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# TO PRACTICE WHAT IS PREACHED: CONSTITUTIONAL PROTECTION OF RELIGIOUS PRACTICES VIS-À-VIS REFORMATIVE SECULARISM

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**ABSTRACT**

*In light of India's commitment to reformative secularism, both implicitly and explicitly, the essential religious practices test evolved by the Supreme Court, is problematic. It allows the State unfettered control over any kind of practice that courts consider to not be 'essential'. In application, 'essentiality' of a practice to a religion is decided inconsistently, and total State control over 'non-essential' practices is allowed. This article suggests an alternative, juxtaposing a two-stage deferential test that ensures a wider constitutional protection to religion while allowing for social reform as envisioned in Indian secular philosophy, compared to the current essential religious practices test. The alternative combines an inclusive constitutional protection with a substantive second-stage enquiry on the State restriction, along the lines of ones used to test infringement of other fundamental rights. Adopting this alternative alleviates many of the legal and practical difficulties in the current religious freedom regime. By analysing the essential religious practice test*

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*through the lens of secularism, and suggesting an alternative which is not only grounded in an international context, but also tailored to suit the peculiarities of Indian society, the authors have attempted to delineate the issues which arise from the ambiguity of the essential religious practices test.*

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## I. INTRODUCTION

Religious freedom in India has always been a controversial matter, despite the introduction of 'secularism'. Secularism was read into the Constitution of India [*hereinafter* referred to as "**Constitution**"] long before its insertion into the Preamble by the Constitution (Forty Second Amendment) Act, 1976.[1] The principles of secularism had already been envisaged through Articles 25 and 26 of the Constitution.[2] Article 25 protects an individual's freedom of religion and conscience, subject to public order, morality, health, and other people's fundamental rights. Article 26 extends this by protecting the rights of religious denominations to manage their own affairs, subject to public order, morality, and health. By guaranteeing individuals' freedom of conscience and religion,[3] and protecting the rights of religious denominations,[4] the Constitution showed a secular philosophy from its very inception. General attitudes indicated that the Constitution was no less committed to secularism and the explicit addition of the word 'secularism' by way of the Constitution (Forty Second Amendment) Act, 1976, did not make it more secular.[5] Nevertheless, explicit addition of 'secularism' into the Constitution was further

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[1] INDIA CONST., preamble, *amended by* The Constitution (Forty-Second Amendment) Act, 1976.
[2] *Id.* art. 25, 26.
[3] *Id.* art. 25.
[4] *Id.* art. 26.
[5] S.P. SATHE, SECULARISM: LAW AND THE CONSTITUTION OF INDIA WITH SPECIAL REFERENCE TO JUDICIAL ACTIVISM (1999) *reprinted in* SELECTED WORKS OF S.P. SATHE VOLUME 3: SOCIAL JUSTICE AND LEGAL TRANSFORMATION 117, 126 (Sathya Narayan ed., 2014).

strengthened by its inclusion as part of the Constitution's 'basic structure', inhibiting the State's power to act contrary to its spirit.[6]

The theory of secularism in India is rather unique. Although the practice and propagation of religion were initially sought to remain beyond the pale of the State, in a postcolonial, post-Independence India, secularism was not a concept to be copy-pasted from the annals of its Western tradition. Indian secularism differed because it had to account for the peculiar socio-religious culture of its people, as well as the intricacies of the diverse religions India sustained. In essence, Indian secularism was to comprise three aspects:

(i) As a non-discriminatory state, religion was to play no role in the relationship between the State and the individual. As such, the State was not to determine the rights of individuals on the basis of their religion;

(ii) The non-interventionist nature of the State was intended to allocate equal religious freedom to all by ensuring that the State played no role between an individual and his/her religion;

(iii) State intervention was to redefine the scope of religion, whereas non-intervention on behalf of the State was to make religious organisation free from State intervention.[7]

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[6] S. R. Bommai v. Union of India, (1994) 3 SCC 1 (India), ¶¶ 77-79.

[7] S.P. SATHE, SECULARISM, LAW AND THE CONSTITUTION OF INDIA (1991), *reprinted in* SELECTED WORKS OF S.P. SATHE VOLUME 3: SOCIAL JUSTICE AND LEGAL TRANSFORMATION 35, 39-40 (Sathya Narayan ed., 2014) (*hereinafter* "**SATHE, 1991**").

State intervention was deemed necessary because religions covered within their fold the entire social behaviour of the Indian people, as a result of which secularism could only exist when some line was drawn between what was religious and what was temporal.[8] Such intervention was not merely negative in nature. For instance, Article 290A of the Constitution envisaged positive State intervention for the protection of religion by providing for a sum to be paid out of the Consolidated Funds of the States of Kerala and Tamil Nadu towards the maintenance of Hindu temples and shrines in their respective states, as transferred from the princely state of Travancore-Cochin.[9]

Contemporaneously, the Supreme Court of India developed another crucial doctrine which determined the relationship between religion and the Constitution, and if a practice is essential to a particular religion, it cannot be regulated or restricted by the State. This proposition formed the root of what later evolved into the 'essential religious practice test'. This left two approaches open to the courts – the *first* was where the religion itself determined what was or was not essential practice as per their religious texts and manuscripts. The *second* was for the courts to play social reformer and distinguish the religious aspects of life in India from the temporal. The Supreme Court formulated the essential religious practices test in the case of *The Commissioner, Hindu Religious Endowments, Madras v. Sri Lakshmindra Thirtha Swamiar of Sri Shirur Mutt* [*hereinafter* referred to as

[8] *Id.* ¶ 38.
[9] INDIA CONST., art. 290A.

