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[uniquelaw.in@gmail.com](mailto:uniquelaw.in@gmail.com)

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## ABOUT US

“Journal of Unique Laws and Students” (JULS) which shall provide law students, young lawyers and legal professionals to deliberate and express their critical thinking on impressionistic realms of Law. The JULS aims to provide cost free, open access academic deliberations among law students and young lawyers. The ISSUE IV of Volume I focuses on three themes i.e. (i) Environmental Law (ii) Company Law, (iii) Labour Law, (iv) Constitution Law and the themes from our previous issues.

The journal strives to contribute to the community with quality papers on a vast number of legal issues and topics written by authors from various groups that have been reassessed and revised by our editorial team to reach the highest possible standard.

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## PREFACE

Legal research is the “hands on” subject you will take in the course of your legal education. Although numerous books discuss research methods and techniques, there is no substitute for actually performing the task of legal research. Our journal`s Issue IV of Volume I has worked on crucial themes such as Environmental Law, Company Law Law, Labour Law, Constitution Law. We would like to express our deep appreciation of the cooperation of the contributors, who so willingly devoted their time and energies.

We have tried to cover these wide topics with the relevant research and landmark judgments in the form of Research Paper, Case Analysis, Short Notes and Case Commentaries. We have used a standard of words for the explanation, evenly attempted to clear the concepts and presented captivating writing to the readers. The work also contains some suggestions in respective fields.

The views expressed in the articles are purely and solely of the authors and the entire team of the Journal has no association with the same. Although all attempts have been made to ensure the correctness of the information published in the articles, the Editorial team shall not be held responsible for any errors that might have been caused due to oversight or otherwise. It is up to the rest of us to help make the journal a success story in the next several years.

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## EDITOR'S NOTE

### **Volume 1 Issue IV of Journal of Unique Laws and Students (JULS)**

This journal has become a successful climb in reaching to our goal of gaining visibility in the academic front and becoming a great platform in education community.

The journal aims to present merit papers on the numerous legal issues and these topics are authored by various groups of individuals that have been reappraise and emended by our team of editors to attend the highest possible excellence. These research papers, case analysis and shortnotes are the result and we feel privileged to have been able to act as editors.

We thank to all our authors for their obedient submission to the third issue of the journal and also for their productive cooperation with the editorial team to garnish their work with perfection. We would also like to express our gratitude to our diligent editorial board, whose restless support and commitment made this Journal's Issue IV a success.

## TABLE OF CONTENTS

<b>ENVIRONMENT IN THE ERA OF COVID-19 : THE PROS AND CONS OF THE DOOMS DAY .....</b>	<b>09</b>
<i>AUTHOR: KISLAY RAJ</i>	
<b>IMPOSITION OF PRESIDENT’S RULE – S. R. BOMMAI VS. UNION OF INDIA .....</b>	<b>22</b>
<i>AUTHOR: SHUBHANGI CHAND &amp; CO-AUTHOR: PRAKALPA S IYENGAR</i>	
<b>WHAT'S WRONG WITH THE EIA NOTIFICATION 2020, AND WHY IT IS CRITICAL .....</b>	<b>30</b>
<i>AUTHOR: P SANSKAR NAIDU</i>	
<b>ABORTION LAWS IN INDIA – A RIGHT OR A PRIVELEGE .....</b>	<b>42</b>
<i>AUTHOR: SHIVANGI PRAKASH &amp; CO-AUTHOR: ANSH YADAV</i>	
<b>DISTRIBUTION OF POWER BETWEEN CENTRE AND STATE: THE LEGISLATIVE AND ADMINISTRATIVE ASPECT .....</b>	<b>51</b>
<i>AUTHOR: SIYA JINDAL</i>	
<b>COMPANY LAW AND ITS VARIOUS ELEMENT .....</b>	<b>64</b>
<i>AUTHOR: ISHIKA JAIN</i>	
<b>COMPARATIVE ANALYSIS BETWEEN INDIA AND SWEDEN ON THE INSTITUTION OF OMBUDSMAN .....</b>	<b>75</b>
<i>AUTHOR: SNEHA ANN SANTOSH</i>	
<b>THE DOCTRINE OF ESSENTIAL PRACTICES OF RELIGION .....</b>	<b>85</b>
<i>AUTHOR: VIVEK SERJY</i>	
<b>RIGHTS OF LABOUR IN INDIA .....</b>	<b>95</b>
<i>AUTHOR: ARGHYA SEN</i>	

