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Essential Religious Practices Test and the Supreme Court of India: A Critical Analysis

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ABSTRACT

The Constitution of India 1950 provides for religious freedom under the chapter of the fundamental rights. This freedom implies that the state should have minimal interference in the religious matters. In this sense, the Constitution provides for the separation of secular and religious domain. The conflict between the fundamental rights and religious practices led to the intervention by the courts in religious matters. The entanglement between law and religion can be seen into various judgments of the Apex Court. To decide the issues of religious practices, the Supreme Court developed the Essential Religious Practices Test (ERP Test). This test has been criticized for various reasons such as arbitrariness, judge centric etc. Also, few scholars have stated that the judiciary has taken the role of clergy in defining 'essential' and 'non-essential' practices of a religion. The questions have been raised about the role of Apex Court in adjudicating the religious matters. The research paper deals with the concept of ERP Test as developed by the Apex Court through various judgments. The paper tries to explain whether the Apex Court has overreached its power by developing ERP Test and whether it is in its domain to develop a judge centric test to interfere in religious matters. The study also explores whether other secular tests such as reasonable restrictions would have been adhered to instead of evolving ERP test, while adjudicating religious matters.

Keywords: *Fundamental Rights, Religious Freedoms, ERP Test, the Supreme Court of India.*

I. WHAT IS ESSENTIAL RELIGIOUS PRACTICES TEST?: AN INTRODUCTION

Religion is an important and integral facet of society. However, it cannot be denied that the source of discrimination has been the religious personal laws instead of prejudice laws made by those who are in power². The Constitution of India, 1950 in Articles from 25 to 28 provides for 'Right to Freedom of Religion' which affirms that state should be neutral towards all religious practices and belongings. This was further reaffirmed by the 42nd Amendment to the

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² GARY JEFFREY JACOBSON, THE WHEEL OF LAW 104, Princeton University Press, New Jersey (2003).

Constitution which added the word 'secular' to the Preamble of the Constitution of India. Therefore, the Constitution provides for separation of a secular domain regulated by the state and a religious domain which should not be interfered by the state³. Religion exists in public sphere in India but the country has successfully retained its secular character⁴. Therefore, the state has to act and interfere with the religious affairs to maintain the social order.

The inability of state to resolve the religious affairs for achieving the objectives enshrined in the Constitution called the Higher Courts in India to answer complex questions on religion which impact the religious practices⁵. Many a times there has been conflict between the religious practices which are not to be interfered by the state and the fundamental rights of the individual guaranteed under the Constitution. These issues are supposed to be settled by the Courts considering the civil and fundamental rights as well as the religious conceptions and practices. The Courts in India, many a times, refrained from entering in the religious domain citing the reason that it would be like bringing a bull to china shop⁶. There has always been entanglement between law and religion which can be seen in the judgments of Indian Courts. Moreover, the Apex Court has an autonomy in interpreting the meaning of secularism and religion thereby demarcating the spheres of these terms⁷.

The Supreme Court has developed a test, to determine what is essential to a religion and what is not, for the constitutional validity of any religious practice. The test, popularly known as 'Essential Religious Practices Test' (hereinafter ERP Test), is still debatable regarding its lawfulness in a secular state. The Supreme Court in catena of cases applied ERP test whenever there has been clash between the civil liberties of individual and the religious practices⁸. The Summit Court has explained the ERP test to determine which elements are fundamental for a religious practice and which may be eliminated because of its superstitious nature⁹. But the judiciary is flawed in giving upper hand to a religious practice over other and there has been inconsistencies in the application of ERP test as propounded by the judiciary. The judiciary has

³ Gilles Tarabout, *Ruling on Rituals: Courts of Law and Religious Practices in Contemporary Hinduism*, 17 South Asia Multidisciplinary Academic Journal (Online) (2018).

⁴ Ranbir Singh & Karamvir Singh, *Secularism in India: Challenges and Its Future*, 69 INDIAN J. POL. SCI. 597, 603 (2008).

