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EXAMINING THE DOCTRINE OF THE ESSENTIAL RELIGIOUS PRACTICES TEST: A CASE FOR ITS LIMITATION.

AUTHORED BY - CVP RISHIK

Abstract

The focus of this paper is on how the Supreme Court of India has engaged in a delicate task of determining whether a specific religious practice warrants constitutional protection under Article 25(1) through the use of the judicial doctrine of 'essential religious practices.' By examining a series of court rulings, it highlights how the courts have made unwarranted assessments about the validity of religious practices, leading to adverse consequences for religious communities and minorities. Consequently, the question of 'what is essentially religious' has transformed into a consideration of 'what is essential in religion.' The court lacks the authority and expertise to ascertain whether a religious practice is genuinely 'essential.' State interference is only justified based on constitutionally prescribed limitations such as 'public order,' 'morality,' and 'health.' The primary principle should be minimal state intervention but maximum protection.

Keywords- essential religious practice, religion, secularism, constitution of india

Introduction

In *Aishat Shifa v State of Karnataka*[1] in October 2022, the Supreme Court came up with a split ruling concerning the right of Muslim female students in state-funded educational institutions to wear the hijab. A notification from the state government had mandated schools and pre-university colleges to enforce a strict uniform policy without allowing for any religious practices to be observed by female Muslim students. Consequently, several institutions prohibited Muslim girls from wearing headscarves or hijabs, prompting a legal challenge on the grounds of religious freedom. The Karnataka High Court upheld the order, leading to a split verdict by the division bench in the Supreme Court, with Justice Hemant Gupta supporting its validity and Justice Sudhanshu Dhulia deeming it unconstitutional.

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Notably, both justices refrained from employing the essential religious practices (ERP) test, the established legal benchmark for matters related to religious freedom, to support their stances. This implies that neither opinion was founded on whether wearing a hijab constitutes an essential or integral aspect of Islam deserving constitutional protection. Particularly significant is Justice Dhulia's departure from established jurisprudence, as he explicitly disregarded the ERP test in cases where an individual's rights are curtailed by state regulations. With the case now referred to a larger nine judge bench, the Supreme Court has an opportunity to reassess or restrict the applicability of the ERP test, which has faced recurrentcriticism from legal scholars on multiple fronts.

This paper aims to initially outline the content and development of the ERP test. Subsequently, it will look at how it has been applied in various cases post independence.Thirdly, it will lay arguments in favor of abandoning the test. It will then discuss how Justice Dhulia's opinion strikes a balance by limiting the ERP test's application while preserving its utility. The paper will conclude by proposing alternative approaches for consideration as a nine-judge bench scrutinizes the ERP test, among other issues.

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[1] *Aishat Shifa v State of Karnataka,*(2022) SCC OnLine SC 1394

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Emergence and evolution

The Supreme Court's establishment of the Essential Religious Practices (ERP) doctrine as a mechanism to confine religious freedom to essential matters is well-documented. Nevertheless, a bare reading of the Constitution reveals the absence of the term "essential" within it. The right to profess, practice, and propagate religion is granted broadly under article 25. So, how did the concept of ERP come into existence? Insight can be gleaned from the Constituent Assembly Debates, wherein a speech delivered byAmbedkar provides clarification.[2]

Ambedkar's discourse indicated that the religious fabric in India is so pervasive that it permeates every facet of life, posing a potential obstacle to social progress if all religious aspects were safeguarded without distinction. In order to enable social legislation, he advocated for a clear differentiation between inherently religious activities and those that have superficial religious overtones. In essence, the term "essential" was utilized to segregate the religious from the secular, initially aligned with the Supreme Court's interpretation of the ERP doctrine.

