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The Row of Hijab & Quest for Justice

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This article cautiously delineates the advancements in the hijab case since Karnataka's HC judgement till today. This article critically analyzed the use of the essential religious practice test (ERP) with the precedents in which it was used. It also sights the fashion of how ERP gradually amended its essence and modality. Then a glance and the typical stance on Karnataka's high court judgment flows this article towards its climax which is the split decision of the Supreme court with views of both justices namely Justice Gupta and Justice Dhulia articulately explained. Then at the end, this article consummates with a diligent evaluation of both the views with the author's perspective.

Keywords: *essential religious practices, hijab, split decision, right to religion.*

WAS ERP WORTH USING IN DECIDING HIJAB VERDICT BY KARNATAKA HIGH COURT?

"There is absolutely no material placed on record to prima facie show that wearing of hijab is a part of an essential religious practice in Islam and that the petitioners have been wearing hijab from the beginning," [1]the Karnataka High court held. The verdict came on a bunch of petitions that were filed against

[1] *Aishat Shifa v State of Karnataka* [2022] SCC OnLine 1394

Udupi's PU college on restraining the students to wear hijab. The instrument that was used, in figuring out whether the 'hijab ban' needs to be upheld, was the Essential Religious Practices Test or ERP. This test has been used in paving the way for many landmark judgments in the history of the Indian Judicial System, be it the Triple Talak Case, Sabrimala Temple Case, etc. The genesis of ERP could be traced back, to the speech given by Dr. B.R. Ambedkar regarding the interpretation of Article 25.

He acknowledged that in India, religion is duly mingled in the everyday vigour of Indian citizen's life thus it becomes imperative for the government to ensure that all religious activities withstand the test of Constitutional Morality, and it is at an equal distance from all the religions, for the public good. ERP test derives its sole basis and stature from the judicial interpretation, which implies that a practice that was earlier essential by a particular judge in a certain case could turn vague and non-essential by another judge in some other case. It poses a serious question on overreaching judicial powers, as the onus is on judges to decide the sanctity and essentiality of customs practised since time immemorial. On one end of the page, article 25 and 26 protects matters related to customs, traditions, beliefs, and doctrines that forms the integral and fundamental part of the religion, and on the other, the test of ERP decides which customs, traditions, beliefs, and doctrines have to be considered as integral and essential.

This test considering speech and interpretations by Dr. B.R. Ambedkar, was intended to distinguish activities of essentially religious or in essence religious nature from one's of secular nature, and to protect former ones but gradually this interpretation entered into a phase of evolution and ended up distinguishing between, what we observed in Hijab Case, essential religion practices from those of non-essential ones. The modality used in the differentiation was the ERP test, which signifies the judicial system barging in, which could in turn threaten the very spirit of secularism. The most optimal way to keep secularism and religion well in place is the utilization of the doctrine of Principled Distance, which permits only the required intervention to withstand the stance of constitutional morality and judicial neutrality.

PRECEDENTS WITH ERP IN FRAME

One of the first specimens, when words of Dr. B.R. Ambedkar came into an instrumentality of Indian judiciary's discourse, was in the *Madras v Shri Lakshmindar Thirtha Swamiyar of Shri Shirur Mutt*[2], where the question arose that whether Madras Hindu Religious and Charitable Endowments Act, 1951[3] could or not control the management of Shirur Mutt, a monastery in Udupi, which heralded the way of giving importance to religious tenets and doctrines to ascertain what constitutes the essentially religious practice. The concept that was applied in Shirur Mutt Case, was to draw a line between what is essentially religious and secular but this course of interpretation was short-lived as the differentiation soon got evolved into a demarcation between essentially religious and essential religion by Allahabad High Court judgment of 1957, which gave a verdict that bigamy cannot be considered as an integral and quintessential part of Hindu religion, this dimension of judicial interpretation to analyze the essentiality of religious practice was further upheld in Supreme Court judgment of 1958 holding that sacrifice of a cow on the occasion of Bakra Id is not an essential religious practice for Muslims. These cases facilitated the way for a multitude of other cases on a similar judicial dimension, like the Tandava Dance Case, Haji Ali Dargah Case, Triple Talaq, Sabrimala Mandir Case, and the latest the Hijab Ban Case.

