

COURTS SHAPING RELIGION: MOVING BEYOND THE ESSENTIAL RELIGIOUS PRACTICES TEST

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Abstract

“Religion is most threatening to liberal democracy where it informs national identity or permeates everyday life.(Jacobsohn, 2003)”

Freedom of religion under the Indian Constitution guarantees rights to individuals and religious groups. However, the state has the right to interfere in a limited sense. Therefore, we have Articles 25 and 26 to this effect, constitutionally validating the religious freedom of persons and religious denominations. Article 25 of the Constitution that begins with the expression, “Subject to public order, morality and health and other provisions of this part,” is testimony to the fact that freedom is not absolute. Does the Constitution of India protect everything that is incidentally or substantially religious? It is an arduous task for the judiciary to decide the questions of theology. However, a question arises, how competent courts are to resolve these questions of religion?

Nevertheless, the more fundamental question in this regard is, do the courts have the authority to dictate what one’s religious beliefs are? Verdicts of the court in the past led the researcher to question religious doctrines and the principles evolved by the judiciary. This paper seeks to analyze and critique these religious doctrines. The author has argued that the constitutional jurisprudence with respect to the ‘Essential Religious Practices’ test developed by the judiciary over a period of time runs antithetical to the spirit of the Constitution. It is submitted, courts deciding essentiality of practice in a given religion is flawed as it seeks to undermine the diversity in religion and, therefore, to shape the religion according to their conscience. The author attempts to provide an alternative approach to this seemingly incoherent jurisprudence.

Key words: Essential Religious Practices; freedom of religion; Indian constitution; jurisprudence, judiciary

Introduction

India is a multi-cultural country with a diverse population of all religions. Multiculturalism has a strange name in the Indian context. It is known as secularism and seems to be incongruous in the country, which is home to major religions of the world. (Badrinath Rao, 2006). It is now accepted that the Indian version of secularism is different from the model opted in Europe or America. (Ronojoy Sen, 2016) The Constituent Assembly also vociferously debated the form of Indian secularism in furtherance of which there was a clash of ideological differences. The amendment was proposed by H.V. Kamath to begin the Preamble by the phrase “*In the name of God.*” (Kamath) Similar amendments were moved by other members such as Pandit Govind Malviya and Shibban Lal Saxena but were rejected. The Indian Constitution has not envisaged a strict ‘*wall of separation*’ between the church and the state. (St. Xavier's case, 1974). The word “secular” and “socialist” were added to the Preamble only in 1976, during the Indira Gandhi's authoritarian Emergency rule, 42nd Constitutional Amendment, 1976. Coming to the landmark judgment of S.R. Bommai,.....wherein the court reiterated that secularism is part of the basic structure.

The debate on the Freedom of religion jurisprudence keeps reviving whenever any religious matter enters the court. In this paper, the researcher has discussed in length about the judicial stand on the religious issues and in what way the court has evolved the “essential religious practice” test in the process of defining religion. Various social reforms in furtherance of the underlying transformative constitution have been discussed in the light of the ERP test. Further, the disputed realm of judiciary’s intervention has been dealt with, which has led to the

evolution of a new doctrine called “essential religious practice” test. This paper primarily covers the following issues:

- I. What are the various legal doctrines & the interpretative techniques that have been evolved by the courts while adjudicating religious matters?
- II. How do the courts determine as to what is “essential” to the religion and therefore qualifies for constitutional protection?
- III. Are the courts true to the vision of the framers of the Constitution or have gone down a mis-interpretive tangent?

Review Of Literature

In today’s time, it is enormously imperative to appreciate the role of religion in society and the impact on the country’s polity of judicial interventions, says (Sen, 2019). Religion and its relationship with the State have always been an intriguing question for its people. (Austin, 2001) claims that in India, personal laws and religion are closely intertwined. He says when their relationship in the context of society as a whole or individually, participants and the observer must evaluate in theological, sociological, cultural, political terms as well as in terms of personal predilection.