# THE DOCTRINE OF ESSENTIAL PRACTICES OF RELIGION

Author: Vivek Serjy\*

## **ABSTRACT**

*India is a secular state which has no official religion of the State. However, all religions are given equal respect and dignity. The people are free to profess, practice and propagate<sup>1</sup> their religion and this is protected under the fundamental right of Article 25. It is to be noted that the Supreme Court is the custodian of the Constitution and has the right to interfere in the legislations that violate the Fundamental rights of the Citizens i.e through the process of Judicial review. On other hand, the practices that are inherent and essential part of the religion cannot be interfered with by the Judiciary or any other organ as it is protected by the Constitution.*

*Eversince the case of 'The Commissioner, Hindu Religious Endowments, Madras vs Sri Lakshmindra Thirtha Swamiyar of Sri Thirur Mutt', the Apex Court has developed the doctrine of the Essentiality test to determine whether the religious practice is essential part of the religion or not. The primary goal of the research paper is to analyse how the Judiciary employs this test to different cases pertinent to religious practice and describe the criticisms followed on this test. Also, the research also analyses how the role of the Supreme Court varied from the interpreter of the Constitution to the role of theological interpreter. The research is based primarily on the ratio and judgements of the cases. In the end, the overall utility of the essentiality test would be elucidated.*

**Keywords:-** Article 25, Religious Freedom, Judicial Review, The Essentiality Test

## **INTRODUCTION**

Secularism is the DNA of Indian society. Even before the European definition of Secularism arose from the French revolution, India was a pot of different religions, cultures and languages

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\* 1<sup>st</sup> year BA. LLB(Hons.), Christ University, Bangalore; Available at: [vivekserjy16@gmail.com](mailto:vivekserjy16@gmail.com).

<sup>1</sup> INDIA CONST. art. 25(1).

coexisting with each other. The respect for each other's identity, accommodation of communities and appreciation of ideas and thoughts of different schools was part of the Indian society. The Golden Age of India at that time of Hindu Kingdoms of Maurya dynasty, the open mindedness and civilisation were intertwined. It was at the same period where the new religion of Buddhism flourished and expanded across the world. At the rule of emperor Akbar (termed it as the Golden Age of Mughal empire), the emperor advocated a new religion of 'Din-i-Illahi' which is a collection of syncretic ideas of all religions and promoted the religious unification of the country. The Freedom fighters of India like Gandhi advocated and fought for one united independent sovereign India where all the faiths, castes and creed are treated one.

India has a history of religious freedom and accommodation. This is the reason why the secularism in the Constitution has been deeply inscribed and accepted within the Indian society. The Western definition of Secularism arose primarily from the French revolution, where the State and the Church are separate and the Church has no role in the administration of the State and vice versa. The word 'laicite' primarily arose from the context of Separation of powers of the State and the Clergy. However, the Secularism model followed in India is religious plurality and accommodation.

In the Indian Constitution, religious freedom has been protected under Article 25 and Article 26. The religion has not been defined in the constitution but the Supreme Court has the power to define it in judicial matters. A framework was needed to determine the practices which are essential to the religion or not, therefore, it developed the doctrine of 'the essential practices of religion' or also known as 'the Essentiality Test'.

### **THE ESSENTIALITY TEST:**

#### **Analysis**

Primarily in the case of Hindu Religious Endowments, Madras v. Shri Laskmindar Tirthu Swamiyar of Shri Shirur Mutt, the Apex court defined the framework which defines what constitutes the practices that are integral part of religion and what are secular practices associated with the religion. This framework in short was known as the Essentiality Test. The Apex Court considers this crucial as the essential practices of religion are protected under Article 25 and the State cannot interfere.

The Supreme Court implied in the above case that all rituals, modes of worship and ceremonies come under the essential practices of religion.<sup>2</sup> It is essential to note that there should be differentiation between ‘laws’ and ‘laws in force’. Laws passed by the competent authority in the territory of India prior to the commencement of the Constitution and are not previously repealed are referred to as ‘laws in force’. Whereas, the laws which are the existing legislations, are passed in the both houses of Parliament with the acceptance of the President of India through his signature.

