
THE CONSTITUTIONAL VALIDITY OF THE ESSENTIAL RELIGIOUS PRACTICES TEST

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ABSTRACT

The Constitution provides caveats to the freedom of religion through curtailment provisions with such rights being “subject to public order, morality, and health” alongside other specific restrictions.⁷ Jurisprudence concerning religious freedom and state intervention has come to evolve with the establishment of the *Essential Religious Practices (ERP) Test* or the *Doctrine of Essentiality*. This essay undertakes a critical analysis of the ERP test, the inefficient implementation in its current form, and the associated curtailment of religious freedoms, particularly those of minority religions, provided in the Constitution.

The Indian Constitution guarantees to all its citizens the ‘Right to Freedom of Religion’ under Part III,¹ which embodies its secular underpinnings and the defining vision of its founding fathers. The earliest debates about secularism can be traced back to the Constituent Assembly, which addressed the dichotomy between the “religious and political realms.”² Opposing views were propagated by the assemblymen concerning the type of delineation that needed to be established between religious freedoms and state interventions and reforms. Bhargava notes that the dominant view in the Assembly was that of “equidistance and non-preferential treatment” and that the state would endeavour to “help or hinder all religions to an equal degree” to maintain neutrality.³ Consequently, India introduced, what Aysel Madra calls, “*emancipative⁴ state-intervention policies*”, wherein the state adopts an active role in annihilating practices that impede social justice and bringing about reforms, to free citizens from regressive religious practices.⁵ The bedrock of this interventionist approach is to regulate “religion” insofar as “to promote social reform.”⁶

The Constitution provides caveats to the freedom of religion through curtailment provisions with such rights being “subject to public order, morality, and health” alongside other specific restrictions.⁷ Jurisprudence concerning religious freedom and state intervention has come to evolve with the establishment of the *Essential Religious Practices (ERP) Test* or the *Doctrine of Essentiality*. This essay undertakes a critical analysis of the ERP test, the inefficient implementation in its current form, and the associated curtailment of religious freedoms, particularly those of minority religions, provided in the Constitution. The essay is divided into four parts: the *first* introduces the topic; the *second* outlines the history and evolution of the ERP test; the *third* provides a theoretical discourse of the arguments in

¹ Indian Const. Art.25.; Indian Const. Art.26.; Indian Const. Art.27.; Indian Const. Art.28.

² Aysel Madra, *Interventionist Secularism: A Comparative Analysis of the Turkish Grand National Assembly (1923-1928) and the Indian Constituent Assembly (1946-1949) Debates*, JSSR, 2015, at 2.

³ Rajeev Bhargava, *What is Secularism for?*, in *SECULARISM AND ITS CRITICS* 486, (Oxford University Press, 1998). ⁴ The other type of state intervention as expounded by Aysel Madra is restrictive state intervention where the state exerts control over religious domains in a manner that makes religion subservient to the state.

⁵ Madra, *Supra*, note 2.

⁶ *ibid*

⁷ *Supra*, note 1.

favour of and against the essentiality test; while the conclusion analyses the effectiveness and constitutionality of the doctrine.

The genesis of the ERP doctrine lies in the Constituent Assembly debates and more specifically in a speech delivered by Dr. B.R. Ambedkar, who underscored the need to limit the pervasiveness of religion in a manner that did not augment “beyond beliefs and rituals, which are *essentially religious*.”⁸ He feared that religion, in a country like India, would become the “opium of the masses”⁹ and would thus hinder state-led social reforms due to the predominance of religious freedoms. The implication of *essentially religious*, as articulated by Ambedkar, was that the religious could be separated from the secular,¹⁰ to allow “emancipatory state interventions”.¹¹

Keeping in mind the state intervention provisions under Articles 25 and 26, the initial suits regarding “freedom to practice, propagate and profess any religion”¹² arose because of state regulation of temples and religious institutions.¹³ This was challenged on grounds of restricting religious liberty in the famous *Shirur Mutt* case.¹⁴ Justice Mukherjea ruled that the state did not have an absolute right to intervene in religious matters,¹⁵ thereby implying that Article 25(2)(a)¹⁶ did not provide regulatory powers to the state in essentially religious matters.¹⁷ Furthermore, the judge asserted that religious doctrines should be referred to in deciphering the essentiality of religious practices.¹⁸ The court reiterated the judgment in the

⁸ Constituent Assembly Debates, 2 December 1948, vol 7 doc 65.