The secularism disputes are one of the most contentious topics in today's Indian political culture and are by no way confined to academics or courts. (Jha, 2002) in her analysis of the Constituent Assembly Debates about secularism, notes that majorly the discussion revolved around two issues, i.e., parting of the religion and the political spheres and “mutual exclusion” of religion and the state. Nevertheless, the leading opinion manifested separation as “*equal-respect*” and “*non-preferential*” treatment of all religions. (Acevedo, 2013) acknowledges the intention of the framers and states that the intention was to imbibe the ideas of modernity and liberalism.

(Smith, 1963) mentions the distinctiveness of Indian secularism. In India, secularism has a different connotation; it does not mean complete separation but rather State’s neutrality towards all the religion. (Mahajan, 2002) discusses the relationship between state and religion in India and assumes that this separation is the core feature of secularism; nevertheless, strict separation is a utopian view.

(Jacobsohn, 2003) terms the model opted under the Indian Constitution as “*ameliorative secularism*.” With varying degrees of skepticism, many arguments are offered: that secularism is fundamentally unsuited for a country like India, which consists of the religious populace. Others, such as (Bhargava, 2006) defend the concept. Secularism, the proponent recommends, is necessary as it helps in protecting the rights of minorities and the oppressed. Pointing out to the fact that State can intervene in religious affairs, he argues that this is not a deviation from “*secular principles*.” Similarly, (Chatterjee, 2007), in his work, points out that due to various historical instances, the Indian state has to get itself involved in the “*regulation, funding, and in some cases, even the administration of various religious institutions*.” Therefore, in the absence of the church-state model, the development of secularism in India is not affected, which Madan fails to understand.

This conflict between the State and the people practicing a religion is inevitable. Here the role of the judiciary becomes even more significant to resolve the religious disputes. Speaking on the role of the judiciary, (Mahmood, 2006) remarks that it is the judiciary that, through interpreting laws, gives “substance” to the religious freedom and determines the extent of restriction. (Sen, 2019) believes that the internal regulation of religion by the state has been counter-productive and says that irrespective of the “*high modernist and rationalist thrust of the court*,” and particularly of individual judges.

Constitutional Text and the Religious Freedom

Freedom of religion has been conferred under Articles 25 to 28 of the Indian Constitution as a fundamental right. These constitutional provisions guarantee individual as well as group rights. (Jain, 2018). Freedom that is enshrined is not absolute but is subject to limitations. The very opening clause of Article 25 makes it clear that the freedom granted is not absolute but “*subject to public order, morality, health, or any other fundamental*

rights." Moreover, the state is allowed to make laws "regulating or restricting any economic, financial, political or other secular activity" accompanying religious practice. In matters of conflict, the right to freedom of religion takes a back seat and gives way to the latter. However, when considered in the context of a more comprehensive constitutional scheme, what does 'religion' mean? Does every belief, practice, tradition, custom, protected under Article 25 of the Indian Constitution?

The Constitutional text, as well as the discussion in the Constituent Assembly debates, did not mention any test, any set of rules, or the principles to differentiate between the two realms, i.e. "secular" and "religious." Therefore, the conflict reaches the court (Bhatia, 2019). In matters like these where the Constitution leaves it very open-ended for interpretation, the roles of the court become even more vital.

Defining Religion: A Tough Terrain

Definitions, by their nature, include and exclude (Neo, 2018). It is stated that the courts, through the essential religious practice test, determine the potential beneficiaries entitled to constitutional protection. When courts adopt a narrow rather than expansive interpretation of religion, they may end up exempting constitutional protection against religious activities or even whole religion or their belief systems. The fear is that when courts intrude into religious affairs by deciding on the essential religious practices, the act itself is a religious issue (W. Cole Durham, 2017). Also, when the judiciary themselves comes up with their definition or judgment, they risk performing the role of the religious arbiter (Sen, 2019).

Notably, U.S., Canadian, and European Courts usually deny deciding on the matter of whether a practice is religious or not. These courts resort to the "assertion test" wherein "a petitioner basically asserts that a particular practice is religious and thus thenot challenged by the courts further (Dhavan, 1987). The court only assesses whether the evidence adduced is sufficient enough to establish the existence of religious practice (Dhavan, 1987).

Therefore, it remains unclear what are the constituents of the religion under the Indian Constitution. Also, whether only the "essential" practices are given immunity under the said provision? Does Article 25 need further judicial scrutiny to limit the definition of religion, keeping in mind the intention of the constitution-makers, even when the provision comes with the rider? The judiciary has taken recourse to the Essential Religious Practice Test to decide matters relating to freedom of religion.

