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Phone : +91 73059 14348 – [info@iledu.in](mailto:info@iledu.in) / [Chairman@iledu.in](mailto:Chairman@iledu.in)



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## INQUIRY INTO THE ESSENTIAL RELIGIOUS PRACTICE DOCTRINE IN INDIAN CONSTITUTIONAL LAW

**AUTHOR** – NIRANJEN SUBBU M S, STUDENT AT SCHOOL OF LAW, CHRIST (DEEMED TO BE UNIVERSITY)

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### ABSTRACT

The Essential Religious Practice (ERP) doctrine has emerged as one of the most influential yet contested judicial principles governing religious freedom in Indian constitutional law. Developed by the Supreme Court, the doctrine attempts to distinguish between practices that are “essential” to a religion and those that are merely secular or non-essential, thereby determining the extent of constitutional protection under Articles 25 and 26 of the Constitution of India. The study critically examines the conceptual inconsistencies and methodological challenges embedded in the doctrine, particularly the role of courts in determining theological essentiality. It argues that the ERP test has gradually shifted from a jurisdictional boundary between religion and secular regulation to an instrument of judicial intervention in matters of faith. The research further identifies issues such as judicial overreach, inconsistency in application, and the “inversion of agency” that compels individuals to frame personal choices as religious obligations. In response to these shortcomings, the paper evaluates alternative approaches, including the anti-exclusion principle and a sincerity-based proportionality framework, advocating for a more rights-oriented method of adjudicating religious freedom claims within India’s constitutional framework.

**Keywords:** Essential Religious Practice Doctrine; Religious Freedom; Constitutional Morality; Judicial Review; Indian Constitutional Law

### I. Introduction

India is a civilization marked by its deep and lasting religious diversity. It was established as a secular republic with a constitutional promise of religious freedom. The creators of the Constitution understood the significance of faith in the lives of its people. They included this commitment in the Preamble, which guarantees all citizens the “liberty of... belief, faith and worship.”<sup>278</sup> This promise is solidified in Articles 25 through 28, which serve as the foundation of religious freedom in the country. Article 25 ensures that everyone has the freedom of conscience and the right to practice

and promote their religion.<sup>279</sup> Article 26 allows religious groups to manage their own affairs<sup>280</sup>.

However, India's secularism does not entirely separate state from religion, unlike some Western countries. It presents a unique and complex approach often described as “principled distance.” This model allows the state to get involved in religious matters under certain conditions defined by the Constitution. The rights protected by Articles 25 and 26 are subject to “public order, morality and health.”<sup>281</sup> Additionally, Article 25(2) gives the state the authority to regulate or limit any “economic, financial, political or other secular activity that

<sup>278</sup> INDIA CONST. pmb1.

<sup>279</sup> INDIA CONST. art. 25, cl. 1.

<sup>280</sup> INDIA CONST. art. 26.

<sup>281</sup> INDIA CONST. art. 25, cl. 1; INDIA CONST. art. 26.

may be linked to religious practice" and to ensure "social welfare and reform."<sup>282</sup> This constitutional framework creates a delicate balance between protecting religious freedom and the state's legitimate need for regulation and social reform.

To navigate this complex and often contentious area, the Supreme Court of India, in the early years of the republic, created a judicial tool that would become the key and most debated principle in this field of law: the Doctrine of Essential Religious Practices (ERP). First articulated in the landmark 1954 case of *The Commissioner, Hindu Religious Endowments, Madras v. Shri Lakshmindra Thirtha Swamiar of Shirur Mutt* (hereinafter *Shirur Mutt*), this doctrine claims that constitutional protection applies only to those practices that are "essential" or "integral" to a religion<sup>283</sup>. Practices deemed non-essential, even if linked to religion, are seen as secular and thus fall under the state's regulatory authority.

This doctrine emerged from a foundational paradox that has shaped its legal development for over seventy years. The *Shirur Mutt* judgment appeared to support a deferential approach, stating that "what constitutes the essential part of a religion is primarily to be ascertained with reference to the doctrines of that religion itself."<sup>284</sup> This indicates that the court's role is mainly to identify what the religious community considers core to its faith. However, by assuming the responsibility of making this determination, the court took on the power to decide on matters of theological significance. This created confusion between judicial deference and judicial oversight.

This fundamental contradiction was not a minor flaw but a significant vulnerability in the doctrine's framework. It opened a legal space that later courts would exploit, allowing them to shift from identifying essentials to actively defining and sometimes reforming them. This

change is clearly seen in later decisions like *The Durgah Committee, Ajmer v. Syed Hussain Ali*, where the court broadened its role to eliminate what it viewed as "superstitious beliefs and... unessential accretions to religion."<sup>285</sup> Therefore, the doctrine's troubled evolution is not just a tale of a clear principle later abandoned but rather one of a flawed foundation that enabled legal opportunism and a gradual yet significant increase in judicial power within the sacred domain.