⁵ *Supra* note 3.

⁶ Harvinder Kaur v. Harmander Singh Choudhry AIR 1984 Delhi 66.

⁷ Sanghamitra Padhy, *Secularism and Justice: A Review of Indian Supreme Court Judgments*, 39 Economic and Political Weekly 5027, 5027 (2004).

⁸ The Commissioner, Hindu Religious Endowments, Madras v. Sri Lakshmindra Thirtha Swamiar of Sri Shirur Mutt 1954 SCR 1005; Sardar Syedna Taher Saifuddin Saheb v. State of Bombay AIR 1962 SC 853; Seshammal v. State of Tamil Nadu AIR 1972 SC 1586; State of West Bengal v. Ashutosh Lahiri (1995) 1 SCC 189; Javed v. State of Haryana 2003 (8) SCC 369.

⁹ Valentina Rita Scotti, *The "Essential Practice of Religion" Doctrine in India and its Application in Pakistan and Malaysia*, Stato, Chiese e pluralism confessionale (2016).

taken over the role of clergy in defining ‘essential’ and ‘non-essential’ practices of a religion¹⁰. The Apex Court has recently applied ERP test in *Shayara Bano v. Union of India*¹¹ (triple talaq case) to declare instantaneous triple talaq (*talaq-e-biddat*) as unconstitutional because it is not an essential religious practice of Islam. The Court further used ERP test in the case of *Indian Young Lawyers Association v. The State of Kerala*¹² (popularly known as Sabarimala case) and held that allowing women of 10 to 50 years of age to enter Sabarimala temple for offering prayers, it cannot be imagined that the nature of Hindu religion would be fundamentally altered or changed in any manner and therefore it cannot be held as the essential religious practice of Hindu religion. But in both the cases the court could have resorted to the gender based reasoning instead of applying ERP test. One more case before the Supreme Court which should be discussed is *Goolrokh Gupta v. Burjor Padriwala*¹³. The five judge bench of Supreme Court passed an order¹⁴ dated 14 December 2017 stating that the parsi woman shall attend the last rites of her father. The larger question in this matter was the challenge to the ‘doctrine of coverture’ i.e. whether a parsi woman ceases to be a parsi because of her marriage to some other religion. A three judge bench of Supreme Court later on referred the matter to constitutional bench. The matter is now clubbed with Sabarimala review petition to address the larger questions of law. The issues raised are- Whether Supreme Court can tell how a religion is to be practiced? Whether ERP test is protected under Article 26 of the Constitution of India? The present CJI Justice SA Bobde in the month of January stated that the nine judge constitutional bench will look in to the larger issues of law such as women’s entry to mosques/temples, genital mutilation by Dawoodi Bohras, entry of Parsi women who marry outside their community into fire temple. It will not decide individual facts of each case¹⁵. In the coming time only, we can see whether ERP test is protected under the Constitutional provisions in the judgment of nine judge constitutional bench constituted to deal with the matter at hand. The Supreme Court as the guardian of the Constitution and the protector of the fundamental rights of the individuals is contradicting with its role of constitutional court in determining essentials of religion as a theological authority. In this context, the research paper deals with the concept of Essential Religious Practices Test as evolved by the Supreme Court of India in its various judgments. The paper also analyses how the Supreme Court with its

¹⁰ Faizan Mustafa, *Haji Ali Verdict: Can we permit Sati, Polygamy if they are essential practices?*, Hindustan Times, August 30, 2016.

¹¹ AIR 2017 SC 4609.

¹² 2018 SCC OnLine SC 1690.

¹³ Special Leave Petition (Civil) No. 18889/2012.

¹⁴ Order dated December 14, 2017 in SLP (C) No. 18889/2012.