⁹ Rosie Blau, *What is Opium of the People?*, THE ECONOMIST (Jan 5, 2015), <https://www.economist.com/1843/2015/01/05/what-is-the-opium-of-the-people>.

¹⁰ Gautam Bhatia, *Essential Religious Practices and the Rajasthan High Court's Santhara Judgement: Tracking the History of a Phrase*, INDIAN CONSTITUTIONAL LAW AND PHILOSOPHY (Aug.19, 2015), <https://indconlawphil.wordpress.com/2015/08/19/essential-religious-practices-and-the-rajasthan-high-courts-santhara-judgment-tracking-the-history-of-a-phrase/>.

¹¹ Madra, *Supra*, note 2.

¹² Indian Const. Art.25.

¹³ Arvind Kurian Abraham, *Essential Religious Practices Test and the First Amendment: A Comparative Analysis of the Free Exercise of Religion in India and the United States*, in THE INDIAN YEARBOOK OF COMPARATIVE LAW 279, (John, M., Devaiah, V.H., Baruah, P., Tundawala, M., Kumar, N. ed., 2021).

¹⁴ The Commissioner, Hindu Religious Endowments, Madras v Lakshmindra Thirtha Swamiar of Sri ShirurMutt, AIR 1954 SC 282.

¹⁵ *Ibid.* Except those that were “economic, commercial or political in character”.

¹⁶ Indian Const. Art.25, cl.2.

¹⁷ *Supra*, note 14.

¹⁸ Abraham, *Supra*, note 13. It was held that “religious denominations” as per Article 26 had the autonomy to determine essential practices for their religion and this was not open to outside authority.

Ratilal case¹⁹ by positing that courts should adopt a lens of “practical necessity” in differentiating between secular and religious matters, thereby empowering judges with some discretionary powers in this regard.

The ERP test has no direct basis in the text of the Indian Constitution and has been introduced by the judiciary through its judgments, wherein legal protection to the fundamental right to freedom of religion is provided only to essential practices under any religion. This reflects reliance on the overarching principle of constitutional morality to prevent religious activities from impeding the essence and spirit of the Constitution which protects regressive practices that constitute a fundamental component of certain religions.²⁰ While legal pluralism forms one of the cornerstones of our Constitution, this has perpetuated a disjunction between the “over-arching constitutional structure and religious norms” creating a “Gordian knot” of sorts.²¹ The judicial response to this contrariety was the introduction of the ERP doctrine to enable the determination of religious norms that warranted constitutional protection.²²

Courts have gradually departed from the principle of what is essentially religious and necessary for segregating them from secular practices, to determine those practices which were essential to religion.²³ Thus, the judiciary proceeded to categorically differentiate essential practices from non-essential ones, to justify state regulation of the latter practices. The ERP test has never been concretely defined in judicial pronouncements, but some key characteristics can be delineated from various judgments. *Firstly*, it was held in the *cow- slaughter ban* case that only practices that were “obligated or mandated by scriptures” formed essential religious practices.²⁴ The courts turned to the Quran to assert the absence of any requirement for slaughtering cows on Eid, thereby denying the historically practiced custom fundamental protection under Article 25. *Secondly*, non-religious interests and superstitious beliefs were removed from the ambit of constitutional protection in the *Durgah Committee* case²⁵ asserting that “extraneous or non-essential practices” could not be

¹⁹ *Ratilal Panachand Gandhi v State of Bombay*, AIR 1954 SC 388.

²⁰ Abhinav Chandrachud, *The Meanings of Constitutional Morality*, PAPERS SSRN (Jan.18, 2020), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3521665.