"***Shirur Mutt***"],[10] noting that freedom of religion in the Constitution was not confined to religious beliefs only, rather it is extended to religious practices and subjected to the restrictions laid down in the Constitution.[11]

The Supreme Court has not definitively adopted one of the two approaches, often fluctuating between the two. Several cases give the religion the responsibility of determining essentiality, while others vest that responsibility with the courts themselves. The issue that arises with the former approach is the possibility of religions unreasonably labelling every activity as 'essential', leaving little scope for any State-sanctioned reform. This furthers divisive politics organised around religious lines, as fragmented groups promote political action backed by religious agendas. With the second approach, there exists the concern that courts might not be equipped to adjudicate social reform in religious contexts as matters of religion in India often veer towards policy-related concerns. This has led to significant confusion with the essential religious practices test being applied differently in different situations. In the context of reformative secularism and its importance in the Constitution, it is prudent to analyse the origins of the test through the lens of secularism.

The objective of this paper is to propose an alternative to the essential religious practices test which juxtaposes wider constitutional protection to religion with the reformative secularism envisioned in the

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[10] The Commissioner, Hindu Religious Endowments, Madras v. Sri Lakshmindra Thirtha Swamiar of Shri Shirur Mutt, (1954) SCR 1005 (India), ¶ 20.
[11] *Id.*

Constitution. The essential religious practices test came up in 1954[12] and has continued to evolve over the decades. Despite its ambiguity, the test relies on a court-made determination of essentiality. The authors submit that the test is problematic for several reasons, such as, it is judge-centric, it denies individuals/groups self-determination, and it assigns the courts the rather thankless duty of defining what does or does not form an essential religious practice. As a result, an alternative to the test becomes necessary. By adopting a deferential approach, over a definitional one, the horizons of religious freedom are considerably widened. This is fundamental to the reformative nature of secularism in India. Further, when combined with the legitimate state interest test and the proportionality test, the alternative to the essential religious practices test is found to be already inhered in the Constitution.

In this paper, Part II analyses the considerable jurisprudence in India which makes up the essential religious practices test and highlights inconsistencies across cases. Part III begins with critiquing the concept of 'essential' religious practices and goes on to provide an alternative to the essential religious practices test keeping in mind the peculiarities of the Indian secularism. Part IV concludes by highlighting the necessity of introducing an alternative to the essential religious practices in India.

[12] *Id.*

## II. ESSENTIAL RELIGIOUS PRACTICES IN INDIA

Articles 25 and 26 of the Constitution, in outlining the freedom of religion, inherently embody the concept of secularism. However, they lay out an ambiguous framework for the exercise of religious freedom. For instance, they do not indicate the extent of judicial powers in determining social welfare or reform, or the extent to which legislations may override religious freedoms. Similarly, there is little to suggest what happens in cases where a sect is not 'Hindu' and is therefore not subject to the social reform exception under Article 25(2)(b), or where a particular temple claims not to have 'public character'.[13] Indian jurisprudence on religious freedom finds itself largely in one of two camps: *first*, cases which involve State intervention in the management of temples, dargahs, gurudwaras and mutts, and *second*, cases which involve practices or relationships between the members of religious communities.[14] Creating a distinction between the religious and the secular was the approach of the courts in the first set, while the essential religious practices test was evolved for the second.[15] Yet the essential religious practices test has been significantly complicated over the years with bits and pieces of the test coming together much after the test was first crystallised in 1954.

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[13] Gautam Bhatia, *Individual, Community, and State: Mapping the terrain of religious freedom under the Indian Constitution*, IND. CONST. L. & PHIL. (Feb. 7, 2016), https://indconlawphil.wordpress.com/2016/02/07/individual-community-and-state-mapping-the-terrain-of-religious-freedom-under-the-indian-constitution/.

[14] *Id.*

[15] *Id.*

## A. THE ESSENTIAL RELIGIOUS PRACTICES TEST: THE ORIGINAL VERSION

The Supreme Court first crystallised the essential religious practices test in *Shirur Mutt,* while considering a challenge to the Madras Hindu Religious and Charitable Endowments Act, 1951, which empowered a statutory commissioner to frame and settle a scheme if they had a reason to believe that the religious institution was mismanaging funds. The Petitioner, a superior of the mutt, argued that this interfered with his right to manage the affairs of his monastery under Article 26(b). Justice Mukherjea in that regard questioned what exactly matters of religion entailed.[16] The Supreme Court noted that the guarantee under the Constitution protects not only freedom of religious opinion, but also all such acts done in pursuance of such religion, as was indicated in Article 25.[17] The Court upheld that the freedom of religion guaranteed by the Constitution applies to freedom of both religious belief and practice, and while distinguishing between the religious and the secular, the Court has to look to the religion itself for the analysis of what constituted 'essential' aspects of religion.[18]

## B. THE COURT DETERMINES ESSENTIALITY…OR DOES IT?

The next application of the essential religious practices test explores the aspect of essentiality. This meant that the Supreme Court could determine what constitute 'essential' religious practices, rather than leaving

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[16] The Commissioner, Hindu Religious Endowments, Madras v. Shri Lakshmindar Thirtha Swamiyar of Shri Shirur Mutt, (1954) SCR 1005 (India).
[17] *Id.*
[18] *Id.*

this to the religion in question, as was originally envisioned in *Shirur Mutt*. In *Sri Venkataramana Devaru v. State of Mysore*,[19] the Supreme Court itself determined whether the practice of religious exclusion of Dalits from a denominational temple founded for the Gowda Saraswath Brahmins was essential instead of permitting the religious denomination to do so. Effectively, the Court established that although it would take into account the views of a religious community in determining essentiality, such views would not be determinative. This established a precedent which was followed for decades.