## II. Scope and Limitation of Research

The purpose of this research is mainly a qualitative and doctrinal analysis of the Essential Religious Practice doctrine as interpreted and applied by the Supreme Court of India. The time frame covers the doctrine's beginning in the *Shirur Mutt* case of 1954 up to the latest important judgments, including the split verdict in the *Hijab* case. The focus is on closely examining judicial reasoning in a select number of landmark cases that mark key turning points or show the doctrine's most controversial applications. The research also references important secondary sources, such as scholarly articles and legal commentary, to place the doctrinal analysis within the wider academic discussion.

The study has some limitations. First, it is not an empirical or sociological study; it does not assess the real-world social or cultural effects of the court's rulings on the religious communities involved. The focus stays entirely on the legal principles and judicial logic. Second, while the paper may mention international law for comparative context, it does not perform a thorough comparative analysis of religious freedom rulings in other legal systems. Finally, the chosen case studies, though representative of the main issues, do not cover every case where the ERP doctrine has been cited. These limitations are intentional and aim to keep a deep and focused inquiry into the doctrine's conceptual framework and its application within Indian constitutional law.

<sup>282</sup> INDIA CONST. art. 25, cl. 2.

<sup>283</sup> *The Comm'r, Hindu Religious Endowments, Madras v. Shri Lakshmindra Thirtha Swamiar of Shirur Mutt*, 1954 S.C.R. 1005.

<sup>284</sup> *Id.* at 1025.

<sup>285</sup> *The Durgah Comm., Ajmer v. Syed Hussain Ali*, (1962) 1 S.C.R. 383, 411.

### III. Research Methodology

This study uses a qualitative, doctrinal, and comparative case-law approach. The analysis focuses on a close reading of primary legal sources, including the text of the Indian Constitution, specifically Articles 14, 15, 17, 19, 21, 25, and 26. It also reviews relevant laws such as the Waqf Act and the Kerala Hindu Places of Public Worship (Authorisation of Entry) Act, 1965, and examines the full judgments from the Supreme Court and various High Courts. These primary sources are supported by a broad range of secondary materials, such as scholarly articles in law journals, academic papers, consultation papers from the Law Commission of India, and analytical reports from legal experts. The main analytical method is a critical discourse analysis of judicial reasoning. This method aims to uncover the underlying assumptions, logical inconsistencies, and changing trends in legal principles that have influenced how the doctrine has been applied over time. A comparative framework contrasts the application of the doctrine in different factual and social contexts to highlight its inherent flexibility.

### IV. Literature Review

#### 1. Reports, Textbooks, Scholarly Commentaries, and Legal Encyclopedias

Foundational legal literature, including important textbooks on Indian constitutional law by jurists like H.M. Seervai and D.D. Basu, scholarly commentaries, and legal encyclopedias, serves as a foundation for understanding the Essential Religious Practice (ERP) doctrine<sup>286</sup>. These authoritative sources trace the doctrine's origins back to the 1954 Shirur Mutt case. They consistently present its initial purpose as a tool to differentiate between the sacred "matters of religion" under Article 26(b) and the state's valid regulatory power over secular activities related to religion<sup>287</sup>. Early

editions of these texts view the doctrine as a necessary judicial development to address the conflict between religious freedom and the state's social reform duties under Article 25(2).

However, modern commentaries and updated editions of these foundational textbooks reveal a notable "doctrinal drift." They critically examine the shift from the deferential approach of Shirur Mutt to the more active stance seen in cases like Durgah Committee. In these cases, the judiciary transitioned from simply identifying a practice as "religious" to deeply assessing its "essentiality" to a faith. This body of literature discusses a significant critique of the doctrine: that it allows a secular judiciary to function as a "super-theologian," a role it is not prepared for. Recent scholarly works have focused on the conflict between the ERP test and the developing principle of "Constitutional Morality," especially after the Sabarimala judgment<sup>288</sup>. These works suggest that the judiciary increasingly relies on constitutional values of equality and dignity to override denominational claims, regardless of a practice's essentiality. Overall, this literature outlines the doctrine's evolution from a defining principle to a heavily debated tool of constitutional interpretation and social change.

#### 2. Secondary Data – Articles

The most dynamic and important discussions about the Essential Religious Practice (ERP) doctrine appear in scholarly articles published in law journals and academic platforms. This literature goes beyond simple descriptions of doctrine. It provides deep critiques of the test's theoretical foundations and its real-world use. A main concern is the issue of judicial overreach and whether courts have the right qualifications. Scholars often argue that the ERP test wrongly puts judges in the position of religious authorities, forcing them to interpret complex theological texts and traditions. This task is well outside their expertise. It often imposes a rational, majoritarian view on diverse belief systems.

<sup>286</sup> See, e.g., H.M. SEERVAI, CONSTITUTIONAL LAW OF INDIA (4th ed. 2015); D.D. BASU, COMMENTARY ON THE CONSTITUTION OF INDIA (9th ed. 2017).

<sup>287</sup> *Shirur Mutt*, 1954 S.C.R. at 1025.

<sup>288</sup> *Indian Young Lawyers Ass'n v. State of Kerala*, (2019) 11 S.C.C. 1.