¹⁵ Krishnadas Rajagopal, *Supreme Court not to review Sabarimala case, to examine ‘larger issues’*, The Hindu, January 13, 2020.

autonomy to decide and interpret religious practices, in recent years, transformed itself into a theological authority under the veil of fundamental rights. The study also examines the legality of ERP test in the nation like India and tries to explore why the Supreme Court has not adhered to other secular tests such as reasonable restrictions of public order, morality, health etc. provided under Articles 25 and 26 of the Constitution of India, 1950.

II. THE VOYAGE OF “ESSENTIAL RELIGIOUS PRACTICES” TEST SO FAR

As it is stated in the previous section, religion cannot be separated from the society. B. R. Ambedkar in Constituent Assembly debates¹⁶ made a speech about the varied nature of religion in India and uses the term ‘essentially religious’ in the context to differentiate between religious activities and secular activities¹⁷. A seven judge bench of the Supreme Court in the case of *The Commissioner, Hindu Religious Endowments, Madras v. Sri Lakshmindra Thirtha Swamiar of Sri Shirur Mutt*¹⁸, devised the term ‘Essential Religious Practice Test’. The Court held that what is ‘essential’ to a religion should be tested and ascertained within the principles of that religion itself. The Court stated that Article 25 of the Constitution of India enumerates all the rituals and practices that are integral to the religion. Therefore, judiciary has bestowed itself the authority to decide what is integral to a religion thereby rejecting ‘assertion test’ which has an application in USA where a petitioner asserts whether a practice is religious practice or not and court would not inquire further in it¹⁹. This leads to arbitrary and ambiguous outcomes by the Courts. Determining a practice to be essential or non-essential is certainly outside the scope of the Courts. The Apex Court again in *Sri Venkataramana Devaru v. State of Mysore*²⁰ while adjudicating whether restricting certain section of people i.e. untouchables is essential practice of Hinduism. The Court applied the ERP test and held that not allowing untouchables to enter a temple is not an essential practice of Hinduism. In this case instead of adhering to ERP test, the court could have settled the issue by using Article 17 of the Constitution of India which abolishes ‘untouchability’. On the Contrary, the Court in *Sardar Syedna Taher Saifuddin Saheb v. State of Bombay*²¹ upheld the authority of spiritual and temporal head of Dawoodi Bohra Community to excommunicate as an essential religious practice. The Supreme Court

¹⁶ Constituent Assembly Debates, Volume VII, <http://parliamentofindia.nic.in/1s/debates/vol7p18b.html> (Accessed on May 10, 2020).

¹⁷ Suvam Kumar, *The Essentiality of Essential Religious Practice Test in Light of Recent Supreme Court Decisions*, RMLNLU Constitutional Law and Public Policy Blog, <https://seclpp.wordpress.com/2019/03/14/the-essentiality-of-essential-religious-practice-test-in-light-of-recent-supreme-courts-decisions/> (Accessed on May 10, 2020).

¹⁸ 1954 SCR 1005.

¹⁹ Faizan Mustafa and Jagtishwar Singh Sohi, *Freedom of Religion in India: Current Issues and Supreme Court Acting as Clergy*, *BYU Law Review* 915 (2017).

²⁰ AIR 1958 SC 255.

²¹ AIR 1962 SC 853.

also in the case of Mohd. Hanif Qureshi v. State of Bihar²² held that cow slaughter is not an essential practice of Islam. In the case of Durgah Committee v. Syed Hussain Ali²³, the Supreme Court went one step further to rationalize religious practices by eliminating the mere superstitions. Now the role of Court was not only to define what is essential or non-essential rather the Court bestowed itself the power to eliminate superstitious religious practices and stated that these practices have no immunity against state intervention. The Supreme Court in Ismail Faruqi v. Union of India²⁴, instead of adhering to the doctrine of 'eminent domain', for the acquisition of the then disputed land of Babri Masjid-Ram Janam Bhoomi by the state of U.P., the Court examined whether offering namaz in mosque is an essential practice of Islam. Although the government had the power to acquire land for 'public purposes' under the Land Acquisition Act of 1894. In this context, the issue of essentiality of a religion is decided by the Supreme Court in the following manner:

1. The religious practices shall be differentiated by the secular practices.
2. The religious community must consider the practice in question an integral part of its religion.
3. The essential religious practice would not automatically deem to be a matter of religion if it has been generated by superstitious beliefs.
4. Finally, the Court will scrutinize the claims of religious practices for the protection under Article 26(b)²⁵.