Here, there are uncodified religious personal laws which do not come under the ambit of ‘laws in force’. This is important because the Supreme Court may not be empowered to make any of these uncodified religious personal laws voidable under Article 13 of Indian Constitution even if such laws are in contravention to the fundamental rights. It is reasonable to think that these uncodified personal laws do not come under the ambit of the clauses of Article 13, so how can the Supreme Court strike down such laws.

However, it is interesting to see in different cases how the Apex Court deals with constitutional validity of religious practices using the Essentiality Test. Also, the exceptions of Article 25 used by the Apex Court is used along with the essentiality test. Article 25 stated that the religious freedom to profess, practice and propagate is subject to the public order, morality and health and other parts of the provision and the Apex Court has used the literal interpretation for these exceptions of Article 25 in several other cases.

Sri Venkatarama Devaru v. State of Mysore<sup>3</sup> is one of the cases. Here, the issue was whether the exclusion of people outside the Hindu temple was an essential practice of a religion. According to some ancient religious texts, the Harijan community is not permitted to enter this temple. The Apex Court eventually used the essentiality test. Hence, the Apex Court ruled out the judgement of the ancient religious book prohibiting specific groups from entering the temple and declared that the temples are open to all. The court ruled that “temples should not be confined to certain groups for the purposes of social welfare and reform as outlined in Article 25”.<sup>4</sup>

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<sup>2</sup> The Commissioner, Hindu Religious Endowments, Madras v. Shri Lakshmindar Tirtha Swamiyar of Shri Shirur Mutt, AIR 1954 SC 282.

<sup>3</sup> Sri Venkatarama Devaru v. State of Mysore, AIR 1958 SC 255.

<sup>4</sup> The Commissioner, Hindu Religious Endowments, Madras v. Shri Lakshmindar Tirtha Swamiyar of Shri Shirur Mutt, AIR 1954 SC 282.

In the case of *Dilawar Singh v. State of Harayana*<sup>5</sup>, Punjab and Harayana court was working on the issue whether Sikhs could enter in the Court as witness donning a Kirpan. The Court depended on the interpretation of religious books such as the Sikh history and religion to determine the essentiality test. The Court using the judgements and verdicts of Shirur Mutt case and Avadhuta case, upheld that “the wearing of Kirpan was an essential of Sikh religion and therefore, allowed the Sikhs to wear five khakars including the Kirpan.”<sup>6</sup>

Similarly, in the case of *Jagadishwaranand v. Police Commissioner, Calcutta*<sup>7</sup>, it was the question whether Tandava dance is recognised as an essential practice of religion. It was a controversial case that has created a lot of debate. Here, the Tandava dance by the Anand Marga religious group involved dancing in the street with skulls and knives on the hand. The police charged them under Section 144 of CrPC. The Ananda Marga community filed a petition regarding violation of their essential religious beliefs. The Judiciary was criticized for being given excessive power in deciding the difference between essential and non-essential religious practises. The Supreme Court has established the right to decide whether a particular ceremony or observance is considered essential by the tenets of a certain religion.

In this case also, the Apex Court has asserted the right to determine whether a particular rite or observance is regarded as essential by the tenets of a particular religion. The Apex Court has considered the status of a separate Hindu religious denomination but ruled out that the ‘Tandava’ dance is an essential practice of the religion. The bench stated that “the Tandava dance involved in the street was formed after ten years of the formation of Ananda Marga community, according to the religious texts. Moreover, this type of dance involving knives on hand and skulls involve the degradation of public morality and deprivation of public order. Hence, on this basis, the Tandava dance is not an essential practice of the Ananda Marga denomination of religion.”<sup>8</sup>

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<sup>5</sup> *Dilawar Singh vs. State of Harayana*, AIR 2016 P&R 149.

<sup>6</sup> *Id.*

<sup>7</sup> *Jagadishwaranand v. Police Commissioner, Calcutta*, (1983) 4 SCC 522.