The predicament with the Supreme Court deciding what is 'religious' or 'essential' is that it impinges upon the subjectivity and self-determination of a religious community. The Court must only determine whether a religious practice or belief can be restrained under the Constitution.[20] In *Durgah Committee, Ajmer v. Syed Hussain Ali*,[21] while hearing a challenge to the Durgah Khawaja Saheb Act, 1955, which barred the *Khadims* of the *Soofi Chishtia* religious order from managing the *Durgah*, the Court observed that when religious practices arose from superstitious beliefs, they did not merit the protection of Article 26, as they were not essential and integral to the religion itself.[22] This shifted the focus of the Supreme Court from analysing religious scriptures to scrutinizing the practice to see if it was based on some superstition. This has been observed

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[19] Sri Venkataramana Devaru v. State of Mysore, (1958) SCR 895 (India), ¶¶ 17-19.
[20] Jaclyn L. Neo, *Definitional imbroglios: A critique of the definition of religion and essential practice tests in religious freedom adjudication,*16 INT'L. J. CONST. L.574, 576 (2018) (*hereinafter* "**Neo**").
[21] Durgah Committee, Ajmer v. Syed Hussain Ali, (1962) 1 SCR 383 (India), ¶ 33.
[22] *Id.*

to be antonymous to *Shrirur Mutt,* and substitutes the view of the Court for that of the denomination on a matter of religion.[23] After all, 'superstition' to one section may well be a matter of fundamental religious belief to another.[24]

The Supreme Court categorically opined in *Tilkayat Shri Govindlalji Maharaj v. State of Rajasthan & Ors.*[25] that the question of essentiality would have to be determined by the Court itself. This effectively did away with a religion's ability to determine essentiality. The Court justified this by reasoning that if conflicting evidences were produced for competing practices by rival contentions between different sections of the same religious community, the Court would not be able to resolve the dispute by blindly applying the formula of communities determining their own integral practices.[26] However, given that the rights under Article 25 & 26 are themselves subject to Part III of the Constitution,[27] even if a community was allowed to define its own practices, any competing interests between it and another sect or individual could be balanced against each other, following the principles laid down in the text of the Constitution itself.[28]

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[23] H.M. SEERVAI, CONSTITUTIONAL LAW OF INDIA 1269 (Universal Law Publishing, 4th ed., 1993) (*hereinafter* "**Seervai**").
[24] *Id.*
[25] Tilkayat Shri Govindlalji Maharaj v. State of Rajasthan and Ors., AIR 1963 SC 1638 (India), ¶ 57.
[26] *Id.*
[27] *See id* ¶ 55; INDIA CONST., art. 25, 26.
[28] SEERVAI, *supra* note 23.

In *Indian Young Lawyers Association & Ors. v. The State of Kerala & Ors.* [*hereinafter* referred to as "***Sabarimala***"][29] the essential religious practices test was used to determine if barring the entry of women into the Sabarimala temple dedicated to *Lord Ayappa* was integral to the practice of the religion. The Supreme Court suggested that the essential religious practices test instilled certain limitations in order to balance competing rights and interests.[30] Further, in her dissent, Justice Malhotra returned to the initial exposition of the essential religious practices doctrine in *Shirur Mutt*, finding that the determination of essentiality of the religious practice of excluding women must be left to the religious community itself.[31] The Court has kept review petitions on the matter pending until a larger constitutional bench determines the exact scope of rights under Articles 25 and 26 and how they exist within the essential religious practices doctrine.[32]

### C. OPTIONALITY: AN ADDITION TO THE ESSENTIAL RELIGIOUS PRACTICES TEST

The Supreme Court included optionality as a relevant factor in *Hanif Quareshi v. State of Bihar*,[33] while deciding whether laws banning cow slaughter infringed upon the religious freedoms of certain Muslim devotees to offer sacrifice of a cow during the festival of *Bakr-Id*. The Court observed that since the scriptures called for either the sacrifice of a goat for one

[29] Indian Young Lawyers Association v. State of Kerala, (2019) 11 SCC 1 (India), ¶ 7, *per* Dipak Misra, CJI.
[30] *Id.* ¶ 49, *per* D.Y. Chandrachud, J.
[31] *Id.* ¶ 10.13, *per* Indu Malhotra, J.
[32] Kantaru Rajeevaru v. Indian Young Lawyers Association and Ors., (2020) 3 SCC 52 (India).
[33] Hanif Quareshi v. State of Bihar, (1959) 1 SCR 629 (India), ¶¶ 11, 13.

person, or a camel or cow for seven persons, it was not obligatory for a Muslim to sacrifice a cow alone.[34] As a result, the claim for essentiality of the religious practice was denied as the Court denied the obligatory nature of the practice itself.[35] Similarly, in *Dr. M. Ismail Faruqui v. Union of India* [*hereinafter* referred to as "***Faruqui***"],[36] the Supreme Court held that a mosque was not an essential aspect of religious aspect in Islam, as the *namaz* or prayer could be offered from anywhere, and not necessarily from a mosque. The Court held that while prayer in itself was an essential religious practice, its offering at every location could not be considered essential unless the place in itself held special significance for that religion.[37] This view of optionality, however, is unsustainable in a religiously pluralistic society like India. A large number of religious practices across faiths would be precluded from constitutional protection if this formula were to be universally applied. In fact, where the reasoning of the Court were to be turned on its head, a Hindu's right to visit a temple during *Diwali*, or the reverence towards the cow, is also optional, and thus is not subject to constitutional protection.[38]

### D. DEFINITIONAL COMPLEXITIES IN THE ESSENTIAL RELIGIOUS PRACTICES TEST

Despite the broadening of the essential religious practices test, definitional complexities in its application soon crept in. In *Sardar Syedna*

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[34] *Id.* ¶ 13.
[35] *Id.*
[36] Dr. M. Ismail Faruqui v. Union of India, (1994) 6 SCC 360 (India), ¶ 418.
[37] *Id.*
[38] A. CHANDRACHUD, REPUBLIC OF RELIGION: THE RISE AND FALL OF COLONIAL SECULARISM 21 (Penguin Viking, 2020) (*hereinafter* "**CHANDRACHUD**").