The Apex Court in recent times has also applied ERP test, despite it being fallacious, in the Triple Talaq and Sabarimala judgments. Although in triple talaq judgment the minority and dissenting opinion did hold that judiciary should not intervene into religious matters. Also, in Sabarimala verdict Justice Chandrachud stated that constitutional values would prevail over religious practices. He further added that Constitution is not bound by any religious practices. This hints towards moving beyond ERP test but a larger bench should settle this issue. Now, the Supreme Court has a golden opportunity in the review petitions before it to examine the legality of ERP test and to do away with this practice as it is arbitrary, fallacious and restriction on religious freedoms.

III. THE ERP TEST: IS IT FLAWED AND RESULT OF JUDICIAL OVERREACH?

The fact that ERP test has been used by the Supreme Court in larger public interest to curb the

²² AIR 1958 SC 731.

²³ AIR 1961 SC 1402.

²⁴ AIR 1995 SC 605.

²⁵ *Supra* note 19 at p. 933.

various religious practices which were social evils. The Constitution of India provides for fundamental right to freedom of religion under Part III. ERP test can be challenged on the ground that the Constitution of India does not discriminate on the basis of essential and non-essential religious practices, then why did the Supreme Court developed the ERP test for religious practices. There are plethora of cases where the Supreme Court applied the ERP test for the evaluation of religious practices irrespective of its significance to the followers.

The Supreme Court in *Acharya Jagdishwaranand Avadhuta v. Commissioner of Police*²⁶ held that courts have power to determine the essential and non-essential practices of a religion by using the principles of that particular religion. In this case the Supreme Court did not consider 'tandava dance' to be an essential practice of Hinduism. The Bombay High Court in the case of *Gram Sabha of Village Battis Shirala v. Union of India* held that capturing and worshipping a live cobra during Nagpanchami is not an essential religious practice of the petitioner's religion. The Court relied upon the Dharma Shastras while the petitioners relied upon their local religious text *Shrinath Lilamrut*. The Courts should keep in conscience that every religion in India have diversity. There are various sects and practices within every religion in India. Therefore, the courts should not adhere to a general religious texts of any religion to justify the practices of any heterogeneous sect of that religion. For example, few Muslim sects such as Khojas and Memons follow several Hindu practices. Also, the Hindu caste system can be seen among Christians²⁷. The transformation of the role of Apex Court from Constitutional Court to a theological authority has raised questions about the power of the court to interpret the essential scriptures of a religion. The Apex court also moved one step further and established the difference between the religion and philosophy²⁸. The court in another case²⁹ held that slaughtering cows on Bakr-Id is not an essential religious practice of Islam. The Court is criticized on the ground that the determination of 'essential religious practice' would differ from bench to bench as there is no straight jacket formula to decide which practice is essential and which is non-essential. The Calcutta High Court in the case of *Acharya Jagdishwaranand Avadhuta v. Commissioner of Police*³⁰ stated that the court by deciding the essentiality of a religious practice, creating confusion among the people of that religion. Therefore, in this context it would amount to arbitrariness to decide the religious practices to be essential or non-essential by a judge-centric approach.

²⁶ (1983) 4 SCC 522.

²⁷ *Supra* note 19 at p. 934.

²⁸ *S. P. Mittal v. Union of India* (1983) 1 SCC 51.

²⁹ *State of West Bengal v. Ashutosh Lahiri* (1995) 1 SCC 189.

³⁰ AIR 1990 Cal 336.

