
LEGAL, BUT UNLAWFUL: THE ESSENTIAL RELIGIOUS PRACTICES (ERP) TEST

Sneha Singal, OP Jindal Global University

ABSTRACT

This paper delves into the evolution and impact of the Essential Religious Practices test within the context of India's constitutional framework, specifically Articles 25 and 26. Initially intended to safeguard religious freedom while discerning between essential religious practices and secular activities, the test has undergone a substantial transformation in judicial interpretation. From its inception in cases like *Narasu Appa Mali* and *Shri Shirur Mutt*, the test aimed to distinguish foundational religious practices from secular ones. However, over time, this evolved to encompass practices necessary to a religion, introducing sub-tests like optionality, recency, and the but for test. Recent landmark cases such as the Hijab ban, Sabarimala dispute, and Ram Janmabhoomi illustrate a stark shift where the judiciary, deviating from the original intent, crafted more of a judge-centric test. This change led to inconsistent and ambiguous rulings, impacting fundamental rights and eroding the test's credibility. The author through this paper urges for a re-evaluation and restoration of the original test's essence, aligning with the drafters' vision and ensuring justice within India's diverse religious landscape.

INTRODUCTION

“Limit the definition of religion in such a manner that we shall not extend beyond beliefs and such rituals as may be connected with the ceremonies which are essentially religious.”¹

The roots of the Essential Religious Practices test can be traced back from the debates of the Constituent Assembly while drafting the religious freedom provisions. The Indian judiciary was wholly entrusted with the authority to determine and distinguish between which practice is secular and which belief is religious via the use of this crucial test.

The Articles 25² and 26³ of the Indian Constitution were exquisitely designed to safeguard the Indian citizens' freedom to profess, practice and propagate any religion. The subclause (b) of clause (2) of Article 25 guarantees equality to not just the prevailing religions but also to the different classes within a particular religion. Article 26 effectively broadens the scope of Article 25 by granting every religion the freedom to manage its own affairs and create and maintain its institutions. These fundamental rights subtly convey the drafters' intention to acknowledge and emphasize that religion plays a significant part in an individual's life and that there should be no discrimination based on religion. In order to guarantee the same, the Essential Religious Practices test was also introduced.

Although secularity is a fundamental and essential part of the Indian Constitution's structure, the primary objective of the Essential Religious Practices test was to determine which practice or belief was deeply ingrained in and intrinsic to religion and not all religious practices of a religion, to provide justice and strengthen the scope of Article 25. This was established by the framers so that the judiciary could accurately interpret Article 25 of the Indian Constitution and ensure that each and every citizen of the country has the right to practice their religion freely. This test was established to draw a clear distinction between the essential, foundational, and deeply ingrained

¹ Constituent Assembly of India Debates (Proceedings), Vol. 8, (Jun 7, 1949), [https://loksabha.nic.in/writereaddata/cadebatefiles/C07061949.html#:~:text=\(1\)%20Every%20Judge%20of,office%20until%20he%20attains%20the](https://loksabha.nic.in/writereaddata/cadebatefiles/C07061949.html#:~:text=(1)%20Every%20Judge%20of,office%20until%20he%20attains%20the).

² INDIA CONST. art. 25.

³ INDIA CONST. art. 26.

practices or rituals of a religion and the secular activities since only the former may be protected and cannot be intervened by the State, not the latter in order to preserve morality and public order.

At first, the Indian judiciary precisely understood the Essential Religious Practices test and pronounced judgements while keeping in view the same. The interpretation, however, continued to change, leading to a drastically different test that now questions whether the practice is necessary or rooted in the religion or not rather than deciding between essential and the secular rituals. Another issue is a question about who decides what and what not is “essential” to a religion? The test not only being interpreted in an opposite way and is unexpectedly in contrast to the Article 25 of the Indian Constitution, but also is very ambiguous and inconsistent now. Rather than guaranteeing equality in religion to every individual, the test has become arbitrary and has adopted a highly judicial or judge-centric perspective, which would eventually completely suffocate Articles 25 and 26 of the Indian Constitution.

THE UNWANTED SHIFT

The position before the transition was as predicted by the drafters and as per the same understanding pointed out by Babasaheb Ambedkar. The judgments were provided on the basis of the Essential Religious Practices test which assessed if a practice is grounded in religion or is secular. The test was first applied in the case of *The State of Bombay vs Narasu Appa Mali*⁴, 1952 where the constitutionality of the Bombay Prevention of Bigamous Hindu Marriages Act, 1946⁵, was challenged. While the petitioner cited Hindu texts like the Mahabharata to support his argument that bigamous marriages should be permitted, the Bombay High Court was able to accurately establish the actual meaning of the Essential Religious Practices test. The Hindu personal laws and religious scriptures were thoroughly examined by the court and were brought into conformity with the fundamental rights guaranteed by the Indian Constitution. In this case, the Court held that the right to profess, practice and propagate any religion provided by Article 25 can only be exercised without contravening any other fundamental rights guaranteed by the Indian Constitution. It was finally declared that the impugned Act aligns Hindu law with the fundamental

⁴ *The State of Bombay vs Narasu Appa Mali*, AIR 1952 Bom 84.