*Taher Saifuddin Saheb v. The State of Bombay,*[39] the Supreme Court, while considering if the practice of excommunication could be prohibited by legislation, held that barring excommunication on religious grounds could not be considered to promote social welfare and reform, and legislation for the same did not fall under Article 25(2)(b) as it could not be a measure of social welfare and reform. Quite paradoxically, the Supreme Court found that just as Article 25(2) did not encompass essential religious practices, the saving provision of Article 25(2)(b) was not intended to cover the basic essentials of the creed of a religion protected by Article 25(1).[40]

This rendered the social reform exception in the first part of Article 25(2)(b) completely redundant. If only essential religious practices were constitutionally protected, then all other non-essential practices could be freely restricted by the State, regardless of their nature or the reformist intention of the State. With this ruling, the alternative became just as extreme. Once a practice was determined an essential one to a religion, the State would no longer be empowered to socially reform it. The classifications of Article 25(2) would serve no purpose, and it could not possibly have been the intention of the Drafting Committee to include a purposeless clause in the Constitution. This sort of variance in the interpretation of Article 25 creates difficulty in understanding not only

[39] Sardar Syedna Taher Saifuddin Saheb v. The State of Bombay, AIR 1962 SC 853 (India), ¶¶ 60-61.
[40] *Id.* ¶ 61.

when a religious practice has constitutional protection, but also when the State can restrict religious practices.

## E. RECENCY: A DISPUTED ADDITION TO THE ESSENTIAL RELIGIOUS PRACTICES TEST

The lack of a clear, holistic definition of an essential religious practice and what it might possibly encompass, has led to a fluctuating standard in determining essentiality of a religious practice. Until 1984, the Supreme Court had not considered recency of a religious practice to be a criterion for essentiality. However, in *Acharya Jagdishwaranand Avadhuta and Ors. v. Comm. Of Police Calcutta and Ors.* [*hereinafter* referred to as "***Avadhuta***"],[41] while holding that the *Tandava* dance could not be considered an essential religious practice for the *Ananda Margis,* the Court reasoned that it was only introduced as a religious rite in 1966, whereas the *Ananda Margis* order itself was established in 1955. Thus, the Court introduced the recency of a religious practice as an aspect of the essential religious practices test. When the case came before the Supreme Court again, Justice Lakshmanan dissented with the inclusion of recency in the fold of the essential religious practices test, by declaring that if such practices have been accepted by the followers of a religion as a method of achieving their spiritual upliftment, the mere fact that the practice was recently introduced, could not make it any less a matter of religion.[42]

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[41] Acharya Jagdishwaranand Avadhuta and Ors. v. Comm of Police Calcutta and Ors., (1983) 4 SCC 522 (India), ¶ 533.

[42] The Commr. of Police and Ors. v. Acharya Jagdishwaranand Avadutha and Anr., (2004) 12 SCC 770 (India), ¶ 793.

The opacity of the essential religious practices test has led to contradictory strains of legal thought within Indian jurisprudence. In *Shayara Bano v. Union of India,* [*hereinafter* referred to as "***Shayara Bano***"],[43] the Supreme Court, by a narrow 3:2 split, found the practice of *triple talaq* to be legally invalid. Justice Kurien Joseph, in his majority opinion, has noted that the freedom of religion in India is absolute in nature, except to the extent it was restricted by Article 25. However, he did not find *triple talaq* to be a practice integral to the religion, stating that, "*merely because a practice has continued for long, that by itself cannot make it valid if it has been expressly declared to be impermissible*".[44] This runs somewhat counter to the rationale of the Court in *Avadhutha*, wherein a religious practice was denied protection under Article 25 because it was too recent.[45] In *Shayara Bano*, the time period for which a practice ran added no weight to the final determination of its essentiality.

Adopting the same test as in *Avadhuta*, Justice Nariman found that the fundamental nature of the Islamic religion did not change through the singular practice of *triple talaq*.[46] He referred to the degrees of obedience attributed to human action in the Islamic faith to determine that the practice of *triple talaq* fell at best into the third degree of *jaiz* or *mubah* (permissible actions to which the religion is indifferent), or more squarely into the fourth

[43] Shayara Bano v. Union of India, (2017) 9 SCC 1 (India).
[44] *Id.* ¶ 53.
[45] Acharya Jagdishwaranand Avadhuta and Ors. v. Comm of Police Calcutta and Ors., (1983) 4 SCC 522 (India).
[46] Shayara Bano v. Union of India, (2017) 9 SCC 1 (India), ¶ 69.

degree of *makruh* (actions reprobated as unworthy).[47] As a result, the practice formed no part of Article 25(1). It is pertinent to note that while observing this, reference was made only to Mulla's Principles of Mahomedan Law by Hidayatullah, J., a secondary source which is legal, rather than sociological, in nature. The usage of secondary sources is considered to be problematic, especially when this selective use of sources overrides evidence of a particular practice having a strong presence locally.[48]