Another important critique, strongly expressed in many articles, is that the doctrine undermines India's rich diversity of beliefs. By trying to define a single "core" of a religion, the judiciary unintentionally simplifies complex faiths. This can marginalize minority groups, oral traditions, and changing practices that don't fit a narrow, text-based view of religion. Additionally, scholars have pointed out negative procedural effects, like the "inversion of agency" highlighted during the Hijab controversy<sup>289</sup>. In this case, a claim for individual choice and expression gets twisted into an argument about religious obligation. While some articles support the doctrine as an imperfect but needed tool for social change, most contemporary literature agrees that the ERP test is legally unstable and conceptually flawed. These articles are also the main source for suggesting more nuanced alternatives, such as the "sincerely held belief" test paired with a proportionality analysis. This shift moves the discussion toward a framework focused on rights.

### 3. Case Laws

The Essential Religious Practice (ERP) doctrine arises from judicial interpretation, making case law the main source for understanding its logic, development, and contradictions. The journey begins with the seven-judge bench in *The Commissioner, Hindu Religious Endowments, Madras v. Shri Lakshmindra Thirtha Swamiar of Shirur Mutt* (1954)<sup>290</sup>. This key judgment set the test for establishing a protective boundary around essential religious practices to shield them from state interference while allowing regulation of related secular activities. However, this initial respectful approach soon changed. The ruling in *The Durgah Committee, Ajmer v. Syed Hussain Ali* (1961) marked a critical shift, as the Court moved from being a gatekeeper to evaluating content, asserting the power to distinguish "essential" beliefs from "superstitious

additions.<sup>291</sup>"

This expanded power has led to a highly inconsistent and context-dependent body of precedent. In *Indian Young Lawyers Association v. State of Kerala* (2018), the Sabarimala case, the majority used the ERP doctrine and the principle of "Constitutional Morality" to overturn the exclusion of women, placing individual dignity above denominational claims<sup>292</sup>. In contrast, the divided verdict in *Aishat Shifa v. State of Karnataka* (2022) regarding the Hijab ban highlighted significant judicial disagreement. One judge applied the ERP test to deny protection, while the other ignored it completely, favoring individual choice and privacy<sup>293</sup>. The doctrine's practical application is clear in the Ayodhya dispute, where the precedent in *Dr. M. Ismail Faruqui v. Union of India* (1994)—which stated that a mosque is not essential to Islam—was used to weaken the Muslim claim, whereas the final ruling gave substantial weight to the beliefs of the Hindu community<sup>294</sup>. A review of these cases shows that the doctrine is not a stable legal principle but a flexible tool, with its application varying significantly based on the specific facts and the dominant judicial philosophy.

<sup>289</sup> Gautam Bhatia, *The Essential Religious Practices Test and the Inversion of Agency: Notes from the Hijab Hearing*, INDIAN CONST. L. & PHIL. (Feb. 9, 2022).

<sup>290</sup> The Comm'r, Hindu Religious Endowments, Madras v. Shri Lakshmindra Thirtha Swamiar of Shirur Mutt, 1954 S.C.R. 1005.

<sup>291</sup> *The Durgah Comm., Ajmer v. Syed Hussain Ali*, (1962) 1 S.C.R. 383.

<sup>292</sup> *Indian Young Lawyers Ass'n v. State of Kerala*, (2019) 11 S.C.C. 1.

<sup>293</sup> *Aishat Shifa v. State of Karnataka*, (2023) 2 S.C.C. 1.

<sup>294</sup> *Dr. M. Ismail Faruqui v. Union of India*, (1994) 6 S.C.C. 360; *M. Siddiq (D) through Lrs. v. Mahant Suresh Das & Ors.*, (2020) 1 S.C.C. 1.

Case Name & Year	Core Issue	Asserted Right(s)	Court's Finding on "Essentiality"	Key Rationale / Test Applied	Broader Implications
<b>Indian Young Lawyers Association v. State of Kerala (2018) (Sabarimala)</b>	Exclusion of women (aged 10-50) from Sabarimala Temple.	Art. 14, 15, 17, 21, 25(1) (individual) vs. Art. 26(b) (denominational).	<b>Not an essential religious practice.</b>	Constitutional Morality, Anti-Exclusion Principle, Lack of consistent historical practice, Violation of dignity and equality. <sup>25</sup>	Prioritizes individual dignity over denominational claims; potential shift away from pure ERP test.
<b>Aishat Shifa v. State of Karnataka (2022) (Hijab)</b>	Ban on wearing hijab in educational institutions with prescribed uniforms.	Art. 19(1)(a), 21, 25(1).	<b>Not an essential religious practice.</b> (Karnataka HC). SC delivered a split verdict.	Scriptural analysis of Quran, emphasis on uniformity in "qualified public spaces." <sup>10</sup>	Highlights the "inversion of agency" critique; showcases deep judicial division on the role of ERP vs. other rights.
<b>M. Siddiq v. Mahant Suresh Das (2019) (Ayodhya)</b>	Title dispute over the Babri Masjid / Ram Janmabhoomi site.	Rights of deity as juristic person, historical worship rights vs. rights of Waqf Board.	<b>Namaz in a mosque is not an ERP</b> (relying on <i>Faruqui</i> , 1994), but the site has <b>particular significance</b> for Hindus. <sup>39</sup>	Primarily treated as a title suit based on evidence of possession, but faith of one community was a key factor in moulding relief. <sup>42</sup>	Demonstrates selective use of the doctrine and its limitations in complex historical disputes.