⁵ *Bombay Prevention of Bigamous Hindu Marriages Act*, 1946.

rights guaranteed to both men and women in this country. For the first time, the court used the term "essentially religious," which was later approved by the Supreme Court.

In 1954, a seven-judge bench of the Supreme Court made a direct reference to the Essential Religious Practices test in the case of *The Commissioner, Hindu Religious Endowments, Madras v Shri Lakshmindhar Tirtha Swamiyar of Shri Shirur Mutt*⁶. The issue in this case questioned as to what extent the Madras Hindu Religious and Charitable Endowments Act, 1951, could control the management of the Shirur Mutt, a monastery in Udupi. The court in this case observed that what constitutes an essential part of a religion is to be ascertained with reference to the doctrines of the religion itself. The court held if there are some practices such as a ritual to be performed at a specific time by a person, or providing offerings are part of such religion and cannot be excluded from religion and considered as secular activities, merely due to the fact that such practices involved expenditure of money or appointment of servants⁷. The court was specifying a clear distinction between essential religious practices that are integral to a religion and those that are secular via this judgment, precisely what was envisioned by the drafters of the Constitution.

While the Indian judiciary was interpreting the test accurately as anticipated, it didn't take much time for the interpretation to change as a result of a series of judgments. The interpretation of the test soon transformed from being "essentially religious" to "essential to the religion". These two tests being diametrically opposite, lead to a serious confusion. While the former means only the practices which are integrally religious, the latter is evolved to cover all practices necessary to a religion⁸. In the first judgment of this saga of transformation, the Supreme Court of India in case of *Sri Venkataramana Devaru*⁹, 1958, held that untouchability is completely abolished in India and restricting some sections of the society to enter into temples was not an "essential part of Hindu religion" and is held void. This is for the first time when a new term was coined and in the subsequent judgments, the interpretation started to change. The Essential Religious Practices Test further expanded and started to include some tests. Firstly, the optionality test which means that

⁶ *The Commissioner, Hindu Religious Endowments, Madras v Shri Lakshmindhar Tirtha Swamiyar of Shri Shirur Mutt*, 1954 AIR 282.

⁷ Ibid.

⁸ Namita Saxena, *Evolution of the ERP test*, The Daily Pioneer, May 6, 2016, <https://www.dailypioneer.com/2016/columnists/evolution-of-the-erp-test.html>.

⁹ *Sri Venkataramana Devaru vs The State of Mysore*, 1958 AIR 255.

the ritual or the practice is merely an option for the followers of the religion¹⁰. This internal test was applied in the case of Hanif Qureshi¹¹, 1959, the Supreme Court while deciding if the ban on sale of cattle for slaughter is violating Article 19(1)(g), 14 and 25 of the constitution or not, held that cow slaughter is not an "essential part of the Islamic religion" and the sentiments of Hindu community considering cow as a pious animal should also be kept in mind. This case made it very clear that there is a distinction between "essentially religious" and "essential to the religion" and that the courts have started following the latter. Later, the but for test came into existence which meant that if the practice is inherent and fundamentally integral to the religion and the religion cannot survive without that practice. Finally, the test of recency came into force which meant that the practice followed by the people is tested on the basis of its time value. For instance, if the practice is followed since the history of the religion was qualified as the essential religious practice of it. Next, in the case of Durgah Committee¹², 1962, the Supreme Court held that protection under Article 26 of the Indian Constitution will be provided to those religious practices should be treated as an "essential and integral part of religion" and no other. Finally, in the case of Sardar Syedna¹³, 1963, the constitutional bench held that what constitutes essential practice is to be gathered from the "texts and tenets of the religion."

The judiciary kept on building and expanding the test further which has now made the judgments ambiguous and inconsistent. This changed interpretation got so ingrained in the history of Indian Judiciary that the original intention of the drafters has been overlooked. The recent judgements serve as examples for the same.

THE LAG & THE OUTCOME

Although, in the history of the Indian judiciary, the Supreme Court of India laid down judgments that evidently reflect that all of the fundamental rights guaranteed by the Indian Constitution have been accorded to the citizens of the country and that the sole purpose of this law of the land has been firmly established and ingrained in the history. For instance, in the case of Vishwa Lochan

¹⁰ Rushil Batra, *The Essential Religious Practice Test- The Need For A Well Deserved Burial*, Law and Other Things, <https://lawandotherthings.com/the-essential-religious-practice-test-the-need-for-a-well-deserved-burial/>.