Essential Religious Practice: Tracing the Origin

On 2nd December 1948, Ambedkar said, "*The religious conceptions in this country are so vast that they cover every aspect of life, from birth to death.*" (B.R. Ambedkar, 1948). He was aware that in India, religion touches every single facet of life. At the same time, he was concerned about the fact that if personal laws are to give protection, then in social matters, the society would come to a standstill. To narrow down to scope, he opined that the freedom extends only to "*beliefs and such rituals as may be connected with ceremonies which are 'essentially religious.'*" (B.R. Ambedkar, 1948). The "essentially" religious practices are not to be regulated, but only those are having a secular character. The Constitutional text and also Ambedkar did not provide any test, set of rules or principles to differentiate between "religious" and "secular." He just cited examples like tenancy, succession law, Constitution of the administrative body, without defining it. So, the conflict has to reach the courts (Bhatia, Transformative Constitution: A Radical Bibliography In Nine Acts, 2019)

"Religious" or "Secular": Evolution of Essential Religious Practice Doctrine

Article 25 and 26 under the Indian Constitution confers rights on the individual, community, and the state. It is interesting to note that the courts have developed two doctrinal methods to solve this complicated relationship and conflict of interests arising thereof. The courts make the differentiation between "religious" and "secular" in furtherance of which they developed the ERPT. Also, judges themselves have acknowledged the complexity of defining them. As Gajendragadkar wrote about Hinduism in 1963 that, it is a very complicated situation to find out as to whether the practice is a religious matter or not. (Tilkayat Shri Govindlalji Maharaj case, 1963)

Now, if one thinks about the cases where any disagreement arises between the religious practitioners and the state, regarding the practice being "secular" or "religious," the Indian Constitution cannot be referred as it lacks any clarification on this issue. These questions highlight that the courts have to intervene to some extent to scrutinize, and to find out the very nature and character of religion.

Essential Religious Practice Test: Supreme Court Rulings

In *Shirur Mutt's case* (1954), the impugned Act, i.e., Madras Hindu Religious and Charitable Endowments Act, 1951, was in question. Before the court dealt with the issues relating to the provisions in the Act, the court took up and answered a fundamental question: where one has to draw a line between the "religious" and "secular"? Mukherjea J. held that religion, no doubt, consist of a system of believes or consists of doctrines but also different rituals are prescribed.

In the same case, the court observed, "*what constitutes the essential part of a religion is primarily to be ascertained with reference to the doctrines of that religion itself*" It was also pointed out, that if any religion prescribes that a certain way is to be adopted in doing any religious practice like, the offering of food, recital of the sacred text, then it is to be considered as religious activity irrespective of the involvement of marketable commodity or money expenditure. So, one can see that not only beliefs but also the associated activities are to be given protection even if incidentally involves some secular activity. This essential element of religion has been given protection under the Constitution. Like, under Art. 26(b), the religious denominations have the right to determine the essential practices, and no other authority can interfere with the decision. However, under the provisions, the right to freedom to religion comes with limitations under which they legitimately can regulate when such practices.

The position was affirmed in the case having similar issues in *Ratilal's case* (1954) wherein also the state took over the Hindu religious endowments. This time, the court did not indulge itself in going into the meaning of the term denomination. Nevertheless, it upheld the broader powers under Article 26, which covers both, the belief as well as the acts and gave substantial powers to determine the scope of the provision.

Further, in *Devarus's case* (1958), the appeal was made by the trustees of the temple that *Gowda Saraswath Brahmins* were the founders of the temple and is of private nature, hence outside the scope of Madras Temple Entry Authorisation Act of 1947. Under the Act, the people who were prohibited earlier were allowed to worship and enter the temple. This case is significant in a way as the court had to balance the rights of the religious group and the state. The rule of harmonious construction was applied and was held by the court, "*that during certain ceremonies on special occasions members of the Gowda Saraswath Brahmin community had the right to take part.*" This verdict followed the ERPT but did not recognize the rights of the denomination.