With Justices Khehar and Nazeer's dissent, there comes another predilection. Having upheld *triple talaq* to be an essential religious practice, Chief Justice Khehar elevated personal law to the stature of a fundamental right.[49] This is problematic because Article 25 protects an individual's right to religion, not the institution of religion in itself. Chief Justice Khehar observed that *triple talaq* was essential, simply because it was sanctioned by the Muslim faith.[50] This was vastly different from all previous applications of the test, which required the religion to have mandated the practice under consideration and not to have simply sanctioned it.[51] He also recorded an observation that in various judgments of High Courts, the position regarding irrevocable *talaq* was affirmed.[52] He further observed that each of the judges who authored the judgments was in fact a *Sunni* Muslim of the *Hanafi* school, and their understanding of their own religion could not be

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[47] *Id.*
[48] Neo, *supra* note 20.
[49] Shayara Bano v. Union of India, (2017) 9 SCC 1 (India), ¶¶ 250-251.
[50] *Id.* ¶ 296.
[51] Acharya Jagdishwaranand Avadhuta and Ors. v. Comm of Police Calcutta and Ors., (1983) 4 SCC 522 (India); Shayara Bano v. Union of India, (2017) 9 SCC 1 (India).
[52] Shayara Bano v. Union of India, (2017) 9 SCC 1 (India), ¶ 241.

considered an outsider's view.[53] Although he disclaimed the same as inconsequential and as never forming a relevant consideration, it is interesting that he nevertheless chose to record such an observation. Such a reading of the law (even as a dissenting opinion) indicates how flexible the essential practices test really is. Depending on the sort of order that a judge may wish to pass, they could rely upon any kind of sources to hold that the practice is either essential or non-essential, while completely disregarding the submissions put forth by the religions themselves.

Despite the path the essential religious practices test has traversed over the years, perhaps its' time is up. Justice Chandrachud in his concurring opinion, vocalized the need for a test better suited than the essential religious practices test. He observed that the Court lacked both the legitimacy and the competence to decide the essentiality of a religious practice, and that in doing so, it imposed an external point of view which was inconsistent with the autonomy of faith and belief as envisioned by the Constitution.[54]

## III. ALTERNATIVES TO RELIGIOUS FREEDOM ADJUDICATION

### A. ISSUES WITH THE ESSENTIAL RELIGIOUS PRACTICES TEST AS A 'DEFINITIONAL TEST'.

The essential religious practices test is pernicious for several reasons, some of which its past application already demonstrates. However,

[53] *Id.* ¶ 129.
[54] *Id.* ¶ 110, *per* D.Y. Chandrachud, J.

the larger issue lies with it being in variation of the traditional 'definitional' test. The essential religious practices test defines the scope of religion and decides which religious practices are to be protected.[55] Constitutional courts, such as the Supreme Court of India, have to contextualise the test in the pluralistic society of their country, to create a workable legal definition. Such a definition is required to be sufficiently comprehensive, provide for an international interpretative diversity, include local particularities, avoid dominant socio-cultural attitudes and include socio-cultural attitudes towards minority religions.[56] Given the complexity of these parameters, courts often lack the necessary qualities to make such a determination, as it requires a high level of dynamic theological and sociological understanding.

Moreover, even in situations where courts do formulate a workable definition, it denies religious individuals or groups self-definition.[57] Definitional tests and their variants, heavily influence the dynamics between religious majorities and minorities in pluralistic societies. Definitional tests place the burden of proving the essentiality of their respective religious practices on the individual or groups themselves. There is a certain communal strain created when courts use tests like the essential religious practices test to deny religious practices of a religious minority constitutional protection, or to impose theological explanations on their

[55] Neo, *supra* note 20, ¶ 576.
[56] *Id.* ¶ 579.
[57] *Id.* ¶ 588.

beliefs or practice, more so, when the judges themselves may not belong to such minority.[58]

Definitional tests are practiced in several South Asian legal systems and are not particular to India alone,[59] although the essential religious practices test has been uniquely developed to suit the peculiarities of Indian society and to accommodate the reformist ideology of Indian secularism. The Federal Court of Malaysia reviewed the Indian essential religious practices test in *Meor Atiqulrahman bin Ishak v. Fatimah bte Sihi*[60] and pointed out that it led to one of two extreme outcomes – if a practice is found to be integral to a religion, any restriction or limitation, even regulatory, can be deemed unconstitutional, but if the practice is not found to be integral, it can be prohibited completely.

## B. THE ALTERNATIVE TO THE ESSENTIAL RELIGIOUS PRACTICES TEST

The essential religious practices test is a constitutional complication. As seen in Part I of this paper, the Constitution of India already provides for a constitutional mechanism to protect religious freedoms. This paper advances the notion that in addition to those mechanisms, the Constitution also inherently provides for the adjudication of questions of religious

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[58] *Id.* ¶ 589.

[59] *See* WEN-CHEN CHANG ET AL., JIUNN-RONG YEH, CONSTITUTIONALISM IN ASIA: CASES AND MATERIALS 831 (Hart Publishing, 1st ed., 2014) (*hereinafter* "**CHANG ET AL**").

[60] Meor Atiqulrahman bin Ishak v. Fatimah bte Sihi, [2006] 4 MLJ 605 (Malaysia); *see also* CHANG ET AL., *supra* note 59, ¶ 831.

freedom, to the effect that the essential religious practices test is rendered unnecessary.