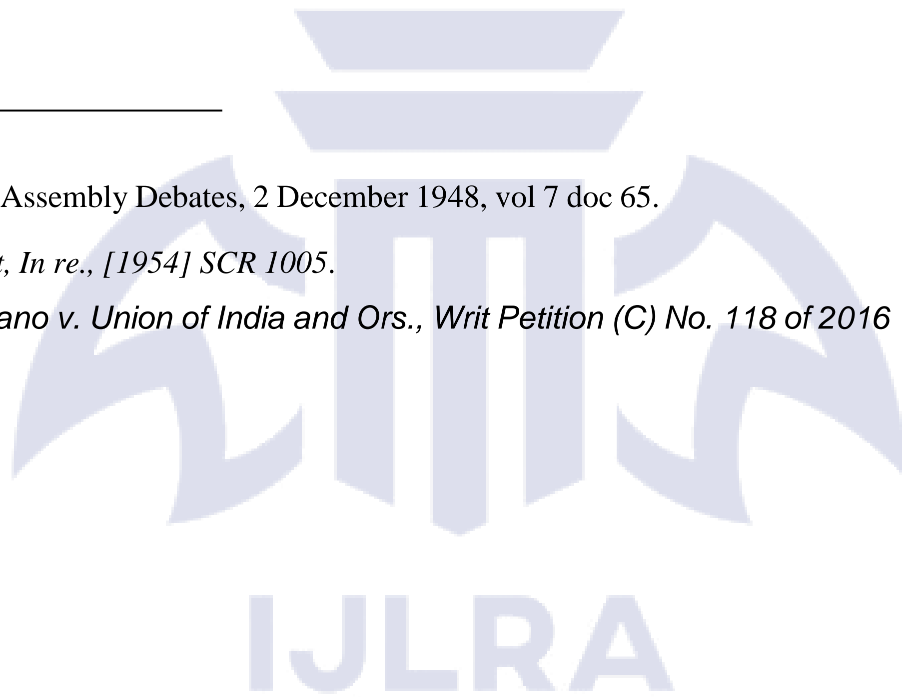
In its initial rulings on the validity of state intervention in religious endowments[3], the Court emphasized that secular activities associated with religion but not constituting an essential part of it could be subject to state regulation. However, the Court underscored the need to respect a religion's internal doctrines when determining whether a matter was inherently religious or secular. For instance, if a sect's tenets mandated specific ceremonies with secular components, these were considered inherently religious, even if they involved monetary transactions or the employment of religious officials.

This system elucidates the unique model of Indian secularism. While respecting the relative autonomy of religious communities, the state's authority to legislate on religious endowments remained unchallenged.However, subsequent judgments eroded this understanding. Contrary to Ambedkar's premise, the term "essential" underwent a notable transformation, as evident in the Supreme Court's ruling on cow slaughter.

The Court ruled that the practice of sacrificing cows during Bakrid was not an ERP, as it was deemed optional based on an interpretation of Islamic religious texts. This signaled a shift from

analyzing the nature of a practice to assessing its significance within the religion. This shift necessitated the Court to delve into substantive interpretations of religious doctrines, assuming the role of a "theologian." This interpretation of ERP was subsequently applied to numerous cases, serving as a tool for initiating religious reforms in line with overarching state laws.

An exemplary instance of this was seen in the Shayara Bano case[4], where the Court assessed the constitutionality of triple talaq, determining it to be non-essential based on an analysis of Islamic jurisprudence. This re-interpretation of what constitutes an essential practice aimed at promoting gender-based reforms within the religion. Moreover, the Court extended its authority to rationalize and



[2] Constituent Assembly Debates, 2 December 1948, vol 7 doc 65.

[3] *Shirur Mutt, In re., [1954] SCR 1005.*

[4] *Shayara Bano v. Union of India and Ors., Writ Petition (C) No. 118 of 2016*

purge religious practices deemed superstitious or extraneous, as seen in the Durgah Committee case[5] and subsequent instances where practices were dismissed as "unessential" or "superstitious."

These reformative initiatives led the Court to ban animal sacrifice in temples, allow non-Brahmins to serve as temple priests, and most notably, overturn a religious prohibition on the entry of women in Sabarimala. Consequently, the Court assumed the power to dismiss practices it deemed non-essential or superstitious, signaling a substantial expansion of its authority. The following sections seeks to understand the transformation of the Supreme court's powers.

What is erp, how is it being used

The ERP (Essential Religious Practices) test, employed by the Indian judiciary, serves as a measure to ascertain whether a specific religious practice or custom qualifies as an "essential or integral part" of a religion, warranting protection under Article 25 of the Indian Constitution, which enshrines the fundamental freedom of religion.