By reviewing the case laws above, one can see that two tests were working out together, the essential religious practices test and the separate denominational test. The case laws suggest that the first test determined the essential practices of the religion while the latter was answered the "what" aspect and latter the "who," i.e., protected under Articles 25 and 26. Therefore, it is evident that the "essential religious practice" test emerged as part and parcel of the religious "denominational test."

Redefining Essential Practices

On analysis of the case laws, the critical shift has been pointed out how the word "essential" from determining the practice as secular or religious gradually was used to gauge the importance within the religion—thereby allowing the courts to intervene into internal matters of religion. The gradual shift will be more apparent in the following case laws. In *Ram Prasad's case* (1957), the issue was whether theregulation barring bigamous marriage violated Article 25(1). The act of bigamy is performed due to the particular religious duties performed by the Hindu sons, so it gave a chance to give birth to the son if it could not be conceived in the first marriage. The court, this time, adopted a new approach and went on analyzing the Hindu religious scriptures and held that "polygamy is not an essential part of the Hindu religion."

In *Hanif Quareshi's case* (1961), the validity of three legislation relating to the prohibition of cow slaughter was in question. The petitioners belonged to the Quareshi community and, by profession, were butchers. The petitioners claimed that rights under Articles 14, 19(1)(g), and 25 of the Constitution are being violated. The court, in this case, took the help of *Hedaya*, translated by Charles Hamilton. It was concluded that the sacrifice of the cow was not mandatory.

Moreover, other alternatives, like camel and goat, were prescribed. The sacrifice of cow or camel (consisting of 7 parts for seven persons), whereas goats have (merely 1 part). So, the reason behind the prescription of sacrificing of cows and camels arose out of economic (secular) reasons for the equal participation of the poor in the community. Also, historical facts were relied upon, and examples of rulers like Babar, Akbar, Jehangir, and Ahmad Shah were cited because, during their reign, they prohibited the slaughter of cows. Ultimately, the court rejected the practice being essential to the Muslim community. (¶ 15)

In the *Durgah Committee's case* (1961), again, the court applied the test of essential religious practices test. The Dargah Khwaja Saheb Act, 1955, was challenged on the ground that the Act permitted all the Hanafi Muslims who were to take part in the maintenance of the Dargah. Although the claim was dismissed saying that denomination had no right under Article 26. Justice Gajendragadkar observed that secular activities have the potential to be clothed with the religious tint and be claimed to be an essential practice under Art. 26. (¶ 19). The court ran together the "essential religious practices" test and the "religious/secular" distinction and then added another requirement practice born out of "*mere superstition could not be considered for protection under Article 25 and 26.*" (Bhatia, 2016)

It is contended that this case makes the drastic alteration apparent seen in courts' reasoning. As in the earlier cases, the courts gave extensive powers to the religious denomination in order to determine whether the practice was essential to the religion or not. Now the courts became skeptical about the religious denomination that they might mislead the courts in deciding whether the practice was secular or religious by claiming the practice to be religious only. Therefore, now the courts got themselves more involved in resolving the matter as to what was essential or non-essential, and thus the ERP test became much more prominent tool in the hands of the court.

Coming to the next significant case wherein the test was applied is *Syedna Saifuddin's case* (1962). In this case, the constitutionality of the Bombay Prevention of Excommunication Act, 1949, was challenged by the Dawoodi Bohra Community. The central question was whether ex-communication by the head of the sect is an integral practice of the Community? Here we must take into account what did the Bombay High Court (1953) observed adjudicating against the Bohra Community. The Bombay High Court did not even consider whether the right to excommunicate was an essential practice or not. Bombay High Court observed that even if the practice is essential, but if the legislature thinks that it is contrary to public order, morality, health, or a policy of social welfare, then in such cases, the religious practice has to give way to the legislation. (¶18)

The High Court ruling is very significant because the court did not indulge itself in ruling on the essential religious practice but instead relied upon the various limitations that have been mentioned under Article 25 and 26. The dissenting opinion of Chief Justice Sinha is remarkable as he did not question the essentiality of the practice. However, it was observed that a person who is excommunicated gets excluded from exercising, even their civil rights. (¶19 (dissenting opinion of CJ Sinha). Bhatia, in his work, has developed this alternative approach calling it an "*anti-exclusion*" principle. (Bhatia, 2019, p. 398)