¹¹ Mohd. Hanif Qureshi & Others vs The State of Bihar, 1958 AIR 731.

¹² The Durgah Committee, Ajmer vs Syed Hussain Ali and Others, 1961 AIR 1402.

¹³ Sardar Syedna Taher Saifuddin vs The State of Bombay, 1962 AIR 853.

Madan v. Union of India¹⁴, 2015, the Supreme Court laid down that the *Fatwas* given by the extra judicial court of Islamic Law are not binding upon any Muslim and can be simply ignored. Importantly, these Shariat Courts have no legal binding and cannot be considered as an established parallel judicial system. Even, the High Courts have laid down some remarkably secular and positive judgments, for example, in the case of Nikhil Soni vs Union of India¹⁵, 2015, the High Court of Rajasthan while deciding on a PIL, criminalized the Santhara practice of Jainism which means fast up-to death. The court in this case relied upon a binding precedent of Gian Kaur v. State of Punjab¹⁶, where the Supreme court held that the right to life under Article 21¹⁷ of the constitution does not include the “right to die”. Thus, held that the practice followed by the community was against the principle of secularity and fundamental rights of the citizen. Further, in the case of Shani Shingapur temple¹⁸, where the Bombay High Court heard a PIL claiming the entry of women in the temple was a fundamental right and the state is duty bound to protect it. The court ruled that if men are allowed in the temple, women should be allowed too and the state government should ensure that there is no discrimination even if the villagers believe that the idol gets impure. These decisions unequivocally demonstrate how the judiciary has always upheld secular judgments and adhered to Articles 25 and 26 of the Indian Constitution.

However, the changed interpretation further led to a saga of questionable and argumentative judgements which testify that the Essential Religious Practices Test is no more a test laid down by the drafter of the Indian Constitution while it has inherently become a judicially crafted test which doesn't serve the purpose of equality anymore. When it comes to recent decisions in context to religion, the judgments that everyone is well-versed with are the cases like the Hijab ban or the Sabarimala entry case, and of course, the highly contentious Ram Janmabhoomi dispute. These are the cases which, *prima facie* appears to be incredibly secular and grant equality to the citizens of the nation. Nonetheless, a close examination of these decisions might reveal how the Essential Religious Practices test was incorrectly applied and how the ideal of secularity was not enforced. Discussing the case of Hijab ban, the case of Aishat Shifa v State of Karnataka¹⁹, 2022, the

¹⁴ Vishwa Lochan Madan vs Union of India, AIR 2014 SC 2957.

¹⁵ Nikhil Soni vs Union of India & Ors, 2015 Cri LJ 4951.

¹⁶ Smt. Gian Kaur vs The State of Punjab, 1996 AIR 946.

¹⁷ INDIA CONST. art. 21.

¹⁸ Gram Panchayat Shani Shingapur vs The State of Maharashtra, MANU/MH/3153/2018.

¹⁹ Aishat Shifa vs The State of Karnataka, MANU/SCOR/99839/2022.

Karnataka High Court ruled on a writ petition filed by college students claiming that their Articles 14²⁰ and 25 of the Indian Constitution are being violated as they are not allowed to wear hijabs in the college premises, wearing which is an essential Islamic practice. The High Court in this case applied the Essential Religious Practices test to evaluate whether or not this particular practice was foundational to Islam. But it is abundantly obvious from the present case that the judges misapplied the test. The examination sought to distinguish between secular activities and religious practises, as it has been noted several times. Following this, the Karnataka High court upheld the Hijab ban on account of it not being an essential practice to Islam. Further, although both of the Supreme Court's judges had opposing viewpoints, but, the major critique of the judgment is that the concept of Essential Religious Practice had not been evaluated and decided upon. Justice Dhulia had made a clear opinion that "It is just a matter of choice, no more no less." Justice Hemant on the other hand went into the scriptures and interpreted that it is not an essential religious practice it can be intervened by the government. He stated, "Permitting one community to wear their religious symbols would be an antithesis to secularism²¹." The argument of one community wearing an article of clothing to express their culture or religion has no substantially valid grounds to be proven against secularism.

The judgment which came as a ray of hope is the case of Sabarimala dispute or the case of Indian Young Lawyers' Association v State of Kerala²², where a petition was filed in the Supreme Court questioning the legal justification provided by the High court on not permitting entry to the women and girls of reproductive age inside the temple premises. The respondent in this case claimed that this was not social discrimination but the practice was actually essential religious practice. The court held that there is no gender discrimination in this case and if the women are not allowed in the premises, it is to be seen if this forms an essential part of a religion. The court relied on various precedents and mentioned that "*In the absence of any scriptural or textual evidence, we cannot accord to the exclusionary practice followed at the Sabarimala temple the status of an essential practice of Hindu religion*²³." Although this judgment allowed the entry of women inside the

²⁰ INDIA CONST. art. 14.