<sup>8</sup> *Id.*

## **ROLE OF SUPREME COURT THROUGH ESSENTIALITY TEST**

From the Shirur Mutt case, the Apex Court has put forth two concepts: The Doctrine of Essentiality and Constitutional Morality. The Doctrine of essentiality has been derived from the 7 bench case of Apex Court in 1954 where it was upheld that all customs and rituals are integral practices to religion and the Supreme Court took upon the responsibility of determining essential and non-essential practices of a religion. It is a doctrine intended to protect religious activities that are considered essential to the religion.

In the case of *Sardar Syedna tahere Saifuddin Saheb v. State of Bombay*<sup>9</sup>, the apex Court dismissed the argument that the head of the Dawoodi Bohra's authority of excommunication is unconstitutional. The Apex Court determined that the power of excommunication is a fundamental practice of the Bohra community protected under Articles 25 and 26 of the Constitution, and that the State cannot intervene to make the practise voidable.

It is seen that the role of the Supreme Court has widened to theology and reformism. There is a considerable contention and disagreement with this widened role as the critics believe that it overrides the protection of religious practices guaranteed by Article 25 of the Indian Constitution. In Triple Talaq Case<sup>10</sup>, the All India Muslim Personal Law Board argued that the Judiciary has to keep out the matters of faith and hence, oppose any court intervention in religious matters. However, the Apex court has contested this viewpoint by stating that the “Judiciary has the right to interfere in the non-essential practices of the religion such that of secular activities associated with the religion and the determination of essential and non-essential practices of religion is through the Essentiality test doctrine and with subject to the exceptions provided in the Article 25.”<sup>11</sup>

In another case of *Gulam Abbas v. State of Uttar Pradesh & Ors*<sup>12</sup>, the Apex Court upheld that the fundamental rights guaranteed under Article 25 and Article 26 are not absolute and are subject to public order. Hence, in case the court believes that the shifting of graves is in the interest of the

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<sup>9</sup> *Sardar Syedna tahere Saifuddin Saheb v. State of Bombay*, AIR 1962 SC 853.

<sup>10</sup> *Shayara Bano vs Union Of India*, (2017) 9 SCC 1.

<sup>11</sup> *Id.*

<sup>12</sup> *Gulam Abbas v. State of Uttar Pradesh & Ors.*, AIR 1981 SC 2198.

public then, the consent of the parties is immaterial although the Muslim Personal law is against such practice of shifting the graves.

The Supreme Court also does not always follow the doctrine; instead it uses horizontal application of fundamental rights also. It was seen in the famous Triple Talaq case (Shayara Bano v. Union of India)<sup>13</sup>, that besides the use of the essentiality test, the horizontal application of Article 14 was also executed. The majority view in the 5 judge bench upheld that Talaq was not authorised practice in the Quranic text. However, the minority view involving the Chief Justice JS Khengar and Justice Nazeer asserted the view that “it was not upto the ambit of the Judiciary to interfere in the personal laws of the religion as it is a practice protected by the Article 25.”<sup>14</sup> Thus, the minority view believed that it is best for the parliament to decide the ending of the triple talaq practice through law. On the other hand, the Justice Kurian in disagreement with the Chief Justice quoted that “there is no constitutional protection to such a practice.”<sup>15</sup> Also, through Justice Kurian’s deep research into the Quranic texts, he opined that “essential practices equate to those practices that are fundamental to follow a religious belief. Moreover, he stated that the test for determining whether a part or practice is fundamental to religion is to determine whether the nature of the religion will be altered without that part or practice”.<sup>16</sup> In both cases of Danial Latifi and Shayara Bano, gender based reasoning was resorted to come to the verdict.

Regarding the usage of essentiality test by the Judiciary, there is no straight jacket formula on the application of it towards the cases. It is contested by the critics that the Apex Court has always been favouring the reformist viewpoint rather than giving importance to the proof of religious text. In the case of Sri Vekatarama Devaru v. State of Mysore<sup>17</sup>, the Apex Court gave more importance to the progressiveness. Also, in the Durgah Committee v. Syed Hussain Ali<sup>18</sup>, the Apex Court mentioned that “the religious practices arising from the superstitions do not have immunity from the State intervention.”<sup>19</sup>

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<sup>13</sup> Shayara Bano vs Union Of India, (2017) 9 SCC 1.

<sup>14</sup> Shayara Bano vs Union Of India, (2017) 9 SCC 1.