#### 4. Primary Sources: Constitutions, Statutes, and Rules/Regulations

The legal framework for the Essential Religious Practice (ERP) doctrine is based on key sources, with the Constitution of India being the most important. The doctrine is a judicial response to the complicated and carefully balanced language found in the Constitution regarding religious freedom. Article 25(1) gives everyone the freedom of conscience and the right to

profess, practice, and spread their religion<sup>295</sup>. Article 26 allows religious groups to manage their own affairs in religious matters<sup>296</sup>. However, these rights are not absolute. They are subject to public order, morality, health, and other provisions of the Fundamental Rights chapter.

Importantly, Article 25(2) allows the state to create laws that regulate secular activities

<sup>295</sup> INDIA CONST. art. 25, cl. 1.

<sup>296</sup> INDIA CONST. art. 26.

related to religious practice and promote social welfare and reform<sup>297</sup>. This creates tension between the broad guarantees of religious freedom in Articles 25(1) and 26 and the state's extensive regulatory power in Article 25(2). This conflict is what leads to a judicial test like the ERP, which helps courts define the limits of these competing constitutional mandates. Additionally, conflicts can arise from how these articles interact with other fundamental rights, such as the right to equality (Article 14) and non-discrimination (Article 15)<sup>298</sup>.

Laws made by the legislature often trigger ERP litigation. For example, the Madras Hindu Religious and Charitable Endowments Act of 1951, challenged in the Shirur Mutt case, and the Kerala Hindu Places of Public Worship (Authorisation of Entry) Act of 1965, central to the Sabarimala case, are state actions that require courts to use the ERP test<sup>299</sup>. Likewise, lower-level rules, such as government orders about school uniforms, can lead to constitutional challenges that examine religious rights. Thus, while the primary sources do not contain the ERP doctrine directly, they create a complex constitutional framework of interconnected rights and limitations that made its development by the judiciary almost unavoidable.

### Scheme of Study

#### A first principles analysis of the judgement:

#### Case Study I: Sabarimala and the Ascendancy of Constitutional Morality

The 2018 Supreme Court ruling in *Indian Young Lawyers Association v. State of Kerala* marks a significant turning point in the interpretation of religious freedom<sup>300</sup>. The case dealt with an established custom at the Sabarimala temple in Kerala that barred women aged 10 to 50 from entering the shrine<sup>301</sup>. The petitioners argued

that this practice discriminated against women and violated their fundamental rights to equality (Article 14), non-discrimination (Article 15), abolition of untouchability (Article 17), and freedom of religion (Article 25)<sup>302</sup>. Defenders of the temple claimed protection under Article 26. They argued that Ayyappa devotees formed a distinct religious group and that excluding women was essential to the celibate nature of the deity, Lord Ayyappa<sup>303</sup>.

In a landmark 4:1 decision, the majority deemed the practice unconstitutional<sup>304</sup>. The court ruled that the devotees of Lord Ayyappa were not a separate religious group but part of the larger Hindu community. This finding limited the protections of Article 26<sup>305</sup>. The majority concluded that excluding women was not an essential religious practice. Chief Justice Dipak Misra stated that any practice that violates women's fundamental rights cannot be deemed essential<sup>306</sup>.

The most significant development in legal reasoning came from Justice D.Y. Chandrachud's concurring opinion. He clearly articulated the idea of "constitutional morality" as the main principle that should take precedence over public or religious morality<sup>307</sup>. He argued that any religious practice, whether essential or not, that conflicts with the constitutional values of dignity, liberty, and equality is unconstitutional. He also introduced the "principle of anti-exclusion," which suggests that while religious groups' autonomy should be respected, it cannot justify excluding individuals in ways that harm their dignity or access to basic goods<sup>308</sup>. This approach indicated a shift away from the court acting as a theologian defining "essentiality" and towards a framework that measures practices against fundamental constitutional values.

The sole dissenter, Justice Indu Malhotra,

<sup>297</sup> INDIA CONST. art. 25, cl. 2.

<sup>298</sup> INDIA CONST. art. 14; INDIA CONST. art. 15.

<sup>299</sup> Madras Hindu Religious and Charitable Endowments Act, 1951, Act No. 19 of 1951; Kerala Hindu Places of Public Worship (Authorisation of Entry) Act, 1965, Act No. 19 of 1965.

<sup>300</sup> *Indian Young Lawyers Ass'n v. State of Kerala*, (2019) 11 S.C.C. 1.

<sup>301</sup> *Id.* at ¶ 1.

<sup>302</sup> *Id.* at ¶ 5.

<sup>303</sup> *Id.* at ¶ 6.

<sup>304</sup> *Id.* at 1.