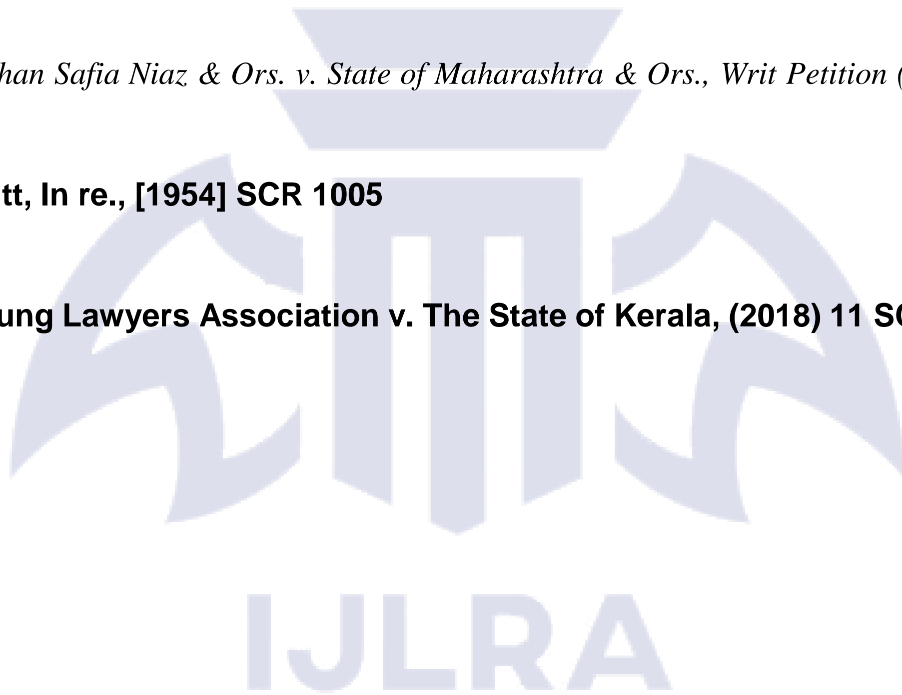
Essentially, this means that even if a practice is religious in nature, it may not receive constitutional protection if it fails to meet the criteria of being an "essential or integral part" of the religion. The ERP test has become ingrained in Indian jurisprudence over time, evolving into a two-step process that the judiciary follows in cases related to religious freedom.

Initially, the Court examined whether the alleged violation of religious freedom pertains to a religious or secular practice or custom. If the practice is deemed to be secular, involving financial or administrative aspects, it falls outside the protection of Article 25. This was established in the Shirur Mutt case[6], wherethe Supreme Court ruled that the state could regulate the administration of a religious institution to address financial mismanagement, as such matters were considered secular and thus subject to state intervention.

Subsequently, if the practice under consideration was found to be religious, the Court proceeded to determine whether it constitutes an "essential or integral part" of the religion. Notably, this stage of inquiry involves the Court's interpretation of religious doctrines to establish the essentiality of the practice. In the Shirur Mutt case, Justice Mukherjea[7] emphasized that the determination of what constitutes an essential part of a religion must be derived from the religion's own doctrines. This marked a crucial juncture that enabled the courts to delve into religious matters and assume the role

of arbiters in religious affairs.

In contrast, the "assertion" test employed in the United States, a plaintiff could simply assert the religious nature of a practice without further scrutiny, the Indian courts employ the concept of "essentiality" to scrutinize religious practices, often by examining religious texts or the historical context of a religion or religious organization. For instance, in the *Indian Young Lawyers Association v The State of Kerala*[8] case, the Court delved into the legend of Lord Ayyappa and the history of the Sabarimala temple, concluding that the restriction on women of menstruating age from entering the temple did not constitute an essential



5 *Dr. Noorjehan Safia Niaz & Ors. v. State of Maharashtra & Ors., Writ Petition (L) No. 2732 of 2014*

6 **Shirur Mutt, In re., [1954] SCR 1005**

7 *Supra*

8 **Indian Young Lawyers Association v. The State of Kerala, (2018) 11 SCC 1**

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religious practice and therefore was not protected. Similarly, in the case of Shayara Bano v Union of India, the Court determined, after examining the Hanafi school of Islamic jurisprudence, that the practice of triple talaq was not an essential religious practice and hence lacked constitutional protection. Justices Nariman and Joseph based their legal opinions on religious texts,highlighting that while triple talaq may be permissible in law, it was considered sinful by certain scholars, rendering it non-essential to the religion[9].The ERP Test essentially entails the judiciary interpreting the theological aspects of religious practices to assess their essential nature within the scope of constitutional protection.