<sup>15</sup> *Id.*

<sup>16</sup> *Id.*

<sup>17</sup> Sri Vekatarama Devaru v. State of Mysore, AIR 1958 SC 255.

<sup>18</sup> Durgah Committee vs. Syed Hussain Ali, AIR 1961 SC 1402.

<sup>19</sup> *Id.*

The role of reformist can be often criticised by referring to it as the role of interventionist in certain spectrum. It can be argued in both ways for both sides. From the critics' side, it may be true because it violates religious autonomy of an individual as the Supreme Court dictates what constitutes the essential practices of a religion or not and affirms the position that the Supreme Court has the right to do so for the purpose of maintaining and upholding the constitutional provisions. The idea of secularism should be maintained according to the Supreme Court. In the case of *Adi Saiva Sivachariyangal Nala Sangam & Ors v. State of Tamil Nadu*<sup>20</sup>, the Supreme Court stated that “even in the absence of special ecclesiastical jurisdiction, the Apex Court is not barred on the grounds of interference with religious practice’s ‘complete autonomy’. It believes this right of essentiality test because the Apex Court is the custodian of the Constitution. The rule of law is fundamental to the nation and that the Constitution should be followed in necessity and the Judiciary plays a vital role here”.<sup>21</sup>

However, it is important that consultation with the religious pundits and the concerned community should be done in reference to the decisions related to the essential practices of the religion. A reformist approach can be perceived as purely interventionist also in the eyes of the public. The famous case of Sabarimala temple is the perfect example. Menstruating women between the ages of 10 and 50 were not permitted to enter the Sabrimala temple grounds since the temple is devoted to Lord Ayyappan, who is an eternal celibate. The five bench judge ruled out in majority view that this religious activity is violative of Article 14 and 25 of the Indian Constitution. Justice Deepak Mishra has said that “religion is a way of life inherently associated with the self respect of an individual and gender biased exercises based on exclusion of one gender in favour of another is not acceptable.”<sup>22</sup> He believes anything that is contrary to constitutional mandate is not permitted in the State. Justice Mishra opines that this practice removes the women of their freedom to worship under Article 25(1).

Also, Justice Mishra observes that “followers of Lord Ayyappan do not come under the ambit of constitutional criteria that these followers are separate religious denominations, instead they are hindus. Also, Article 25(2)(b) allows the State to make any law that provides a public Hindu

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<sup>20</sup>*Adi Saiva Sivachariyargal Nala Sangam & Others v. The Government of Tamil Nadu & Another*, (2016) 2 SCC 725.

<sup>21</sup> *Adi Saiva Sivachariyargal Nala Sangam & Others v. The Government of Tamil Nadu & Another*, (2016) 2 SCC 725.

<sup>22</sup> *Indian Young Lawyers Association & Ors v. State of Kerala & Ors*, (2019) 11 SCC 1.

institution to all classes and sections including the gendered category of women”.<sup>23</sup>Hence, Justice Mishra concludes that this custom is under the ambit of State sanctioned reform. Also, Justice Mishra does not recognise it as “an essential religious practice as the majority of Ayyappan followers are Hindus”.<sup>24</sup>Justice Rohington Nariman is of the same opinion of Justice Mishra for these arguments.

According to the distinct and concurring judgement of Justice D Y Chandrachud, he upheld that this practice of debarring certain age groups of women by the Sabrimala Temple is unconstitutional and that leads to undermining of ideals of autonomy, liberty, and dignity. He decided that “the morality conceived under Articles 25 and 26 of the Constitution cannot have the effect of abridging the fundamental rights guaranteed under these Articles”.<sup>25</sup> Along in agreement with Justice Deepak Mishra and Justice Rohington Nariman, Chandrachud believes that the followers of Ayyappan are not a separate religious sect and hence the debarring custom for a certain age group of women to enter in the temple, is not an essential religious practice. Also, he underscored the psychological characteristics of women like menstruation, and mentioned that such categorisation does not have significance on the entitlements guaranteed to them under the Constitution. It cannot be a valid constitutional criterion to deny her dignity and respect, and the taboo and stigma followed around have no validity under the Constitutional morality. Moreover, Justice Chandrachud gave the opinion that this custom of debarring was more like the practice of untouchability which is prohibited under Article 17 of the Constitution. He highlighted in the Constituent Assembly Debates that the Constitution drafters have not intentionally given specific meaning of untouchability. In the conclusion, he said that “untouchability was not restrictive in meaning and had to have an expansive and inclusive meaning. Hence, the custom of debarring the women group of certain age comes under the ambit of Article 17 which is used for guarantee against exclusion of groups”.<sup>26</sup>