<sup>305</sup> *Id.* at ¶ 198 (Misra, C.J.).

<sup>306</sup> *Id.* at ¶ 155.1 (Misra, C.J.).

<sup>307</sup> *Id.* at ¶ 286 (Chandrachud, J., concurring).

<sup>308</sup> *Id.* at ¶ 309 (Chandrachud, J., concurring).

provided a strong defense of religious autonomy. She argued that courts should not interfere in matters of faith and that rationality should not be applied to judge religious practices<sup>309</sup>. She maintained that Ayyappa devotees were a religious group and that the practice was a vital part of their faith, protected under Article 26. Her dissent revealed the significant clash between individual rights and the collective rights of religious groups.

### Case Study II: The Hijab Controversy and the "Inversion of Agency"

The debate over the hijab ban in some schools in Karnataka has once again put the ERP doctrine in the spotlight. In 2022, the Karnataka High Court backed the ban, deciding that wearing the hijab is not a key religious practice in Islam<sup>310</sup>. The court analyzed the Quran and other Islamic texts, concluding that the hijab is merely "recommendatory" rather than mandatory, and therefore does not deserve protection under Article 25<sup>311</sup>.

This ruling faced strong criticism from scholars, highlighting one of the harmful effects of the ERP test: the "inversion of agency."<sup>312</sup> The petitioners argued their case not only as a religious obligation but also as a matter of personal choice, expression under Article 19(1)(a), and privacy under Article 21<sup>313</sup>. However, the ERP framework forced them to claim that wearing the hijab was not a choice but a religious requirement. This doctrine shifts a claim of personal agency into a claim about the lack of agency. It makes constitutional protection depend on proving religious obligation instead of personal belief. By concentrating solely on whether the hijab is essential, the High Court ignored broader constitutional issues surrounding expression, autonomy, and identity.

In the subsequent appeal to the Supreme Court,

the judges issued a split decision that highlighted the judicial challenge<sup>314</sup>. Justice Hemant Gupta supported the High Court's reasoning, stressing the need for discipline and uniformity in "qualified public spaces" and backing the ERP framework as the right approach<sup>315</sup>. In contrast, Justice Sudhanshu Dhulia ignored the ERP test entirely. He viewed the issue as one of choice, privacy, and dignity, arguing that it was irrelevant to question whether the hijab is essential<sup>316</sup>. For him, the critical issue was whether a student could be barred from education for choosing to wear a specific piece of clothing. His opinion marked a notable shift from established ERP law, proposing a focus on individual rights instead of theological matters.

### Case Study III: The Ayodhya Dispute and the Instrumentalization of Doctrine

The long-standing Ayodhya dispute, which led to the 2019 Supreme Court decision in *M. Siddiq v. Mahant Suresh Das*, shows how the ERP doctrine can be used and selectively applied in complicated historical and religious conflicts<sup>317</sup>. Although the final decision focused mainly on evidence of possession, the ERP doctrine influenced the case's history.

A key step before the final decision was the 1994 ruling in *Dr. M. Ismail Faruqui v. Union of India*<sup>318</sup>. In this case, the Supreme Court supported the central government's acquisition of the disputed land. The court controversially determined that praying in a mosque is not a necessary practice in Islam, unless that specific mosque has particular religious significance<sup>319</sup>. This ruling effectively lowered the constitutional status of the Babri Masjid as a place of worship, making it easier for the state to treat the land as property that could be acquired, which significantly changed the legal context of the dispute.

<sup>309</sup> *Id.* at ¶ 403 (Malhotra, J., dissenting).

<sup>310</sup> *Smt. Resham v. State of Karnataka*, 2022 SCC OnLine Kar 255, ¶ 121.

<sup>311</sup> *Id.* at ¶ 92.

<sup>312</sup> Gautam Bhatia, *The Essential Religious Practices Test and the Inversion of Agency: Notes from the Hijab Hearing*, INDIAN CONST. L. & PHIL. (Feb. 9, 2022).

<sup>313</sup> *Aishat Shifa v. State of Karnataka*, (2023) 2 S.C.C. 1, ¶ 7 (summarizing petitioners' arguments).

<sup>314</sup> *Id.*

<sup>315</sup> *Id.* at ¶ 140 (Gupta, J.).

<sup>316</sup> *Id.* at ¶ 72 (Dhulia, J.).

<sup>317</sup> *M. Siddiq (D) through Lrs. v. Mahant Suresh Das & Ors.*, (2020) 1 S.C.C. 1.

<sup>318</sup> *Dr. M. Ismail Faruqui v. Union of India*, (1994) 6 S.C.C. 360.

<sup>319</sup> *Id.* at ¶ 82.