²¹ Aishat Shifa vs The State of Karnataka, MANU/SCOR/99839/2022, para 197.

²² Indian Young Lawyers Association vs The State of Kerala, (2019) 11 SCC 1.

²³ Indian Young Lawyers Association vs The State of Kerala, (2019) 11 SCC 1.

temple, but, again the interpretation of the Essential Religious Practice test goes in contradiction to its object and spirit.

Lastly, in the property cum religious dispute of Ram Janmabhoomi, Babri Masjid or the Ayodhya dispute, or the case of *M Siddiq v Mahant Suresh Das*²⁴, Prima facie, the Supreme Court appears to uphold the well-settled principle of justice, equity and good conscience, but a critical analysis of the extensive decision reveals how the court appears hostile to secularism. The judgment which provided the Hindus with the disputed property and also the Muslims with some other land, shows how the minority community was actually required to prove that the *namaz* was being offered in the mosque from a prolonged period. However, the majority community was provided with the benefit of the principle of preponderance of possibilities. In this case, the court questioned whether offering namaz in a mosque was integral to Islam, which runs contrary to the intent of the Essential Religious Practice test.

Every judgment illustrates how the Essential Religious Practice test has transformed into a wholly judicially-crafted and judge-centric mechanism. These latest judgements which applied the Essential Religious Practices test indicate how the courts twisted the criteria and implemented the test in a way that is not only inconsistent and ambiguous but also violates the individuals' fundamental rights. These contradictory judgments have enabled the judiciary a great deal of discretion to issue inconsistent rulings by interpreting the test differently in each case. Future cases like the Haji Ali Dargah issue, the Kashi Vishvanath temple conflict, or the Krishna Janmabhoomi controversy would undoubtedly demonstrate the consequences of the same.

CONCLUSION

In navigating the intricate terrain of religious freedom, the evolution of the Essential Religious Practices test within the Indian judiciary has been both pivotal and tumultuous. Initially conceived to delineate between fundamental religious practices and secular activities, its trajectory has witnessed a profound shift. What commenced as a means to safeguard individual religious liberties has, over time, morphed into a judge-centric mechanism, losing sight of its original essence.

²⁴ *M Siddiq (D) Thr Lrs vs Mahant Suresh Das*, 2019 1251 SC.

The framers of the Indian Constitution, in enshrining Articles 25 and 26, envisioned a framework that acknowledged the significance of religion in an individual's life while ensuring equality and non-discrimination. However, the unfolding interpretations of the Essential Religious Practices test have strayed from this vision. What was once a distinction between foundational religious practices and secular activities has transmuted into a broader scope, encompassing practices necessary to a religion. This transformation, while aiming to protect religious freedom, has inadvertently become arbitrary and inconsistent, diverging from its intended purpose.

Recent judgments, notably the Hijab ban, Sabarimala dispute, and the Ram Janmabhoomi case, reflect the divergence from the original intent of the Essential Religious Practices test. The misapplication and reinterpretation of this test have led to contentious rulings that seem to contradict the principles of equality and secularism enshrined in the Constitution. The evolving interpretations have given rise to ambiguity and inconsistency, providing ample judicial discretion that often results in conflicting judgments.

As mentioned by Justice Dhulia in his judgment²⁵, *“judges themselves are not religious experts who can study such scriptures and interpret them in the manner intended, the courts are not the ideal place to decide whether a practice is essential to religion or not.”* Thus, analysis and interpretation of religious practices by India's highest court, which isn't suited for determining a practice's essentiality to a religion, could impact not just the law but also societal norms and moral perceptions. The morality, is put into question when a couple of decisions overturn and invalidate the entire test, causing subsequent decisions to lack consistency and clarity. Similarly, when the inaccurate interpretation is applied and the decision is made based on whether a practice is essential to the religion or not, the social aspect enters the picture because the citizens may sense that their religious practices, beliefs, and rituals are controlled or restricted by the Indian judiciary, which could result in agitation and protests. For instance, in the Hijab Case²⁶, agitation was seen across India as the controversy spread like wildfire.

To conclude, the journey of the Essential Religious Practices test underscores the delicate balance between religious freedom, secularism, and individual rights. Its evolution, albeit intended to

²⁵ Aishat Shifa vs The State of Karnataka, MANU/SCOR/99839/2022.

²⁶ <https://www.nbcnews.com/news/world/muslim-women-india-protest-hijab-ban-rcna17038>

fortify constitutional freedoms, has deviated from its original intent, necessitating a recalibration to restore its alignment with the core principles of equality, non-discrimination, and the protection of individual liberties. The need for clarity, consistency, and adherence to the foundational values of the Constitution remains paramount in ensuring a harmonious coexistence of religious freedoms within the Indian societal fabric.