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Essential Religious Practices (ERP)

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Through recent landmark judgments such as the Karnataka Hijab Case, the Sabrimala Temple Case, and the Triple Talaq Case, the Essential Religious Practices test (hence referred to as "the ERP Test") has been strongly discussed in Indian jurisprudence. The ERP test was inspired by a speech made by Dr. B.R. Ambedkar in the Constituent Assembly regarding the proper interpretation of Article 25 of the Constitution. He accepted that nearly every element of life in India is governed by religion and religious customs, but that this influence should be constrained and that religious traditions should be able to pass the constitutional morality test to remain valid. However, over time, the interpretation and application of this test have evolved dramatically, creating a plethora of challenges that endanger the secularism and unity of India.

Keywords: *essential, religious, pluralism, constitutional morality, reasonable accommodation*.

WHAT IS ESSENTIAL RELIGIOUS PRACTICE?

The court developed the "essential religious practice test" to only protect those religious practices that were essential and inherent to the religion. The test enables the Court to conduct a judicial investigation into whether a contested religious practice qualifies as an "essential practice", regardless of what the practice's own practitioners may believe.

HOW DOES THIS PRACTICE DEVELOP?

In the Constituent Assembly on December 2, 1948, Ambedkar made a speech where, among other things, he observed:

"*The religious conceptions in this country are so vast that they cover every aspect of life, from birth to death. There is nothing that is not a religion and if personal law is to be saved, I am sure about it that in social matters we will come to a standstill. I do not think it is possible to accept a position of that sort. There is nothing extraordinary in saying that we ought to strive hereafter to limit the definition of religion in such a manner that we shall not extend beyond beliefs and such rituals as may be connected with ceremonials that are essentially religious. It is not necessary that the sort of laws, for instance, laws relating to tenancy or laws relating to succession, should be governed by religion*"[1]

Therefore, the term originally used by Ambedkar "essentially religious" was in reference to a very particular issue. He was concerned that there was no part of Indian society that was influenced by religion, in contrast to the West where there appeared to be a clear distinction between the Cities of Man and God. There was a high possibility that the Constitution's protection of personal and religious freedom would completely restrict the State's ability to enact social policy. This led him to believe that there should be a distinction between religious activities and secular activities having a religious undertone. The latter might not be protected from legislation by the constitution.

The phrase "essentially religious" was applied in the first few rulings following the constitution's enactment in the way Ambedkar had intended. Like in the case of ***LakshmindraSwamiar (1954)***[2] it was held that"*What makes up an essential component of religion is essential to be determined with reference to that religion's own principles*". If the beliefs of any Hindu religious sect require food offerings to be made to idols at specific times of the day, periodic ceremonies to be carried out in a specific manner at specific times of the year, daily recitation of sacred texts, or sacrifices to the sacred fire, all of these would be considered to be aspects of religion, and All of them are

[1] Constituent assembly speech by Dr. BR Ambedker <https://prasarbharati.gov.in/whatsnew/whatsnew_653363.pdf> accessed 09 July 2022

[2] *Madras v Shri Lakshmindar Thirtha Swamiyar of Shri Shirur Mutt* (1954), SCR 1005

religious practices and should be regarded as matters of religion within the meaning of Article 26(b)[3] regardless of the fact that they involve spending money, hiring priests and servants, or holding regular ceremonies. This would not change the fact that they are all religious practices. Therefore, "essential" was the border between the religious and the secular for the Court. In ***Ratilal v State of Bombay***[4], the same observation was repeated where the Court added that "no outside authorities have any right to say that these are not essential parts of religion and it is not open to the secular authority of the State to restrict or prohibit them in any manner they like under the guise of administering the trust estate."