Also, one more criticism ground on which ERP test is challenged is the violation of religious autonomy of an individual as the court decides the essential practices which should be followed thereby opposing the idea of secularism. If we take the USA Supreme Court view, it rather defines religion on the basis of believer's perspective. But the Indian Supreme Court apart from triple talaq and sabarimala judgment, in the case of *Adi Saiva Sivachariyargal Nala Sangam & Ors. v. Govt. of Tamil Nadu*³¹ held that the Supreme Court is not barred from determining the essential religious practices as it is an issue of constitutional necessity which shall be adjudicated by this Court as the apex court is the guardian of the Constitution. It has been contended that the in determining the 'essential' practices of a religion, that community itself should be consulted. The ERP test has given the court with the authority to construct the religious practices as essential or non-essential as it deems fit. Therefore, the Apex Court in the veil of social reforms narrowed the scope of religion through ERP test.

It is true that after independence, the Supreme Court has huge challenges with regard to the freedom of religion and religious institutions. Firstly, the Court has to define 'religion' in the context so that the practices qualify for constitutional protection. Secondly, the court has to deal with the appeals of managing religious institutions against state laws. Thirdly, the court has also had to define the limitations on the freedom and independence of religious denominations³². The Court has addressed these issues by striking down those religious practices which are in conflict with constitutional values. But this approach of the Supreme Court resulted into conservative approach which excluded few religious groups to be recognized as the official religion as can be seen in the *S.P. Mittal*³³ case where the teachings of the Sri Aurobindo was held to be only a philosophy and not a religion. The Supreme Court by acting as a religious authority in deciding the essential and non-essential practices of a religion violating the freedom of religion of an individual which is a fundamental right as guaranteed by the Constitution. The Apex Court should reject and remove ERP test or it should be used in consonance with the original method of determining the essentiality of a religious practice with due consideration of the beliefs of that particular community. Certainly, the ERP test is the result of judicial overreach in religious matters and flawed on the Constitution principles of individualistic religious freedom.

IV. THE WAY FORWARD

The framers of the Constitution of India have stressed upon the freedom of religion to practice

³¹ AIR 2016 SC 209.

³² Ronojoy Sen, *Legalizing Religion: The Indian Supreme Court and Secularism*, Policy Studies 30, 10 (2007).

³³ *Supra* note 28.

one's own beliefs based on his inward association with God. The Supreme Court has also admitted it that a person has fundamental right to practice and entertain such religious beliefs as may be approved by his judgment or conscience³⁴. Society is dynamic in nature and therefore social reforms are necessary to prevail justice in the society. The Judiciary is bestowed upon with the duty to protect rights of the individuals as well as to remove social evils within the underlying principles of the Constitution. The autonomy for religious freedom is given to the individuals under the Constitution. But the Supreme Court seem to have intervened in this autonomy through ERP test. Religion is personal and sacred to oneself but the judiciary has developed the ERP test which defeats very purpose of religious freedom in India. The Apex Court is acting as religious reformer by determining the essentiality of religious practices in India. Under article 25 of the Constitution there is individual religious freedom and under Article 26(b) it is a group right if the religious group recognizes the particular practice as essential. Also, Article 29 of the Constitution of India provides for its citizen to protect their distinct language, script or culture of its own which shows an individualistic approach.

The framers of the Constitution did not seem to give power to state to interfere in religious matters and the scope of social reforms can be found within the text of the Constitution. But the ERP test gives immense power to the courts to intervene in religious matters. Some scholars consider this power of court to that of clergy. To apply ERP test for religious practices cannot be objective as the concept of religion itself is subjective. To say a religious practice essential and other non-essential is itself flawed because various practices and elements together makes a religion and cannot be independent of each other. Lastly, religion is evolving, therefore, a practice to be essential or non-essential cannot be tested on the basis of its application to a community some centuries ago. The Supreme Court should in Sabarimala review petitions reconsider the ERP test and initiate social and religious reforms on the grounds of public order, health, morality and subject to other fundamental rights as right to freedom of religion is not absolute in India and subject to the above mentioned grounds.

³⁴ Gandhi v. State of Bombay 1954 SCR 1035.

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