Indeed, in the same judgment where the Federal Court of Malaysia raised issue with the essential religious practices test, a broader, overarching test for religious freedoms was used which depends upon existence rather than essentiality.[61] It was observed that the essentiality of a religious practice is only one factor which affects religious freedom. After establishing that the practice was indeed one of the religion, further considerations are also required to looked into, such as the seriousness of the problem created, the extent of the prohibition of religious freedom sought, and the circumstances under which the said prohibition was made.[62] Similarly, the Supreme Court of Japan, in *Saiko Saibansho*, suggested using a set of well-defined holistic factors, not only limited to the external aspects of religious procedure, but also including factors like place of the activity, whether the average person viewed it as a religious act, the intent, purpose, and degree of religious consciousness, and its effects on the average person, to adjudicate claims of religious freedom.[63]

Professor Jaclyn L. Neo proposed a two-stage deferential alternative to the definitional essential religious practices test, which combined an inclusive definitional test based on self-definition and a substantive second-stage enquiry, which includes a test of determining

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[61] *Id.*
[62] *Id.*
[63] Saiko Saibansho [Sup. Ct.] July 13, 1977, Hei 31 no.4, [MINSHU] 533 (Japan).

whether it is based on balancing, proportionality type analysis, or a compelling interest requirement.[64] This falls more in line with what the Supreme Court of India envisioned in *Shirur Mutt,* where religious communities were afforded the right of determining what was or wasn't essential to them. Self-definition, in Professor Neo's alternative, allows religions to use a certain degree of subjectivity in protecting their traditions and practices, while still allowing the courts to check their motives and balance against competing interests, as compared to the current test, where a religious practice may be denied protection from the very outset.

The two-stage test, therefore, acts simply like other tests of constitutionality against individual rights. At the first stage, the court presumes that a group's self-definition of their religious practice is protected unless there is a compelling reason not to do so.[65] At the second stage, the court balances a person's right to religious freedom against a competing state or public interest, by using a legitimate aim and proportionality analysis.[66]

**i. Self-Definition of What is 'Essential'**

In the first limb of the test, the court accepts a group's self-definition. Of course, the power to self-define cannot be unlimited, as that would create a potential for abuse. Therefore, the court should have the leeway to deny a self-definition if there is a compelling reason to do so. The

[64] Neo, *supra* note 29, ¶ 592-93.
[65] *Id.* ¶ 591.
[66] *Id.*

compelling reason must not be rooted in the actual nature of the practice itself, but instead in the petitioner's *bona fides*. This allows the courts to prevent abuse of the fundamental right to religious freedom, while still distancing themselves from the substance of the religious practice. Reasons that may be compelling enough to deny self-definition would include insincerity of the petitioner, fraud or ulterior motive.[67]

Professor Neo's reliance on the sincerity of religious belief, as a check on self-definition, has also been the view of the European Court of Human Rights [*hereinafter* referred to as "**European Court**"] in several cases dealing with religious freedoms. The European Court, instead of dealing with essentiality or nature of the practice, simply focused on the sincerity of the individual applicant before them.[68] This sincerity of religious belief can be questioned in cases where applicants seemed to cite religious belief simply to earn some benefit or the Court refused to acknowledge the sincerity of such alleged beliefs.[69] For instance, the European Court, in *Kosteski v. The Former Yugoslav Republic of Macedonia*,[70] found that the Applicant had merely converted to Islam in order to claim extra religious holidays, when in fact he ignored the basic tenets of Islam and always celebrated Christian holidays instead. The usage of the same in India would strengthen the courts' ability to check the *locus standi* of individual petitioners claiming violations of their religious freedoms.

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[67] *Id.*
[68] Skugar and Ors. v. Russia, App. no. 40010/04, Eur. Ct. H.R. (2009).
[69] *See* Kosteski v. the former Yugoslav Republic of Macedonia, App. no. 55170/00, Eur. Ct. H.R. (2000).
[70] *Id.*

The authors further argue that the usage of fraud or ulterior motive as a check changes the approach of the court while assessing whether an individual has a genuine claim under Article 25. Rather than undertaking a theological dive, wherein the court has the arduous task of assessing the tenets of the religion, historical and cultural contexts, and customs and traditions, the court would instead check if the claim is not meant to provide some ulterior benefit to the petitioner(s). While the sincerity test would check an individual petitioner's *locus standi*, the ulterior motive test would test the standing of denominational claims and public interest litigations. The Supreme Court has recently taken a stand against PILs filed by members of one religious community against another,[71] and adoption of such a test would provide a footing in Common Law against such frivolous litigation.

This type of broad test would allow the Supreme Court to limit its assessment in petitions under Articles 25 and 26, and not become an arbiter of religious disputes. It also significantly reduces subjectivity of each Bench, and would help in making judicial decisions on religion more consistently across the board. As far as reformative secularism goes, rather than outrightly denying the protection to the religious practices as a fundamental right, the Supreme Court will now shift the focus to the State action restricting the practice. This gives the Court greater power to scrutinise

[71] Live Law News Network, *SC Dismisses Hindu Mahasabha's Plea for Allowing Muslim Women's Entry In Mosques*, LIVE LAW, (July 8, 2019), https://www.livelaw.in/top-stories/sc-dismisses-hindu-mahsabhas-plea-for-allowing-muslim-womens-entry-in-mosques-146162.

whether the State action is actually reformative or not. It is pertinent to note that the Supreme Court itself has observed in *A.S. Narayana Deekshitulu v. State of A.P*,[72] the difficulties of a definitional approach by stating that it would be difficult to devise a definition of religion which would be regarded as applicable to all religions or matters of religious practices. Although the Court, in the same case, has held that essentiality of a practice must be viewed in its context,[73] the authors submit that the most effective solution would indeed be to change the test altogether.