However, three years later, in ***Ram Prasad Seth v State of UP***, the Allahabad High Court[5] gave the case a totally different twist. On the basis of Article 25,[6] the regulation of UP Government laws that forbade bigamous marriages for people who work for the government was challenged. It was asserted that certain burial ceremonies for a deceased person could only be carried out by sons under Hindu tradition. As a result, having a son was essential for a Hindu, and bigamy was sometimes the only option to do it. In response, the Court examined some significant Hindu religious writings and determined that "bigamy *cannot be regarded as an integral part of a Hindu religion… the acts done in pursuance of a particular belief are as much a part of the religion as belief itself but that to my mind does not lay down that polygamy in the circumstances such as of the present case is an essential part of the Hindu religion."*

In place of describing the practice's character (i.e., whether it is religious or secular), the word "essential" now refers to its necessity (within the religion). In other words, the focus is now on determining whether something is essential to the religion rather than whether it is inherently religious. The modest but significant language shift allows the Court to define the nature of religion itself by establishing religiously-specific concerns in legal proceedings. As a result of this, in the ***Shirur Mutt Case*** in 1954, a 7 judge Supreme Court bench created the doctrine of "essentiality." The court decided that all rituals and acts that are "integral" to a religion fall under

[3] Constitution of India, 1950, art.26(b)
[4] *Ratilal Panachand Gandhi v The State Of Bombay And Ors.*, (1954), AIR 388
[5] *Ram Prasad Seth v State Of U.P. And Ors.*, (1957), AIR All 411
[6] Constitution of India, 1950, art.25

the umbrella word "religion," and it assumed the task of identifying which religious practices are essential and which are non-essential.

MAJOR JUDGEMENTS

- ***Sabarimala case***[7]

By a majority decision of 4:1 on September 28, 2018, the Supreme Court overruled the restriction that barred women and girls between the ages of 10 and 50 from visiting the well-known Ayyappa shrine in Kerala.

The dissenting judgment given by Justice Indu Malhotra raises some crucial points[8]

1. **Maintainability:**

"*The right to move the Supreme Court under Article 32*[9] *for violation of Fundamental Rights, must be based on a pleading that the Petitioners' personal rights to worship in this Temple have been violated. The Petitioners do not claim to be devotees of the Sabarimala Temple where Lord Ayyappa is believed to have manifested himself as a 'NaishtikBrahmachari'. To determine the validity of long-standing religious customs and usages of a sect, at the instance of an association/Intervenors who are "involved in social developmental activities, especially activities related to the upliftment of women and helping them become aware of their rights", would require this Court to decide religious questions at the behest of persons who do not subscribe to this faith." (paragraph 7.2)*

Malhotra J. continues by criticizing that the maintainability problem, in this case, is more than just a "mere technicality." It would invite "interlopers" to question a broad range of religious practices and beliefs, which would put "religious minorities" in even greater danger. She further examines the nature of the claim. And finds that the demand is for Sabarimala temple worship by women between the ages of 10 and 50. This is a classic instance of cultural dissent when the norms and values established and imposed by cultural gatekeepers and dominant groups must

[7] *Indian Young Lawyers Association v The State Of Kerala* (2018) 11 SCC 1

[8] Gautam Bhatia, 'The Sabarimala Judgment – II: Justice Malhotra, Group Autonomy, and Cultural Dissent' (*Indian Constitution Law & Philosphy*, 15 March 2022) <https://indconlawphil.wordpress.com/category/freedom-of-religion/essential-religious-practices/> accessed 05 July 2022

[9] Constitution of India, 1950, art.32

be contested because they are prohibitive due to religious conventions. The Sabarimala case's core issue is cultural dissent, which Justice Nariman and then-CJI Mishra both acknowledged. The majority of the time, marginalized groups within cultures or faiths need an external authority (like the courts, operating under the Constitution) to back them in their fight against oppressive norms or practices. However, Justice Malhotra argues that the claim must come directly from marginalized groups. They cannot be represented by an outside authority advocating on their behalf.

2. **Pluralism:**

Our Constitution recognizes the diversity of religions. Pluralism includes allowing the various religious communities and organizations inside our country internal autonomy, as well as the flexibility to choose whatever norms and practices are necessary for them to survive. The Court can intervene when these standards or practices cause real social harm, but it cannot do so when the only grounds for challenge are simple immorality, irrationality, or unequal treatment. And the Court especially cannot act in this way when an external party is bringing the case. In many ways, the opinion of Justice Malhotra is powerful and well-reasoned. Her arguments regarding maintainability, essential religious practices, and constitutional plurality, which the opinions of CJI Misra and Nariman J. closely hew to, are sound in my opinion and more accurate to the constitutional text and history than the current Indian religious freedom jurisprudence.

