholars and community leaders, undermining the internal mechanisms of faith-based governance. This is particularly troubling in a secular republic where the State is meant to maintain principled distance from religion. An emblematic example is *Shastri Yagnapurushdasji v. Muldas* (1966)³⁹, where the Supreme Court invalidated a sect's claim to religious autonomy by dismissing their beliefs as founded on "superstition and ignorance." Such pronouncements reflect an unwarranted judicial paternalism that is antithetical to the values of religious pluralism.

3.2 The Relativity and Pluralism of Religion

Religion, by its very nature, defies uniformity. Practices considered sacrosanct in one sect may be irrelevant—or even sacrilegious—in another. The ERP Test, however, imposes a monolithic interpretation of religion, ignoring its inherently plural character.

For instance, the divergent observances of Dussehra across India demonstrate this variance. In most parts of the country, effigies of Ravana are burnt to symbolize the triumph of good over evil. Yet, in Mandore (Rajasthan), where Ravana is revered as a son-in-law, the effigy is not burnt, and rituals such as *Shraddh* and *Pind Daan* are performed instead. Applying the ERP Test would create doctrinal hierarchies, privileging majority practices over localized customs, thereby eroding cultural specificity.

The Sabarimala controversy further exposes the limitations of a unitary religious test. The restriction on the entry of menstruating women into the Sabarimala temple is rooted in the celibate identity of Lord Ayappa. While such a practice may appear exclusionary through a secular lens, it holds profound spiritual significance for devotees. The court's application of the ERP Test to invalidate this tradition failed to appreciate its religious and symbolic complexity, thus alienating a section of the faithful.

In a country like India, where religion is lived and experienced in myriad forms, a rigid test like the ERP Test is ill-suited. Legal scrutiny that fails to account for cultural context risks doing more harm than good.

3.3 Doctrinal Rigidity and the Inhibition of Religious Reform

Another critical flaw in the ERP Test is its doctrinal rigidity, particularly its tendency to freeze religious practices in time. The courts have often demanded that a practice must be coeval with the inception of the religion to be deemed "essential." This approach is not only historically untenable but also conceptually flawed.

The *Tandava Dance*⁴⁰ case exemplifies this problem. In *Commissioner of Police v. Acharya Jagadishwarananda Avadhuta*⁴¹ (2004), the Supreme Court held that since the Ananda Margi sect introduced the Tandava dance after its foundation, it could not be

³⁹ AIR 1966 1119 (CB).

⁴⁰ *Commissioner of Police v. Acharya J. Avadhuta* (1983) 4 SCC 522.

⁴¹ (1983) 4 SCC 522.

considered essential. Such logic effectively fossilizes religion, denying it the capacity to evolve and adapt.

Religious traditions are dynamic, shaped by time, context, and lived experiences. Limiting “essential” status to foundational practices negates centuries of doctrinal development and reinterpretation. If applied strictly, the ERP Test would render post-scriptural innovations in Islam, Christianity, and Hinduism constitutionally irrelevant which is a stance that is both impractical and unjust.

More fundamentally, the rigid application of ERP Test contradicts the principle of organic religious reform. As scholars like Jay Newman have argued, meaningful religious change must arise from within the faith, not be imposed externally.⁴² By denying constitutional protection to newer practices, the ERP Test hampers this process and sustains religious ossification.

3.4 Rationalization of Religion and Judicial Overreach

Perhaps the most troubling aspect of the ERP Test is its implicit effort to rationalize religion and to sanitize it of so-called superstitions and align it with secular norms. In doing so, the judiciary inadvertently enforces a vision of “elite religion,” often shaped by reformist and Vedic interpretations, at the expense of “popular religion” grounded in folklore and oral traditions.

This bias is evident in cases where practices considered superstitious or irrational, such as feeding snakes or animal sacrifices are denied protection. The court’s reliance on scriptural authority (like the *Dharamshastras*) to invalidate localized customs demonstrates an epistemological preference for textual over experiential religiosity.

Such an approach undermines the essence of religious freedom, which includes the liberty to believe in the mystical, the symbolic, and even the illogical. As famously noted in the *Jehovah’s Witnesses Case*⁴³, “What is religion to one is superstition to another.”⁴⁴ The Constitution protects both.

Justice Indu Malhotra’s dissent in the *Sabarimala* case rightly emphasizes that rationality cannot be the benchmark in matters of faith. Courts must resist the temptation to “correct” religious beliefs and instead focus on ensuring that these beliefs do not violate public order, morality, or health—the only constitutionally permitted grounds for restriction.

3.5 Implications for Constitutional Morality and Secularism

The unchecked application of the ERP Test has far-reaching implications for constitutional morality and the secular fabric of India. By assuming the role of theological

⁴² Jay Newman, *On Religious Freedom* 159–60 (1991).

⁴³ *Bijoe Emmanuel v. State of Kerala* 1986 SCR (3) 518.

⁴⁴ *Id* at 125.

arbitrator, the judiciary dilutes the principle of *principled distance* enshrined in Indian secularism.