### ii. Legitimate State Interests and Proportionality

With regards to the second stage of the test, we can find the compelling/legitimate state interests and proportionality tests prevalent in both international and domestic jurisdictions. The International Covenant on Civil and Political Rights [*hereinafter* referred to as "***ICCPR***"] (to which India is a State Party) protects the freedom to manifest religion under Article 18 and allows to impose restrictions, if any, necessary for a legitimate state interest.[74] It is pertinent to note that these legitimate state interests are similar to what is mentioned under Article 25(1) of the Constitution. Limitations under Article 18(3) of the ICCPR must be proportionate to the specific need on which they are predicated.[75]

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[72] A.S. Narayana Deekshitulu v. State of A.P, (1996) 9 SCC 548 (India), ¶ 593.
[73] *Id.* ¶ 594.
[74] UN Human Rights Committee (HRC), *CCPR General Comment No. 22: Article 18 (Freedom of Thought, Conscience or Religion)*, CCPR/C/21/Rev.1/Add.4, (July 30, 1993).
[75] *Id.*

The legitimate state interest and proportionality tests also feature in regional human rights forums. The European Court, for example, determines whether the measures taken at the national level are justified in principle and are proportionate,[76] and that there must not exist any other means of achieving the same end, which would interfere less seriously with the fundamental right concerned.[77]

In this regard, the burden of essentiality is done away with entirely, as the European Court has protected even those traditional practices which do not make up the core tenets of a religion, but which are nonetheless, heavily inspired by such religion with deep cultural roots.[78] In *Hamidović v. Bosnia and Herzegovina*, a Muslim man's desire to wear a skullcap was protected despite it not being a strict religious duty because it had such strong traditional roots that it was thought to constitute a religious duty.[79] This sort of wider interpretation of religious practices is preferable to the narrow construction taken by the Indian courts.[80]

Nevertheless, one might hesitate to adopt a test which is based on its westernized effects alone, given the vast socio-religious differences between Asia and the West. To this, we present a two-pronged counter: the *first*, is the exposition given by the Supreme Court of Philippines which

[76] Leyla Şahin v. Turkey, App. No. 4474/98, Eur. Ct. H.R. (2005).
[77] Biblical Centre of the Chuvash Republic v. Russia, App. No. 33203/08, Eur. Ct. H.R., ¶ 58 (2014).
[78] Osmanoğluet Kocabaş v. Switzerland, App. No. 29086/12, Eur. Ct. H.R. (2017).
[79] Hamidović v. Bosnia and Herzegovina, App. No. 57792/15, Eur. Ct. H.R. (2018).
[80] Dr. M. Ismail Faruqui v. Union of India, (1994) 6 SCC 360 (India).

presented a more liberal adoption of the test, to fit the peculiarities of pluralistic Asian societies. The *second*, is that the legitimate state interest test is more familiar in Indian jurisprudence, and its usage in the context of religious freedoms is appropriate given its stringency.

The Supreme Court of Philippines, in *Alejandro Estrada v. Soledad S. Escritor*,[81] interpreted the strict form of American secularism in a far more liberal manner and in claims of religious freedom, benevolent neutrality or accommodation was found to be the spirit underlying the provisions of the Constitution of Philippines, and the compelling state interest test was applied to ascertain the limits of the exercise of religious freedom. Benevolent neutrality, unlike a 'wall of separation',[82] recognises the significance of religion in society, as a result of which it was observed that there was no constitutional requirement in the Philippines which required the Government to oppose religion and curtail its spread.[83] Even if a government action was intended to be secular, it may still burden the free exercise of religion. The objective was to accommodate religion with governmental action to enable individuals and groups to exercise their religions without trouble.[84] In furtherance of the same, the Filipino courts also follow a 'compelling state interest test'.[85] The Indian secularism follows the Filipino reasoning more so than the American understanding of

[81] Alejandro Estrada v. Soledad S. Escritor A.M. No. P-02-1651 (S.C., June 22, 2006), (Phil.) (*hereinafter* "**Estrada**").
[82] *See* Zorach v. Clauson, 343 U.S. 306 (1952).
[83] *Estrada*, *supra* note 81.
[84] Chang et. Al., *supra* note 59.
[85] *Estrada*, *supra* note 81.

secularism. Even though the Constituent Assembly initially proposed a draft with a 'non-establishment' clause, which forms the basis of the wall of separation between Church and State in America, the clause was dropped from the final draft.[86]

Meanwhile, in India, a similar test of proportionality has been developed in *Modern Dental College and Research Centre v. State of Madhya Pradesh*.[87] This is a comprehensive four-stage test, which assesses the legitimacy of the State's aim, the suitability of the means employed, possible alternative measures, and balancing the effect on the holder of the right. Interestingly, the SC further expanded these principles in the *Justice KS Puttaswamy v. Union of India*,[88] by calling for a deeper focus on the necessity stage of the test, and by using established 'bright-line' rules as a standard to determine the balancing stage. The concept of a legitimate state interest test has also found its way into recent Indian jurisprudence on the fundamental right to privacy, as being grounds for restriction of the right.[89] Such legitimate state interests can be found within the provision itself such as freedom of religion includes public order, morality, health, other fundamental rights, social welfare and reform, and throwing open of Hindu religious institutions.[90]

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[86] CHANDRACHUD, *supra* note 38, ¶ 88.
[87] Modern Dental College and Research Centre v. State of Madhya Pradesh, (2016) 7 SCC 353 (India), ¶¶ 412-413.
[88] Justice KS Puttaswamy and Anr. v. Union of India and Ors., (2019) 1 SCC 1 (India), ¶¶ 123-124, *per* Dipak Misra, CJI.
[89] Justice KS Puttaswamy v. Union of India, (2017) 10 SCC 1 (India), ¶ 504.
[90] INDIA CONST., art. 25, 26.