In *Tilkayat's case* (1963), Shri Govindlalji Maharaj, the Tilkayat, i.e., head of the denomination, challenged the validity of the Nathdwara Temple Act of 1959. The court held that even when the temple was a private one but the head was "merely a custodian, manager and trustee of the temple." (¶ 43). The court this time banked on order issued the ruler of Udaipur in 1934, which declared that the Royal Courts had the absolute rights to the supervision of the temple, it could even depose the Tilkayat. (¶ 59)

(Sen, 2019, p. 21) observes that the line of thought reached finale in *Shastri Yagnapurushdasji's case* (1966). The appellants argued that the "Swaminarayan sect" began as a dissident offshoot of Hinduism, does not consider themselves as Hindu. On an analysis of the judgment, one can see a plethora of text were analyzed, including

the holy scriptures to find out the real meaning of “Hinduism.” The judgment was authored by CJI. Gajendragadkar who observed that the impugned Act was enacted with the objective of giving equal rights to the *Harijans*. The democratic way of life was emphasized by praising social justice as its primary foundation. Dhawan remarks that the Chief Justice’s vision of Hinduism illustrates “rationalistic” and “progressive” religion, within which it was implicit was that the appellants themselves had misunderstood the dictates of Hinduism by denying certain castes to worship in their temples. (Dhawan, 1987, p. 227)

In yet another *Seshammal’s case* (1972), a law was introduced in order to put an end to the hereditary succession to the office of “*Temple archaka*” (the person who looks after an idol in a temple). The objective is not to make caste as a ground for the exclusion of the Individuals who are otherwise well qualified. The court held that even when the *acharaks* perform a religious function, but their appointment falls within the domain of secular and, therefore, outside the protection of Art. 25 and Art. 26.

In *Acharya Jagdishwaranand’s case* (2004), the Anand Margi sect claimed to perform the “tandava dance” during their public processions. The dance is to be performed with the skull, a small knife, and a trident. The court rejected this claim by applying the ERP test, saying that the sect is of recent origin and their religious writings of the sect to the effect that the dance is mandatory to be performed in public. In response to the decision, the founder of the sect added in the *CaryaCarya* (holy book), the dance to be integral. The case reached the High Court again, which ruled in favor of the Anand Margis; finally, the case reached the Supreme Court. The court rejecting the claim of the Ananda Margis, observed, that the practice is of recent origin and also, and it is upon the courts to determine the essentiality of the practice, and it is problematic if one alters its religious doctrines with the objective to circumvent the court’s decision. The court expounded upon the attributes of “essential” religious practices and observed that Essential practices are the cornerstones upon which the superstructure of religion is founded. (¶ 3-4).

As per Lakshmanan, J. dissenting view, a religious denomination has the sole authority to decide what forms part of the ERP test. One should see that Ananda Margis considers Ananda Murti as their religious preceptor or guru. Since he is alive, so any directive from him would be followed until he dies. (¶ 41). He also rejected that the practice lies within reasonable restrictions clause under Article 25.

Recent Judicial Interpretations and The Essentiality Test

Dr. Noorjehan Safia Niaz’s case (2014) (*Haji Ali Dargah case*) is relevant as it owes to the further development of the essential religious practice test. The petitioner challenged the prohibition which prevented women from entering the *sanctum sanctorum*, where the saint lies buried. Several verses of the Quran were referred by the respondents for the submission that “proximity by women to the grave of a male Muslim Saint was sin in Islam.” Respondents, in this case, had the onus to prove that “if women entered the ‘*sanctum sanctorum*,’ the very nature of its religion would change.” (¶ 29) It is completely contradicting because when till 2012 they were allowed, then how can that practice of exclusion be considered as an integral part. The claim for women’s safety was also rejected. (¶ 38). Therefore, the petitioners finally were successful in getting the orders in their favor to enter the sanctum sanctorum along with the men. Also, it was on the state had to take responsibility in order to ensure safety and security.