KARNATAKA HIGH COURT STANCE ON HIJAB

In the Karnataka High court judgment, it was held that wearing the hijab does not constitute an essential religious practice under Islam- which means it can be regulated by the state. This judgment includes certain discrepancies as the application of the ERP test turned the focus of the bench to determine whether the hijab is an essential practice of Islam, rather than directly taking the right to freedom of speech and expression and the right to equality into consideration. The court used the archaic model to investigate whether there is any Quranic injunction that

[2] *Sri Lakshmindra Theertha Swamiar v The Commissioner* [1952] IMLJ 557
[3] *Commissioner Of Hindu Religious & Charitable Endowments v U. Krishna Rao & Ors* [1970] AIR 1114

supports the view of hijab being an intrinsic element in Islam. Thus, the application of tests curtailed individual agency and rights rather than protecting religious practices.

The Hijab judgment and the precedents set on finding the essentiality of religious practice have received a lot of criticism, due to the arbitrary nature of the ERP test. This test gives overreaching power in hands of judges to decide on the faith and customs of people, which as a result sows the feeling of alienation among the people of that sect. The need is to make the approach centric to constitutional morality, which would enhance secular nature by not deeming any activity as non-essential but as unconstitutional.

SPLIT DECISION & SPLIT HORIZONS

ERP, a modality for deciding which religious practice is essential to religious or non-essential, took a back seat in the recent verdict of the Supreme Court in *Aishat Shifa v the State of Karnataka*[4]. Supreme Court passed a split verdict on a batch of appeals challenging the Karnataka High court judgment which held that the Hijab is not an essential practice on the basis that there is no specific Islamic injunction that articulates the Hijab as a practice necessary to Islam. The Supreme Court bench of Justice Hemant Gupta and Justice Sudhanshu Dhulia had a divergence of views on the issue of whether to allow the Hijab in school or upheld Karnataka's Court judgment, which resulted in a split decision, letting this issue queued-up on Chief Justice of India's desk. It was quite stunning to observe that in the split decision of the Supreme Court, the ERP test wasn't the consideration, instead, Freedom and Discipline played the leading role, where Justice Gupta batted for Discipline and Justice Dhulia defended Freedom of Choice as an intrinsic and necessary element to be taken cognizance of.

Justice Hemant Gupta in his judgment observed that hijab may be a religious practice, essentially religious practice or it may be social conduct for women of the Islamic faith, but sighted that, the importance of discipline and secularism is foremost and superior to all others[5].

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[4] Aishat Shifa (n 1)

[5] Ashok KM, 'Permitting One Religious Community To Wear Their Symbols Would Be Antithesis To Secularism: Justice Hemant Gupta In Hijab Ban Case' (*Live Law* , 13 October 2022) <https://www.livelaw.in/top-stories/supreme-court-hijab-case-justice-hemant-gupta-judgment-211565> accessed 15 October 2022

He even took an instance of the Hijab being considered an essential religious practice of Islam but questioned the point that whether students should be allowed to wear or carry their religious beliefs and symbols and profess their religion in a 'secular' school managed out of state funds. He even remarked that students are free to wear hijab or carry any other religious symbols in a school that permits it but sighted that the school in the issue, comes within the state's jurisdiction, thus the state has the authority to disallow apparent symbols of religious beliefs. Justice Hemant Gupta dismissed all the 26 appeals filed against Karnataka High Court and delivered that 'Secularism applies to all citizens, therefore, permitting one…community to wear their religious symbols would be an antithesis to secularism.' Reading within the lines of his judgment, it is quite clear that discipline in form of uniform is embraced, he mentioned that uniform fosters equality and a sense of oneness among all students irrespective of their cultural, social, economic, and religious distinctions.