THE JUDGEMENTS OF CJI MISRA AND JUSTICE KHANWILKAR

According to Misra CJI and Khanwilkar J., the followers of Lord Ayappa in the Sabarimala temple have not demonstrated that they are a "separate religious denomination". This is due to the strict requirements for "separate denominations," which include a set of distinctive beliefs, a separate name, and a shared organization. The public aspect of the Sabarimala Temple, where all Hindus and even members of other religions are allowed to visit and worship alongside other temples to Lord Ayappa where the prohibition against women does not apply, has led the two justices to rule that it does not represent a “separate denomination."

THE JUDGEMENT OF JUSTICE NARIMAN

Nariman J. acknowledges that preventing women under a certain age from attending Sabarimala is an essential religious practice and is therefore protected by Article 25(1) for the sake of argument. He agrees with Khanwilkar J. and Misra CJI that Sabarimala does not meet the strict requirements for a "separate denomination," though.

THE JUDGEMENT OF JUSTICE CHANDRACHUD

According to Chandrachud J.[10], the respondents have not established that women are required to be excluded from Sabarimala as a component of their faith or that this practice has been ongoing for a long time. The evidence, at most, demonstrates Lord Ayappa's celibacy, but it does not establish that the exclusion of women constituted ERP. Chandrachud J.'s observation that the effect of the celibacy argument "is to impose the burden of a man's celibacy on a woman" serves as a crucial link between the denial of the right to worship (which Malhotra J. views as a private, internal matter to religion in her dissent) and the public aspect of this case. The term "patriarchal order" is significant. It suggests that women are not permitted in Sabarimala is not just a unique feature of that particular religious community, as Malhotra J. would have it, and something that can be isolated from the rest of society. The patriarchy is one of the many ways, as a social institution, strives to maintain women in a position of subordination as is the exclusion of women from Sabarimala due to celibacy and menstruation.

UNTOUCHABILITY

Malhotra J. rejects this argument on the grounds that "untouchability" under the Indian Constitution is only defined as caste-based untouchability, whereas the Chief Justice and Nariman J. do not address it. Not all discrimination or prejudice can be covered by Article 17. The phrase "untouchability" was used specifically by the framers, confining the scope of the Article to the most heinous form of discrimination. Chandrachud J. is aware of this since he

[10] Gautam Bhatia (n 8)

continues to explain why exclusion based on menstruation is covered by Article 17 in the following manner:

"The caste system represents a hierarchical order of purity and pollution enforced by social compulsion. Purity and pollution constitute the core of caste."

Of fact, purity and pollution are at the root of barring menstruation women from all types of human interaction during the menstrual period, including, as is frequently the case in our country, temples. Therefore, Chandrachud J.'s key realization is that the social exclusion of a group of people (who have historically been oppressed) based on concepts of purity and pollution is a manifestation of the kind of "untouchability" that the Constitution intends to establish. Chandrachud J. makes an effort to show how the relevant prescription actually restricts freedom and dignity and should, as a result, be declared unconstitutional by a judge. In order to achieve this, He magnifies the specific occurrence—the exclusion from temple worship—into a larger context—and demonstrates how it is nested inside a larger social and institutional structure that is characterized by hierarchy, subordination, and exclusion. In his opinion, Chandrachud J. emphasizes the structural nature of prejudice and inequality as well as the need to combat it constitutionally. In the end, he notes that:

"*In the dialogue between constitutional freedoms, rights are not isolated silos. In infusing each other with substantive content, they provide cohesion and unity which militates against practices that depart from the values that underlie the Constitution – justice, liberty, equality, and fraternity. Substantive notions of equality require the recognition of and remedies for historical discrimination which has pervaded certain identities. Such a notion focuses on not only distributive questions but on the structures of oppression and domination which exclude these identities from participation in an equal life. An indispensable facet of an equal life is the equal participation of women in all spheres of social activity.*" *(paragraph 117)*