In the 2019 judgment, the court did not need to directly address the ERP test regarding the mosque. It viewed the case as a property dispute and gave title to the Hindu deity, Ram Lalla, based on the likelihood that Hindus had maintained a continuous claim to the site<sup>320</sup>. However, the court's reasoning for its final decision—granting the entire disputed site for temple construction while designating an alternative plot for a mosque—was influenced by the beliefs of one community over another. The court recognized the important significance of the site for Hindus as the birthplace of Lord Ram.<sup>321</sup> This shows a selective and strategic use of religious doctrine: the ERP test was applied in Faruqui to weaken the Muslim claim to the site as a place of worship, while the site's significance to Hindu faith was later used to justify the final land allocation. This highlights how the doctrine can shift, serving not as a neutral guideline but as a mechanism to support majority sentiments.

A close look at these significant cases reveals a concerning trend in how the ERP doctrine is applied, suggesting it affects claims from minority and majority religious communities differently. The test seems to be enforced more rigorously when examining minority religious practices. For example, in *Shayara Bano*, the practice of instant triple talaq was deemed non-essential to Islam and unconstitutional. In *Ismail Faruqui*, the court decided that a mosque was not crucial for Islamic worship. In the *Hijab* case, the Karnataka High Court found the practice non-essential to Islam. In contrast, when addressing practices of majority or established non-Muslim communities, the judicial response has at times been more lenient. In the case regarding the Jain ritual of *Santhara/Sallekhana* (a ritual fast unto death), the Supreme Court blocked a High Court ruling that had banned it, allowing the practice to continue. In the final Ayodhya verdict, although not strictly an ERP finding, the beliefs of the Hindu community played a significant role in

shaping the final remedy. This trend, noted by legal scholars, raises serious concerns about the supposed neutrality of the doctrine and its effectiveness in maintaining India's secular principles. It suggests that, in practice, it may be more likely to intervene in minority religions.

### Genesis of the Substantive Test

The roots of the ERP test trace back to the 1954 decision made by a seven-judge bench in *Shirur Mutt*<sup>322</sup>. This case challenged the Madras Hindu Religious and Charitable Endowments Act, 1951. The Act gave the state significant control over the financial and administrative affairs of Hindu religious institutions<sup>323</sup>. The *Mathadhipati*, the head of the Mutt, argued that the Act violated the Mutt's fundamental rights under Articles 25 and 26 of the Constitution.

In its decision, the Supreme Court aimed to clarify the extent of state power. It made a key distinction between "matters of religion," which are protected under Article 26(b) and have complete autonomy, and the secular administration of property under Article 26(d), which can be regulated by law<sup>324</sup>. The court stated that "religion" under the Constitution is not limited to beliefs; it also includes all "rituals and practices integral to a religion."<sup>325</sup> The state could regulate secular activities tied to religion, but it could not interfere with core religious practices.

The court's initial stance was likely shaped by Dr. B.R. Ambedkar's speech in the Constituent Assembly. He suggested that the definition of religion should focus on "beliefs and rituals... which are essentially religious," allowing the state to regulate related secular matters<sup>326</sup>. At first, the court used this distinction to maintain jurisdictional boundaries. However, a significant change occurred in later cases. In rulings like *The Durgah Committee, Ajmer v. Syed Hussain Ali* (1961) and *Mohd. Hanif Quareshi v. State of*

<sup>322</sup> The Comm'r, Hindu Religious Endowments, Madras v. Shri Lakshmindra Thirtha Swamiar of Shirur Mutt, 1954 S.C.R. 1005.

<sup>323</sup> *Id.* at 1010.

<sup>324</sup> *Id.* at 1025.

<sup>325</sup> *Id.* at 1025.

<sup>326</sup> 7 CONST. ASSEMBLY DEBATES 831 (1948).

<sup>320</sup> *M. Siddiq*, (2020) 1 S.C.C. 1, ¶ 798.

<sup>321</sup> *Id.* at ¶ 799.

Bihar (the cow slaughter case), the judicial inquiry shifted<sup>327</sup>. It moved from asking if a practice was "essentially religious" to determining if it was "essential to a religion." This change transformed the court from a simple gatekeeper, separating religious from secular matters, into a content evaluator, deciding the importance of a practice within a faith.

This development has faced criticism for creating a method of "constitutional evasion." The Indian Constitution shows a clear conflict between Article 25(1), which limits an individual's right to religion in favor of other fundamental rights, and Article 26, which grants group religious rights without this explicit limitation. Resolving a conflict between a denomination's right under Article 26 and an individual's equality right under Article 14 would require the court to establish a clear hierarchy of rights or a complex balancing system. This task poses both legal difficulties and political sensitivity. The ERP doctrine offers a way around this. By declaring a practice "non-essential," the court effectively removes its constitutional protection under Article 25 or 26. Once a practice is not a fundamental right, conflicts with other rights like equality or dignity become irrelevant. The court can then invalidate the practice without deciding if Article 14 takes precedence over Article 26. This approach was crucial in the Sabarimala judgment, where the conclusion that the exclusion of women was not an essential practice was central to the reasoning. It allowed the court to achieve a reformative outcome while avoiding a direct clash between the articles<sup>328</sup>.