²¹ Mary Kavita Dominic, *Essential Religious Practices Doctrine as a Cautionary Tale: Adopting Efficient Modalities of Socio-Cultural Fact-Finding*, Socio-Legal Rev. 46, (2022).

²² *Ibid*

²³ *Supra*, note 13.

²⁴ *Mohd Hanif Quareshi and Others v State of Bihar*, AIR 1958 SC 731.

²⁵ *Durgah Committee, Ajmer v Syed Hussain Ali*, (1962) 1 SCR 383.

protected from state interventions.²⁶ Thirdly, the *Anand Margis* judgment postulated the requirement of “temporal continuity”²⁷ and assumed the static nature of religions by denying the essentiality of the *tandava* dance to the Ananda Margi faith.²⁸ Lastly, the court in the *Anand Margis II* case held that a practice is essential only if its removal results in a “fundamental change in the character of that religion” and propounded that essential practices “remain static over time” and assumed their temporal continuity.²⁹ While laying down the doctrine, the judiciary has thus departed from its original conception of the ERP doctrine,³⁰ as enunciated by Ambedkar and in early judicial pronouncements, making its interpretation extremely arbitrary and subjective.

The primary criticism of the ERP test is that it undercuts religious freedom by providing constitutional protection only to essential religious practices, the arbiter for which is the judiciary. This contravenes the provisions expressly enshrined in the Constitution by way of caveats and restrictions for religious freedoms. The judiciary has expanded the scope of these restrictions by introducing the modern ERP doctrine that allows for pervasive state intervention which is more restrictive than emancipatory.³¹ The religious rights were absolute, except in instances stated in the provisos of the articles. The judiciary through judicial overreach has significantly undermined the value which the forefathers had envisaged for such rights. “Normative pluralism” which is a foundational element of the Indian nation is dismissed by infringing the internal autonomy of religions guaranteed by the Constitution under Articles 25-26.³² Moreover, the doctrine aims at fostering social reform within religions thereby concretizing the idea that religions by themselves are incapable of reformation.³³ A.K. Abraham evocatively notes that the ERP test has often been applied in a way that has proved pernicious to religious minorities, who are often subjected to the dominant cultural norms

²⁶ *Supra*, note 13.

²⁷ Temporal continuity of religious practices and the need for practice to be essential ever since the religion was first promulgated. Dominic, *Supra*, note 21.

²⁸ *Acharya Jagdishwaranand Avadhuta v Commissioner of Police, Calcutta*, (1983) 4 SCC 522.

²⁹ *Commissioner of Police v Acharya Jagdishwarananda Avadhuta*, (2004) 12 SCC 770.

³⁰ In the *Anand Margis I* case the court held that recently originated practices couldn't be essential while in the Triple Talaq Case, they overruled a 1400 yearlong practice because of its inessentiality.

³¹ See footnote 4 for definition of restrictive and emancipatory intervention.

³² Indian Const. Art. 25.; Indian Const. Art. 26.

³³ *Ibid*

and popular perceptions.³⁴ Additionally, Mustafa and Sohi argue that an essentiality test is an undesirable tool that denies “religious adherents constitutionally guaranteed rights” and substitutes religious conscience with the verdicts of the court.³⁵

The ERP test has evolved from deciphering whether the nature of practice is religious or secular into qualifying its importance within a religion, thus opening the door for substantive interpretation and analysis of religious doctrines³⁶ by the seemingly ‘secular judiciary’. In the *Sabarimala* judgment, Justice Chandrachud accepted that the judiciary in applying the essentiality test has unfortunately donned the role of theologians and is bound to delve into hermeneutics,³⁷ which is far beyond their competency.³⁸ This is buttressed by Moody-Adams’s notion of “insider-outsider”³⁹ which explains how the court is a complete “outsider” to religious matters and thus has “little or no appreciation of their values, perspectives and knowledge”,⁴⁰ thereby reflecting its limitations in deciding on matters that strike at the fundamental tenets of the Constitution.