The other significant case is of *Shayara Bano* (2016). The petitioner, Shayara Bano, in this case, was divorced from her husband, Rizwan Ahmad. The divorce was pronounced by *talaq-e-biddat*. One of the aspects was of the essentiality of the practice of Triple Talaq in Islam. Several arguments on this component were put forward. Like many countries, including the Muslim-majority countries, have already prohibited the practice by way of legislation. (¶ 79). Petitioners considered the phrase used in the context of Triple Talaq that it is “bad in theology, but good in law” and claimed that it is not a religious practice but rather a social one. (¶ 16). Further, it was argued that Talaq-e-biddat is not recognized under the Quran or in Hadith. It is also recognized as a “sinful form of divorce” (¶ 16).

The majority opined that talaq-e-biddat is not integral to the Hanafi School of Islam. The dissenting judges concluded that ‘talaq-e-biddat’ is an integral part of *Sunnis* (Hanafi school) and is approved. (¶ 25). In this

observance, the approach for the essentiality is similar to the one proclaimed in *Shirur Muttcase* as is to be determined by the religious denomination itself.

Recently in (*Afzal Ansari and 2 Others v. State of U.P. And Others*), one of the issues was that whether an order prohibiting or restricting the recitation of the azan through loudspeakers and violates Article 25 of the Constitution of India? (¶ 12). The court held that loudspeakers could not be used except with the requisite permission of the authorities as per the Noise Pollution Rules. (Biju, 2020)

The Court in *Nikhil Soni's case* (2015), declared that the Jain practice of *Santhara*, which is performed by keeping a fast-unto-death, an offense to be punished under the Indian Penal Code. This verdict again symbolizes the confusion regarding the freedom of religion in Constitutional jurisprudence. (Parthasarathy, 2015) The Indian Constitution does not permit courts to dictate the believers about the integral aspect of their religion. It is contended that the practice does not fall into the category of any of the limitation clause and should not have been criminalized by the State. Hence, it does not fall into the domain of the State authority to interfere.

In *Amnah Bint Basheer's case* (2016), it was observed that the objective of prescribing a dress code was in furtherance to avoid malpractices during the examination. The prescription does not fall under the limitation clause. Further, the judges acknowledged that the dress code was an essential part, but the State's attempt to ensure credibility and transparency cannot be overlooked. Ultimately, a harmonious construction was applied and held that the girls' dress code was protected under Article 25; nevertheless, the Board can permit the women invigilators to frisk such candidates by removing their scarves, and all such candidates would have to report at the Centre at least half an hour before the scheduled time (¶ 37).

Recently in the *Indian Young Lawyers Association's case* (2018), Justice Chandrachud notes that the ERP test often puts the judges in a difficult situation as it demands to determine the essential practices of a religion. It leads to the assumption of a religious function by the state, which results in intrusion on the autonomy of religions. This entails an irony that this is done for the protection of religious freedom by the state. (Khaitan, 2018) Chandrachud agrees with (Bhatia, 2016), and observes that in future the ERP test should give way to the test which does not ask whether a practice is "essential" but whether the practice challenged is "*socially exclusionary, and denies individuals access to the basic goods required for living a dignified life.*" (¶ 112)

Conclusion: Developing A New Religious Jurisprudence

This paper has tried to examine the evolutions of the Essential Practices Test. The course of the development of the ERP test has been chequered and incoherent, as one can see the case laws so discussed. To classify a practice if it falls under religious or secular activity has been a complicated task. The courts have often resorted to foreign judgments in such determination. However, as the case law developed, the boundary became simultaneously "clear-cut and yet forever shifting." This test was introduced in different aspects of religious life like beliefs, practices, and various other secular activities so associated with religion.

One can also see the changing pattern pertaining to the usage of the sources by the courts to reach a decision. In some cases, the courts have relied upon the sacred scriptures and carried on the process of rationalization of the religious practices and, therefore, of the religion. Moreover, scholarly works appear to have been used for supporting their contentions. Also, the views of the religious communities are one of the factors, although it is no more absolute. Few of the cases have been decided even without the testimony of the affected parties. (Bhatia, 2016, p. 365)

It is astonishing to note that the ERPT test is nowhere mentioned under the Indian Constitution. Moreover, it adopts a very restrictive view of religious freedom and entitles protection only to the essential practices of the religion. In this way, the courts have started imposing their conscience as to what should be religion in the real sense—the whole objective of conferring religious freedom withers away. The test curtails the freedom of religion as now under this test; the religious practices are categorized under the two heads, i.e., those which constitute an essential part of religion and those who do not. Added to this criticism is the fact that the courts have often ignored the alternatives which are available other than deciding the matters internal to the religion.