Some of the criticisms faced are as follows:

### **Judicial Overreach and Lack of Competence**

The main criticism is that the doctrine represents a kind of judicial overreach. It gives secular judges, who do not have training or expertise in theology, the power to act like

"ecclesiastical authorities" or "high priests." This argument raises doubts about whether the judiciary has the capacity or legitimacy to explore complex issues of religious doctrine and practice. By deciding what is truly essential to a faith, the court risks going beyond its competence. It might misinterpret scriptures and traditions while imposing its own rational or majority view on various belief systems.

### **Undermining Normative Pluralism**

A second major critique, strongly expressed in academic literature, is that the ERP doctrine undermines India's valued legal and religious pluralism. By defining a "core" of religion that fits the uniform standards of state law, the doctrine forces various and rich religious traditions into a single, court-defined framework. This method overlooks the unique cultural differences among different religious groups and can push minority sects or traditions to the edges, especially those whose practices do not match the court's view of a "mainstream" version of the religion. It weakens the ability of religious communities to shape their own beliefs and practices.

### **Reification of Religion**

Finally, scholars argue that the doctrine makes religion seem unchanging, uniform, and mostly based on texts. This judicial view often overlooks the changing and developing nature of religious traditions, along with the important internal diversity, like the different schools of Fiqh in Islam. It also ignores the crucial role of oral traditions, which may not be written down in "sacred texts." The tests that courts sometimes use, like the "recency test" (which questions practices not present since the religion began) or the "but for" test (which states a practice is important only if the religion would be fundamentally different without it), are seen as major examples of this flawed and historical approach.

### **Defenses and Justifications: A Tool for Social Reform**

Despite the heavy criticism, the ERP doctrine is

<sup>327</sup> The Durgah Comm., Ajmer v. Syed Hussain Ali, (1962) 1 S.C.R. 383; Mohd. Hanif Quareshi v. State of Bihar, A.I.R. 1958 S.C. 731.

<sup>328</sup> See Indian Young Lawyers Ass'n v. State of Kerala, (2019) 11 S.C.C. 1, ¶ 198 (Misra, C.J.).

defended as a necessary, though imperfect, judicial tool for social reform and for upholding the essential principle of "Constitutional Morality." Proponents argue that in a society where religious practices can sometimes clash with fundamental rights, the judiciary needs a way to step in and ensure that religious freedom does not become a tool for discrimination, inequality, or social problems.

From this viewpoint, the doctrine has played a key role in advancing social justice. It has been used to eliminate practices like untouchability and caste-based exclusion from temples. It has invalidated the practice of instant triple talaq (talaq-e-biddat) for violating gender justice. It has also challenged certain forms of excommunication that harm individual dignity. In these cases, the ERP test has acted as a way for the court to ensure that the "morality" mentioned in Article 25 is not public or religious morality. Instead, it refers to the transformative morality established in the Constitution, which prioritizes equality, liberty, and fraternity. The doctrine thus serves to balance the scales; it respects religious autonomy, but it cannot be used to deny citizens their fundamental constitutional rights.

### **The Unsustainability of the Current Doctrine**

The previous analysis shows that the Essential Religious Practice doctrine, as it stands now, is not a solid foundation for a healthy constitutional democracy. Its unclear nature has allowed it to shift from a jurisdictional tool to a measure of theology, which the courts are neither equipped to handle nor required to do. The way this doctrine has been applied has been uneven and unpredictable, resulting in case law that often contradicts itself. It has faced criticism for promoting judicial overreach, weakening religious diversity by enforcing a uniform, text-focused view of faith, and causing the strange outcome of "inverting agency" by forcing individual choice into a strict set of religious rules. The growing conflict between the ERP test and the concept of Constitutional Morality highlights its shortcomings even more.

A legal principle filled with confusion and prone to inconsistent application cannot provide a solid foundation for protecting a right as essential as religious freedom.

### **Evaluating the Alternatives**

The clear problems with the ERP doctrine have prompted scholars and judges to suggest alternative ways to handle religious freedom claims. It's important to assess these alternatives critically to find a way forward.

- **The Anti-Exclusion Principle:** Proposed by Justice Chandrachud in the Sabarimala case, this principle shifts the focus from the theological importance of a practice to its social impact. It respects the right of religious groups to define their practices, but it requires that this freedom must give way when a practice leads to exclusion that undermines a person's dignity or limits their access to basic needs. The strength of this principle lies in its emphasis on the key constitutional values of dignity and equality. However, it mainly applies to cases of conflict and exclusion within groups. It might not serve as a complete framework for all religious freedom claims, particularly those concerning state regulation of practices that are not inherently exclusionary but may clash with public order or other state interests.

- **The Sincerely Held Belief & Proportionality Test:** This approach is more in line with international human rights laws, suggesting a two-step analysis. First, the court needs to determine if a belief is "sincerely held" by the claimant as a matter of religious conviction, without examining whether it is "essential" to the religion as a whole. This respects individual conscience and choice. Once a sincere belief is established, the burden shifts to the state to justify any interference with the practice. The state's justification is then examined under a strict proportionality test: the state must show that its restrictive action serves a legitimate goal, has a logical connection to that goal, is necessary (meaning no less intrusive options exist), and balances public benefit against the impact on the individual's rights. This framework would

replace theological inquiry with a clear, structured, and rights-focused legal analysis.