Moreover, privileging rational, reformist interpretations of religion over traditional or non-textual ones reflects a form of cultural majoritarianism that is antithetical to constitutional values. The judiciary must be mindful that religious liberty is not a concession granted by the State but a fundamental right grounded in the dignity and autonomy of the individual.

4. Towards a New Jurisprudence of Religious Freedom

The time has come to decisively replace the Essential Religious Practices (ERP) Test with a jurisprudence that is better aligned with the values of constitutional morality, religious pluralism, and democratic ethos. The existing test, by granting courts the authority to determine which religious practices are “essential,” not only exceeds the institutional competence of the judiciary but also undermines the autonomy of religious communities to define their own faith traditions. A more appropriate jurisprudential framework must reflect institutional restraint and a deeper sensitivity to the diversity and complexity of religious life in India. In this regard, four guiding principles are proposed. First, doctrinal minimalism should be adopted, wherein courts restrict their inquiry to determining whether a belief or practice is religious in nature, rather than evaluating its centrality or indispensability to the religion. This principle respects the distinction between religious belief and theological hierarchy and preserves the autonomy of faith communities. Second, a presumption of validity must operate in favour of religious freedom in cases of ambiguity. The judiciary should, wherever doubt exists, lean towards protecting the individual’s right to believe and practise rather than authorising State regulation. Such a presumption honours the liberal foundations of the Constitution, where rights are not to be curtailed except in the most compelling circumstances.

Third, State intervention should be permissible only when a religious practice presents a clear and intolerable threat to public order, health, morality, or another constitutionally protected value. This principle draws inspiration from Gustav Radbruch’s formula, which holds that legal interference is justified only where inaction would result in injustice or harm to an intolerable degree.⁴⁵ Applying this to the religious context would mean, for instance, that practices rooted in untouchability or caste discrimination may be legitimately restricted, whereas symbolic practices like restricting temple entry based on celibacy-related beliefs—as in *Sabarimala*—may not reach this threshold. Fourth, courts must engage in contextual balancing of competing constitutional claims, rather than relying on abstract notions of essentiality. Religious freedom must be weighed against other constitutional values, such as equality or dignity, in a nuanced, fact-sensitive manner. This approach moves away from binary adjudication and promotes a jurisprudence that is dynamic and empathetic. Taken together, these principles would promote a model of adjudication that is deferential, respectful of religious autonomy, and more capable of mediating the complexities of belief in a pluralistic democracy. It would signal a shift from judicial paternalism to constitutional humility, restoring the court’s role as a guardian of freedom rather than an arbiter of faith.

⁴⁵ Gustav Radbruch, *Statutory Lawlessness and Supra-Statutory Law* (1946), 26 OXF. J. LEG.STUD. 1–11 (2006).

5. Conclusion

Religion is a centrally deep rooted concept in our society. But religion should not be considered as any another matter on which supreme court can intervene in and dictate its judgement. The concept of secularism in India was enshrined in our constitution from the beginning although the term 'secular' could be seen only after the 42nd Constitutional amendment, 1976. The concept of secularism that was kept in mind while framing the constitution was that the State shall not interfere with matters of religion, but looking at the backwardness and conservative nature of the traditions, the scope of reform was provided within the text of article 25. The 'subject to' clause was placed before the assertion of the "freedom of conscience", this implied that the citizens have a right to freedom of conscience, however it is only after it passes through the test of "public order, morality and health". Besides, to manage tension between religious groups, all religions were kept on equal footing and state was kept distant from any sort of religious affiliations.

Supreme Court has from time and again reiterated the principle that the state should not intervene with matters of religion. But such idea of limited intervention of the State was not followed by the Supreme Court. A need for reformation could be one of the reasons but over the years the judiciary has taken upon itself to dictate the tenets of the religion and to cleanse superstition from religion and reformed it in a way to suit its own idea of modernity and rationality. The court's insistence on following the essentiality test and not any other test which has proved to be effective has struck at the religious freedom and the secular nature of the Indian Constitution.

The whole concept of deciding on the essential and non-essential practices of a religion and then providing constitutional protection to only essential practices is a problematic concept. Using such doctrines leads to the assumption that religion is concept like any other discipline where there is an objective criteria or formula through which essential criteria can be decided. However, such assumptions are fundamentally wrong as the idea of a religion is a subjective idea. Moreover, religion is an inward association with god and any state organ should not dictate terms as to the religion or faith of an individual. Another problematic area for operation of this doctrine is that it makes religion static and doesn't leave any scope for evolution and reformation of the religion.

Keeping religion out of state function is an impossible task because it is deep rooted in our traditional structure. But following doctrines such as deciding on the essentiality of the religion could be detrimental. It is about time that legitimacy of such doctrines is questioned and better doctrines to decide on matters of religion should be adopted. The primary requirement on part of the judiciary is that they find and resort to alternative approaches which does not undermine the fundamental right and fundamental principles enshrined in our constitution. The essentiality test has stifled the freedom of religion and the main victims are the minority communities.

6. References

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