On other hand, the minority judgement by Justice Indu Malhotra which marvellously a woman supports the essentiality of the Sabrimala custom. She believes in her view that “the Judiciary should not interfere in regards to which religious practices needs to be struck down except in issues

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<sup>23</sup> *Id.*

<sup>24</sup> *Id.*

<sup>25</sup> *Id.*

<sup>26</sup> Indian Young Lawyers Association & Ors v. State of Kerala & Ors, (2019) 11 SCC 1.

where it is of social evil like Sati”.<sup>27</sup> Also, she asserts that “the Judges should not exercise their personal views, rationality and morality when it comes to the worship of a deity”.<sup>28</sup> Also, she questions the capacity of the petitioner to file the case as she said that “those who at the behest not engaging in such practice are not appropriate to file such a course of action”.<sup>29</sup> Justice Malhotra also observed that the petitioners do not belong to the concerned group of devotees visiting Sabrimala, as a result they do not have any interest in the matter.

She also observed that “prevention of changes for time to time made the practice to be competent which leads to categorisation of essential practice. Also, the imposition of morality of court on a religion would create impedance in the freedom to practice one’s religion according to one faith”.<sup>30</sup> Justice Malhotra noted this point that it is outside the ambit of the court’s intervention.

The Sabrimala Case was eventually stayed by the Supreme Court itself and passed it for the review which also included larger issues encapsulating different issues altogether. It includes Muslim’s entry to mosques, female genital mutilation by Dawoodi Bohras, and entry of Parsi woman married to non-parsis in the Agyari. These are some questions regarding the larger bench review. It could open up new questions instead of resolving the pending cases. Also, a single verdict to four cases together may bring disagreements and conflict among the religious communities. The clash of limits and boundaries of the Judiciary pertaining to religious matters can arise. The role of Supreme Court can be clearly seen as the reformist model as it is evidenced in the cases of decriminalising<sup>31</sup> section 377 of Indian Penal Code which dealt with offence of same-gender consensual sex as well as section 497 of Indian Penal Code which dealt with adultery<sup>32</sup>. However, acceptance and accommodation of the reforms by the people is still slow with regard to religious matters. People may see that the Apex Court widens its role from the custodian and interpreter of the Constitution to the role of clergy.

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<sup>27</sup> *Id.*

<sup>28</sup> *Id.*

<sup>29</sup> *Id.*

<sup>30</sup> *Id.*

<sup>31</sup> Navtej Singh Johar vs. Union of India (2018), AIR 2018 SC 4321.

<sup>32</sup> Joseph Shine vs. Union of India, (2018) SCC OnLine SC 1676.

## **CONCLUSION**

It is obvious that the Supreme Court played a reformist role, rendering verdicts on matters involving religious customs through a reform lens. It has been playing very active role in recent years where many landmark judgments like decriminalization of adultery and same-gender consensual sex have been passed. However, it is criticized on the ground whether the Apex Court breached the limits of interventionism or not. Article 25 protects religious practices in particular, and the State is prohibited from interfering with practices essential to the religion. It is seen that through the Shirur Mutt case the Supreme Court has formulated the essential test doctrine to determine what practices are essential to the religion. Moreover, the Supreme Court has highlighted the right to make the practices voidable under Article 13 if the practices are derived from the superstitions. Though the doctrine of essential test has been a contentious debate, certain ways have developed the Judiciary to determine the verdicts. The Essential test is not absolute and differs from case to case. The Judiciary should go for case by case settlement instead of clubbing together and delivering a single verdict as each case varies from issue to issue and requires a distinct redressal. Also, the Courts have to be consistent in application of essential tests as a strait-jacket formula for applying it is not there. This means there should be uniformity in decisions so that parties have a fair sense of justice and avoid tensions and conflicts.