- **The Role of Anthropological Expertise:** Some scholars suggest reducing the court's "outsider" status by bringing in anthropological expertise for socio-cultural fact-finding. Cultural experts could give the court a deeper and more context-aware understanding of religious practices. This would go beyond just textual analysis, acknowledging the importance of oral traditions, cultural differences, and the evolving nature of faith. While this would not take the place of legal tests, it could be a useful addition. It would help ensure that judicial decisions are based on a more precise and thorough understanding of the religious issues involved, thus avoiding cultural biases and stereotypes.

### **Recommendations for a Principled Judicial Approach**

Based on the examination of the ERP doctrine's failures and the promise of other frameworks, this report suggests a major shift in how the judiciary approaches religious freedom. Legislative codification of key practices is not practical because it would freeze religious traditions, be incomplete, and likely worsen conflicts between communities. The way forward must come from the judiciary itself.

The report recommends that the Supreme Court gradually move away from the Essential Religious Practice test in its current form. It should be replaced by a new, multi-faceted framework that is more consistent, clear, and in line with constitutional principles. This framework should prioritize:

1. **A Presumption of Protection based on Sincerity:** The initial inquiry should focus on whether a claimant's belief is sincerely held as a matter of religious conscience. The court should stop trying to define a practice's "essentiality" to the religion. Any practice based on a sincerely held belief should be presumed to fall under the protective scope of Articles 25 and 26.

2. **Direct Application of Constitutional Limitations:** Once a practice gains presumptive

protection, it must be evaluated directly against the clear limitations set out in the Constitution: public order, morality, health, and other provisions of Part III (Fundamental Rights). This avoids the "constitutional evasion" created by the ERP test and encourages a direct and honest assessment of conflicting rights.

3. **Adoption of a Strict Proportionality Standard:** When the state wants to restrict a protected religious practice for reasons like public order, morality, health, or any other fundamental right, it must go through a thorough proportionality analysis. The state has to prove that its action is legitimate, necessary, and proportionate to its intended goal.

4. **Embracing the Anti-Exclusion Principle for Intra-Group Disputes:** In conflicts within a religious group, such as the Sabarimala dispute, the anti-exclusion principle should be used as an important interpretive tool. This will ensure that the collective rights of a religious group under Article 26 do not justify violating the fundamental rights to equality and dignity of its own members.

### **IX. Findings of the Inquiry**

This inquiry yields several important findings that highlight the ERP doctrine's legal instability and its troubling role in modern Indian law.

#### **Finding 1: Foundational Instability and Doctrinal Drift**

- The main finding is that the ERP doctrine relies on a shaky foundation of unclear concepts. Its origin in Shirur Mutt as a boundary marker for jurisdiction hid a deeper issue. By taking on this role, the judiciary stepped into the position of a judge for religious matters. This basic flaw led to a noticeable "doctrinal drift." The focus shifted from questioning if a practice was "religious in character" to whether it was "essential to the religion." This change from gatekeeper to evaluator of theology stemmed from the doctrine's initial ambiguity. It resulted in a body of case law that lacks predictability and coherence.

## **Finding 2: Inconsistency and Selective Application**

Another key finding is the significant inconsistency and selective use of the ERP doctrine. This undermines its claim to be impartial. In Sabarimala, the Court took a broad, reformist approach guided by Constitutional Morality. However, in the Hijab case, the High Court favored a narrow, textual approach while the Supreme Court had differing opinions regarding the proper framework. In the Ayodhya dispute, the doctrine was held to strict standards in the Faruqui case to reduce a mosque's constitutional status, while a more lenient standard of "faith" and "particular significance" was used for the majority community's claim in the final ruling. This pattern shows that the doctrine's application is not consistently neutral and may be swayed by the social power of the involved communities.

## **Finding 3: The "Inversion of Agency" and its Detrimental Impact**

This research points out a harmful effect of the doctrine known as the "inversion of agency," which undermines individual freedom. The doctrine compels individuals to defend their actions as a matter of religious obligation rather than personal choice. To get protection under Article 25, a claimant must show they are bound by a strict religious command, not merely exercising their conscience. This simplifies complex constitutional claims of expression, privacy, and identity into a limited theological argument, making constitutional protection depend on the lack of personal agency. This contradicts the essence of fundamental rights, which aim to safeguard an individual's independence.

## **Conclusion**

The ongoing tension between religious freedom and other constitutional values is not a flaw in India's constitution; it is a key part of its ambitious democratic project. The challenge is not to remove this tension but to manage it with a legal approach that is principled, predictable,

and fair. The Essential Religious Practice doctrine, despite its initial promise, has turned out to be an inadequate and often counterproductive tool for this purpose. The future of Indian secularism depends not on the judiciary acting as a "super-theologian." Instead, it should create a clear and consistent legal framework that encourages real dialogue among faith, law, and justice. By moving from theological judgments to a rights-based proportionality analysis, the courts can better protect the Constitution, making sure that constitutional morality does not lead to cultural alienation and that faith does not become a means of exclusion.