Justice Sudhanshu Dhulia on the other hand set aside the Karnataka High Court judgment and observed that the entire concept of essential religious practice is not pertinent to the present case. "The High Court took a wrong path. It is ultimately a matter of choice and Article 19(1)(a) [6]and 25(1). It is a matter of choice, nothing more and nothing less," he said. He observed that wearing Hijab or not wearing the same, is all about one's choice, about article 19(1)(a). He criticized the Karnataka High court for delving into the issue from the angle of Essential Religious Practice even when the protection by petitioners was asked under Article 25(1)(a). [7]He observed that any religious practice unless not against the public order, morality, and health, is a matter of faith and conscience regardless of being essential or non-essential, thus should not embark on any debate of essentiality. He backed this argument of freedom of conscience, with the Bijou Emmanuel verdict of 1986, where the Supreme Court bench of Justice O Chinnappa Reddy and M M Dutt held that children could not be forced to sing the National Anthem as it violates their fundamental right to religion. SC further noted in light of Article 25(1)(a), the real test of true

[6] *Shobhaa De v Maharashtra Legislature* [2015] 16 SCC 446
[7] *Seshammal v State of T.N.* [1972] 2 SCC 11

democracy, is the ability where even an insignificant minority to find its identity under the country's Constitution.[8]

The most integral basis of Justice Dhulia's judgment was the education of the girl child and whether the judiciary can make her life better. He observed that in rural or in semi-rural areas, it is a luxury for a girl to be allowed to go to school, thus not allowing her to profess her faith, which is more essential to her family than her schooling, is like putting an embargo on her education. The fundamental point of contradiction that Justice Dhulia has with Justice Gupta is the point of emphasis which for Justice Gupta is uniform and discipline and for Justice Dhulia, as he mentioned: "not discipline at the cost of freedom, at the cost of dignity", is the freedom of speech and expression. Justice Dhulia pictures a classroom in which students should embrace a sense of fraternity by expressing their differences instead of shadowing them within the colour of the uniform.

CASE ANALYSIS

This split decision by Supreme Court opened the door for vagaries of horizons within the panoramic view of constitutional and societal understandings of law. The split decision by the SC bench holds a ripple effect in and around our civil dimensions. Since Karnataka's bench decision, our society got split into two groups, one on the same side of the verdict and the other one on the opposite bank. This decision is acting like a coin, having two different aspects and faces, where one side is endorsing a particular wave and the other side, the other wave. It is neither right nor wrong in the decision of the Supreme Court, nor right or more right. Both decisions have their pragmatic backings. In Justice Hemant Gupta's view, secularism and discipline form the vital element in deciding whether Hijab should or not be allowed. He is unerring in observing that the uniform instills a sense of oneness and unity among students and ultimately fosters secularism. No judgement had ever prevented or questioned the wearing of the hijab or any other religious symbols, but it is even quite pragmatic to question the same,

[8] *Bijoe Emmanuel & Ors v State Of Kerala & Ors* [1987] AIR 748

when a school, which is secular and is funded by the state, comes into the picture. The hijab not only differentiates but also violates the feeling of fraternity.

This concept of Fraternity holds a completely different understanding given Justice Dhulia. According to Justice Dhulia, the fraternity will be fostered by wearing of Hijab, as this would nurture a sense of individuality by embracing differences. Justice Dhulia, take education as consideration for negating Karnataka's HC judgment, but if a deeper analysis has to be done, then it is very natural to question that, if my Hindu family allows me to go to school only when I do *ghoonghat* or maybe when I wear a *churidar lehnga*, then will the judicial system step in, and support me in completion of my education or will then judiciary be pulling out the angle of the *patriarchal society* or *uniform* and will contest that *ghoonghat* represents how a woman is under an obligation of patriarchal society to wear the same and will try to abrogate the practice of *ghoonghat* in sham of patriarchy and *churidar lehnga* in the shade of uniform and discipline?

The point of amazement in the present scenario is that, even after Karnataka HC's judgement which adjudicated that Hijab is not an essential tenet in Islam, the patriarchal factor which keeps on popping now and then, is nowhere in the picture. Proponents of the 'Hijab in school', believe that allowing Hijab to be worn in school, will enhance the beauty of our society and make our society work like an orchestra with many voices but is there any guarantee of these voices or maybe melodies not turning into noise and shrills by the passage of time? The answer hangs in the balance, and all the eyes are now turned to Chief Justice for the next, perhaps the final verdict in the row Hijab Case which will hopefully mellow the pandemonium in the aura.