HIJAB CASE

On March 15, 2022, a three-judge bench of the Karnataka High Court upheld the Government Order from February 5, 2022, that prohibited pre-university students from wearing headscarves

(hijabs) or other head coverings to class in a 129-page order in Reshma v State of Karnataka[11]. The petitioners had contested the Order on the grounds that wearing a hijab is an "essential religious practice" in Islam and that, as such, to insist on its removal from educational institutions would be to violate both Article 25[12] of the Constitution's guarantee of one's right of individual's free conscience and that of one's right to practice one's religion. The petitioners further argued that because one's choice of clothing is a form of expression the Order also violates Article 19(1)(a)[13]. The petitioners also said that requiring students to take their hijabs off in order to enter schools constituted gender-based discrimination and violated their right to an education. The Karnataka High Court decision is the subject of a new appeal that has been brought before the Supreme Court, the petition is still in limbo.

HOW DOES THE COURT INTERPRET THE HIJAB AS A NON-ESSENTIAL RELIGIOUS PRACTICE?

According to the Court's analysis of verses from the Quran, Muslim women are not required to wear a headscarf because there is no mention of a punishment for doing so. The Court concluded that donning a hijab "is not a religious purpose in itself, but at most a means to acquire access to public venues." It was held that while wearing a hijab may have certain religious elements, this does not necessarily make it a primarily religious or essential component of Islam. In order to reach its decision, the Court carefully examined opinions issued by other High Courts regarding the question of whether the hijab is essential to Islam. The Court then considered whether wearing a hijab is a matter of conscience guaranteed by Article 25's freedom of conscience. It was held that because conscience is a personal matter, the petitioners could not assert that wearing a hijab is an overt act of conscience without providing specific details of how they came to have that conscience in the first place and how not wearing a hijab would offend it.

[11] *Smt. Reshma v State of Karnataka &Ors.,* (2022) Writ Petition (Civil) No. 2146/2022
[12] Constitution of India, 1950, art.25
[13] Constitution of India, 1950, art.19

FREEDOM OF EXPRESSION AND PRIVACY IS PROTECTED UNDER ARTICLE 19(A) AND 21 OF THE INDIAN CONSTITUTION

On special occasions and depending on the context, the clothing may constitute a "symbolic expression" protected by Article 19(1)(a) of the Constitution., as stated by the Supreme Court in ***NALSA v Union of India***[14]. It is also apparent how the right to privacy is applied in terms of decisional freedom. Noting that the reasons for religious freedom and freedom of expression cannot be clearly separated from one another, the hijab may be worn as a form of symbolic expression because it defends an identity that is beleaguered.

REASONABLE ACCOMMODATION[15]

In situations concerning dress rules and uniforms, the proportionality framework offers the broad intellectual framework within which many jurisdictions throughout the world, including India in the NALSA verdict, have adopted the standard of reasonable accommodation. In order to determine whether a claim for deviating from default is reasonable, the Court must determine whether the State (or private party) can make the requested accommodation without causing the activity in question to lose its distinctiveness. In the case of the hijab, the claim for reasonable accommodation is simple: that the wearing of the hijab can be reasonably accommodated alongside the uniform, without damaging or otherwise impairing the larger public goal of education (particularly a hijab that matches the uniform in colour and is merely draped, like a shawl over the head).

HOW DOES THE COURT RESPOND TO THE ARGUMENT?

1. Since it is a "derivative" right, the dress is weaker than the "fundamental" rights of free expression and privacy.

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[14] *NALSA v Union of India* (2014), AIR 1863

[15] Paras Nath Singh, 'Ban on hijab flies in the face of legal precedents' (*The Leaflet*, 1 June 2022) <https://theleaflet.in/ban-on-hijab-flies-in-the-face-of-legal-precedents/#:~:text=What%20is%20clear%20from%20the,dress%20code%20prohibits%20the%20same> accessed 11 July 2022

2. The classroom is a "quasi-public space," where rights are less effective.

3. The prohibition of the hijab is appropriate in light of points (1) and (2) and the paramount importance of the uniform in a classroom.