Proponents of the ERP doctrine argue that such a doctrine allows for the systematic removal of superstitious and regressive beliefs that are propagated in the name of freedom of religion.⁴¹ Justice Aftab Alam contends that given the strong religious sentiments in India, declaring something as “not essentially religious” is more appropriate vis-à-vis calling the religion opposed to “public order, law or morality.”⁴² The ERP test is favoured due to the heavy burden that the current interventionist provisos lay on the state for justifying intervention, “a burden many regulatory laws find challenging to meet.”⁴³ The ERP doctrine

³⁴ Abraham, *Supra*, note 13.

³⁵ Faizan Mustafa and Jagteswar Singh Sohi, *Freedom of Religion in India: Current Issues and Supreme Court Acting as Clergy*, *BYU L Rev.*, 2018 915.

³⁶ Dominic, *Supra*, note 21.

³⁷ *Indian Young Lawyer’s Association v State of Kerala*, (2019) 11 SCC 1.

³⁸ This is especially relevant while accounting for the adverse religious interpretations of scriptures and doctrines amongst adherents, intellectuals, historians, and others.

³⁹ Michele Moody-Adams, *Fieldwork in Familiar Places: Morality, Culture, and Philosophy* (HUP 1997).

⁴⁰ James A Banks, *The Lives and Values of Researchers: Implication for Educating Citizens in a Multicultural Society*, *Educational Researcher* 27, (1998).

⁴¹ Tarunabh Khaitan, *The Essential Practices Test and Freedom of Religion – Notes on Sabarimala*, *INDIAN CONSTITUTIONAL LAW AND PHILOSOPHY* (Jul.29, 2018), <https://indconlawphil.wordpress.com/2018/07/29/guest-post-the-essential-practices-test-and-freedom-of-religion-notes-on-sabarimala/>.

⁴² Aftab Alam, *The Idea of Secularism and the Supreme Court of India*, UVH (2010),

https://www.uvh.nl/uvh.nl/up/ZkwqzkiW_PWP_no_5_The_Idea_of_Secularism_online_2_.pdf.

⁴³ Gautam Bhatia, *Essential Religious Practices and the Rajasthan High Court’s Santhara Judgement: Tracking the History of a Phrase*, *INDIAN CONSTITUTIONAL LAW AND PHILOSOPHY* (Aug.19, 2015),

ensures that other fundamental rights and constitutional values are not subverted in ensuring absolute religious freedoms, especially those activities that are inherently violative of the Constitution.

The arguments advanced by the proponents and critics of the ERP doctrine show that the doctrine in its current form undermines the constitutionally guaranteed religious freedoms by propagating *restrictive intervention* by the state as against the initially envisioned *emancipative interventionist* approach.⁴⁴ The judiciary by donning the garb of a theologian and giving verdicts about essential and non-essential features of religions has made religious freedoms subservient to state regulation and reform, thereby embracing a restrictive interventionist approach. The doctrine has contributed to a platitudinous representation of religion that undermines normative plurality and subscribes to “singularity, homogeneity, temporal continuity, and inalterability as its trademarks.”⁴⁵ The judiciary has come to adopt the status of the clergy despite being the pallbearers of secularism. There has been a marked departure from the original doctrine enunciated in the *Shirur Mutt* case which was not as diminishing of religious freedoms. From ensuring absolute constitutional protection to essential religious practices, the courts have effectively become arbiters of religious practices that require protection. Cultural exceptionalism or plurality may be further undermined if the current ERP standards are continually implemented without any significant change. Thus, the judiciary may consequently end up rewriting faiths in the garb of construing essential religious practices. To conclude, while the *Essential Religious Practices* test in its present form has no constitutional underpinnings, it may well-nigh be better to revert to the originally envisioned *essentiality doctrine* while espousing anthropologically sound expertise in “facilitating an informed judicial appreciation of cultural particularities”.⁴⁶

<https://indconlawphil.wordpress.com/2015/08/19/essential-religious-practices-and-the-rajasthan-high-courts-santhara-judgment-tracking-the-history-of-a-phrase/>.

⁴⁴ See note 4 for the difference between emancipative and restrictive state intervention.

⁴⁵ Dominic, *Supra*, note 21.

⁴⁶ *Ibid*

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