Furthermore, the application of such a test is an interventionist approach by the courts. Application of the test dilutes the limitation clause too.

On conducting the detailed analysis of the interpretation of the court of the ERPT, it is concluded that the jurisprudence involved is arbitrary and significantly biased and unconstitutional in deciding if an act is an essential religious practice or a secular act. In the researcher's opinion, it is not a good idea of defining religion as it is something that is subjective in nature and often is problematic to define. What is essential to the religion for one might not be for the other. Moreover, in a diverse country like India with a multi-religious structure wherein lies sects within religion, having their own sets of beliefs and practices. So, the ERPT cannot be regarded as an appropriate tool for the determination of religious matters. This also poses concerns about a non-religious court's ability to enforce its opinions on faith on religious believers, significantly when their individual perspectives vary. The point of concern is the role played by the judges. They, while adjudicating on religious matters, have started playing the role of clergy determining matters internal to religion. However, the judges are the scholars of law and are not competent enough to decide on the matters of religion.

The application of the test makes it quite tricky in the formulation of a unified and consistent "Supreme Court jurisprudence." The courts often do not rely on consistent evidence. Sometimes, over the religious text, historical facts, arbitrary anecdotes, and whatnot. The test also acts as a hindrance to the reformation and natural growth of the religion. The primary objective of this claim is that the courts should not be much concerned with the religion when the decision is being arrived at in the judicial capacity. Article 25 was never intended to be absolute protection, and reconciliation of the freedom of religion with the State's authority needs to be done. The limitations under the clause need to be given importance; otherwise, the civil liberties so guaranteed under the Constitution will be transgressed. One of the characteristics of the Essential Practices Test is that only certain religious practices are deemed essential and thus hits upon religious growth.

However, having grasped the flaws in the stand of the judiciary, it is vital that we provide an alternative to the ways adopted by the courts. It is proposed that the courts should base its decision only and only on civil laws and rights and stay as much far removed as possible from religious arguments. Moreover, the courts, in usual circumstances, should refrain from deciding religious questions. At most, the courts may decide whether a practice is religious or not, rather than how religious the practice is. As Dr. B.R. Ambedkar had put it, the practices which are 'essentially religious' must be protected, not the 'essential practices of a religion.'

The dissenting opinions in the cases are of much help to come up with the alternative to this approach. Take the example of Sinha J. in *Syedna Saifuddin's case* (1962). The judge, in his dissenting voice, pointed out that if a person is excommunicated from the community, he becomes an outcast to whom all other civil rights are denied. Further, on the social aspect of this ex-communication, the person is equivalent to the untouchable in his community. The Act, which prohibits such practices in a way, carries out the injunction under Article 17 (¶24). This would serve as an alternative as only those essential religious practices would be protected, which do not transgress upon the civil liberties of the individuals. The author agrees with the idea "anti-exclusionary" principle, which has been developed by Gautam Bhatia (2019) from this dissenting opinion. This principle thus gives importance to individual rights over group rights basing itself on the touchstone of the Constitution.

Moving on further, taking into account the approach of Indu Malhotra J. (*Sabrimala case*) observed that the interference was justified if the practice would have been of an evil nature so that it would have affected the lives of the women, but the exclusionary practice was, according to her, not of such evil nature. So, one can say that instead of the ERP test, the courts would have opted for a test that would have seen the degree of harm it would have caused in the lives of the people, as suggested in the dissenting voice. In the backdrop of the "pernicious and oppressive" practice test as laid down in the dissenting opinion, it is proposed that the courts should also look into the degree of harm to the other person's rights, which is a question of fact. Further, the dissenting opinion in *Ananda Margi's case* and the verdict of *Amnah bint Basheer* also shows us the way for harmonious construction. The state, if possible, should allow the practice; however, it should take all the possible measures to prohibit any mishappening due to that practice, which violates the rights of the other person.

Thus, the courts should opt for alternative approaches suggested above. It should adjudicate the practice to the test of fundamental rights or constitutional principles. Therefore, a much more suitable and acceptable approach should be adopted by the courts in order to bring social change in society.

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