In light of the fact that legitimate state interests and proportionality serve as appropriate tests for the restriction of religious freedom across jurisdictions, as well as the fact that the Indian constitutional jurisprudence also recognizes these tests, the authors submit that it would be appropriate to employ the usage of these tests in religious freedom claims as well. However, the adoption of this test would not fit the Indian secularism system unless it allows for social reform by the State. The view taken by the Indian Courts in the past is that social welfare and reform stands at a higher footing than religious beliefs and practices.[91] However, the Supreme Court excluded essential religious practices from the ambit of 25(2)(b) in the aforementioned *Saifuddin* case,[92] thereby preventing the State from being able to reform a religious practice that is essential, no matter how unjust or inhumane. If the two-stage test were to be adopted, and this observation in *Saifuddin* was to be disregarded, the State could invoke social reform under Article 25(2)(b) as a legitimate state interest, and employ State social reform on all types of religious practices, essential or otherwise. Thus, there would be no legal hurdles in the exercise of religious freedom, as well as in its social reform, as per the reformative secular doctrine in India.

To summarise, the proposed alternative test, based on the deferential approach adopted by Professor Neo, would function in the following manner where a state action has restricted its free exercise: *firstly*, the Court would make a presumption in favour of the constitutional protection of the religious practice being restricted. It should, however,

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[91] State of Bombay v. Narasu Appa Mali, AIR 1952 Bom 84 (India), ¶ 28.
[92] Sardar Syedna Taher Saifuddin v. State of Bombay, AIR 1962 SC 853 (India).

satisfy itself as to whether the representation made before it is based on a good faith. *Secondly*, the Court would then test the proportionality of the impugned state action, along the same lines as in the case of *Justice KS Puttaswamy v. Union of India*, by testing if there is a legitimate aim for the action, whether the action is appropriate and proportionate to achieve the aim, and whether the action is the least intrusive action to achieve the said aim. The state action in this case could refer to a legislative or executive restriction, or even a judicial or quasi-judicial interference on grounds of a competing interest.

From the many benefits of the two-stage test proposed, the most important one would be the shift of the legal burden from the individual to the State. It would now primarily become the government's responsibility to justify the restriction of freedom of religion, instead of the individual's burden to show that they have a constitutional protection in the first place.[93] This falls in line with the adjudication of claims under other rights in Part III of the Constitution, and would be more appropriate even in the case of Article 25. Indeed, the question of essentiality may still arise at this stage, especially in the case of State social reform, but only to determine the weight attached to a particular practice and the threshold the Government would need to satisfy under the second stage of the test.[94]

[93] Neo, *supra* note 29, ¶ 593.
[94] *Id.*

## IV. CONCLUSION

The objective of suggesting an alternative to the essential religious practices test is two-fold. *First*, the test expands and contracts in a manner inconsistent with the stability of constitutional protection which fundamental rights deserve. *Secondly*, in order to better implement the reformative secularism that the constitution envisions, an alternative system would allow for broader protection of religion as well as broader state reform.

The reformative secularism envisioned by the Constitution is starkly different from the western idea of secularism, which succeeded a religious renaissance of sorts. Western secularism heralded a separation of religious and temporal areas of behaviour, as a result of which religion and religious life could be confined to its own personal sphere.[95] In India, an individual's daily life was heavily influenced by their religion, and all their personal and familial law are governed by the religious doctrine. Thus, the State's role was not to be completely non-interventionist but to involve itself in the religious lives of people insofar that it was promoting social reform and eradicating abhorrent practices.[96] The non-discriminatory and interventionist aspects of the State were to protect the individual from the State while the non-interventionist aspect was calculated to allow the religion as well as the individual to be free.[97] Admittedly, it is this antithetical

[95] SATHE 1991, *supra* note 7, ¶ 38.
[96] P.K. Tripathi, *Secularism: Constitutional Provision and Judicial Review*, 8 JILI 1 (1966).
[97] SATHE 1991, *supra* note 7, ¶ 35.

role given to the State which has complicated the approach to religious freedom in India. For instance, the American wall of separation doctrine, where the state has nothing to do with religion,[98] cannot be sustained in a state as religiously ordered as India. The non-interventionist element of the Indian state came from a desire to promote an individual freedom of conscience, rather than to separate the State from religion.[99] Unlike its American counterpart, the Indian Constitution does not entertain a general prohibition against legislation in respect of 'establishment of religion'.[100] As a result, there exist constitutional provisions which ensure that no tax is imposed on any person for the maintenance or promotion of any religion, or no religious instruction is imparted in any State-maintained institution.[101]

As a result, the essential practices test alone is insufficient to cater to the vastly changing needs of religious freedoms across groups and practices. The essential religious practices test serves only to define which practices are included or excluded within a particular religion. This is often difficult to contextualise in a pluralistic society, insufficient in making a comprehensive determination, and denying of self-definition for religious groups and individuals.

By adopting a deferential approach, the courts would significantly broaden the horizons of the scope of religious freedom. When combined

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[98] U.S. CONST., amend. I.
[99] SATHE 1991, *supra* note 7, ¶ 39.
[100] *Id.*
[101] INDIA CONST., art. 27, 28.

with the legitimate state interests and the proportionality test, the approach to the right to religious freedom is much more in tune with other fundamental rights. More importantly, it provides the State with the ability to undertake reform as a legitimate interest, not only in carrying out the will of the framers of the Constitutional but also in upholding the values of a progressive State.

Ultimately, it is the amalgamation of liberal constitutional values and reformative secularism that seeks to protect the religious freedom of individuals and groups from unnecessary interference from the State, as long as the religious freedom in question does not conflict with a pressing state interest.