INDIRECT DISCRIMINATION

Due to the fact that "the dress code is equally applied to all students, regardless of religion, language, gender, or the like," the Court thus lightly dismissed the petitioners' argument that the prohibition on the wearing of hijabs was discriminatory or arbitrary and that, as a result, Articles 14[16] and 15[17] cannot be claimed to have been infringed. The Court, in this case, rejects the contention that the Government Order violates Article 15(1) of the Constitution by indirectly discriminating against Muslim girls. Instead, it only examined the Order's wording to establish a rule that is uniformly applicable to all pupils. In order to be considered non-discriminatory, a law must not only appear to be neutral on the surface but also not have any discriminatory implications in real-world situations.

The court develops a number of dubious ideas. It claims that enabling students to wear hijabs the same colour as their uniforms would constitute a reasonable accommodation and lead to a feeling of "separation." It asserts that the petitioners' requested accommodation is unreasonable. It continues by stating that the purpose of these rules is to establish "safe places" where dividing lines won't exist. The connections between the ideas of uniformity, social segregation, "divisiveness," and "safe places" result in a fairly unsettling narrative. It calls for both the eradication of diversity and the terrorization of difference by associating difference with divisiveness. The concepts of qualified public space, derivative rights, and substantive rights have the ability to restrict the exercise of fundamental rights. The relationship between the State and society in India may suffer as a result of the excessive stress on uniformity and the mistaken equivalency of homogeneity with secularism. The seeds planted by this decision could lead to a reduction in civil rights in the future, if not contested well against the competent authority.

[16] Constitution of India, 1950, art.14
[17] Constitution of India, 1950, art.15

ERP TEST IS NOT COMPETENT ENOUGH[18]

The arbitrariness and inconsistency of the ERP test have been frequently criticised. The Indian courts are confronted with a severe issue because of this test. If a religious activity was determined to be essential, would it also be exempt from legal restrictions since something essential is inviolable, regardless of how morally wrong it may be under the Constitution? Recently, in 2017, the Supreme Court revised its ruling on the constitutionality of triple talaq on the grounds that it was not an essential Islamic religious practice, as opposed to rejecting it because it violated Muslim women's right to equality. The subjectivity of opinions in these cases limits the constitutionally established right to freedom of religion. In Indian Young Lawyers' Association v State of Kerala, Justice D. Y. Chandrachud noted that "these compulsions, nonetheless, have led the Court to don a theological mantle." He added that judges lack the necessary competence and expertise to determine whether a practice is essential to religion.

Instead of judging religious practices based solely on their constitutionality, courts must interpret religious texts in light of the facts and circumstances of each individual case. This limits the Court's jurisdiction to religious grounds. In 2016, the Haji Ali Dargah[19] was opened to women after the High Court of Bombay found that the Dargah's Trust had failed to present any proof that Islam mandated women to be excluded from dargahs. The ERP test was used by the Apex Court in 2004 to evaluate whether the Tandava dance was a necessary component of the Ananda Marga Ritual. Given the immense religious diversity in India, it is essential to respect each religious community's liberty while choosing an Essential Religious Practice. Furthermore, according to constitutional morality, concepts of reason should not be widely used in situations involving religious rituals.

[18] Rohan Manoj, 'What is an 'essential religious practice', and why hijab didn't make the cut for Karnataka HC' (*The Print*, 21 March 2022) <https://theprint.in/theprint-essential/what-is-an-essential-religious-practice-and-why-hijab-didnt-make-the-cut-for-karnataka-hc/880827/> accessed 15 July 2022

[19] *Dr Noorjehan Safia Niaz And 1 Anr. v State Of Maharashtra* (2014) Public Interest Litigation No. 106/2014

CONCLUSION

Due to its arbitrary nature, the ERP test has recently attracted a lot of criticism. The test appears to have forgotten its original goal after going through several interpretations. In addition, it places a heavy weight on judges who must decide whether a practice is essential to a religion or not. As a result, some sects may feel alienated because a religious activity may have many different meanings and interpretations. A new criterion for detecting religious practices that go against constitutional morals must be created by the judiciary. Instead of classifying a practice as non-essential, this new criteria should declare it unconstitutional since it violates core constitutional clauses.