Criticisms

The ERP (Essential Religious Practices) test has faced significant criticism for its implications on the interpretation of religious customs and practices by the courts.

One primary critique revolves around the courts assuming the authority to rationalize or sanitize religious beliefs, essentially shaping religion to align with modernist state ideals rather than acknowledging it as professed by its adherents. This stance of the courts could lead to deeming certain religious practices as non-essential and thus not deserving of constitutional protection. Notably, this approach has been challenged for its perceived overreach and lack of legitimacy, as the judiciary's expertise in theological matters has been questioned, and concerns have been raised about whether the Constitution grants the judiciary the mandate for internal reinterpretation or reformulation of religious practices.[10]

The ERP test's tendency to prioritize mainstream religious texts over local texts and customs has raised concerns about potentially sidelining marginalized traditions within a religion, resulting in a portrayal of the religion devoid of its internal diversity. Critics argue that the contextual interpretation of religious conduct, which takes into account the lived experiences of adherents within specific contexts, is often overlooked by the courts. Furthermore, the doctrine of separation of powers comes into play, suggestingthat the judiciary's assumption of power in this domain encroaches upon the domain of the Parliament, which is constitutionally empowered to bring about social reforms.[11]

It is observed that the ERP test has led to increased state regulation over Hinduism, with the

judiciary treating the Constitution as a charter for reforming Hinduism. This reformative approach has been criticized for its tendency to cleanse Hinduism of perceived superstitions and to define "religious error" and "religious truth" in a modern and rational manner, thereby delegitimizing popular Hindu practices as mere superstitions. The courts' validation of an extensive regulatory framework for Hindu religious institutions has led to the government taking over the management of various Hindu institutions and placing them under statutory boards in the name of regulatory control, essentially "nationalizing" religious endowments on a large scale.[12]

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[9] **Shayara Bano v. Union of India and Ors., Writ Petition (C) No. 118 of 2016.**

[10] *Bhatia, Gautam (2016): "Freedom from Community: Individual Rights, Group Life, State Authority and Religious Freedom under the Indian Constitution," Global Constitutionalism, Vol 5, No 3, pp 352–82*.

[11] *Supra*

[12] *Shirur Mutt, In re., [1954] SCR 1005*

Additionally, state regulation is evident in the temple entry laws made under Article 25(b) of the Constitution, allowing the state to open temples to all sections of Hindus. The courts have favored such laws, even if they infringe on the rights of religious denominations to manage their own religious affairs under Article 26(b). Moreover, the courts have rejected the self-identification of certain sects as
"non-Hindu" by interpreting them as part of the broader Hindu scripture.[13] This approach has been criticized for its tendency to impose a specific vision of Hinduism, considering it a rational and progressive religion, and to impose this vision on Hindu organizations and sects that may not align with this interpretation.[14]

Although initially cautious in applying a reformative approach to Islam or Islamic organizations, the courts, under the Chief Justice Gajendragadkar, have used the essentiality test to rule against practices considered essential to Islam. This trend has culminated in the courts deeming practices such as "praying at a mosque," "keeping a beard," and "triple talaq" as non-essential to Islam.

Why the erp test must be discardedJudicial control of religion

The legal discussion surrounding the ERP (Essential Religious Practices) has been presented as a rational approach allowing the court to define the essence of a religion. However, in practice, it has enabled a manipulated "reform" of religion that aligns it with prevailing state norms,It has established a standardized criterion of regulation to align it with state norms. While it may seem that such a discourse has yielded positive results in specific instances, such as addressing issues of caste or gender discrimination, the court's involvement in doctrinal matters and the imposition of its vision of what religions should embody has undermined the diversity of religions.[15]

While India's unique secular traditions permit some degree of state involvement in religious affairs, this must be balanced with the autonomy of religions. Governing religions through the selective view of age-old customs through a judicial lens, can exacerbate conflicts between different religious groups and internal rivalries within religious communities.
Thus, in a context where the religious and the secular are intricately intertwined, it is crucial to recognize the authority and impact of religions in both tangible and theoretical terms.[16]

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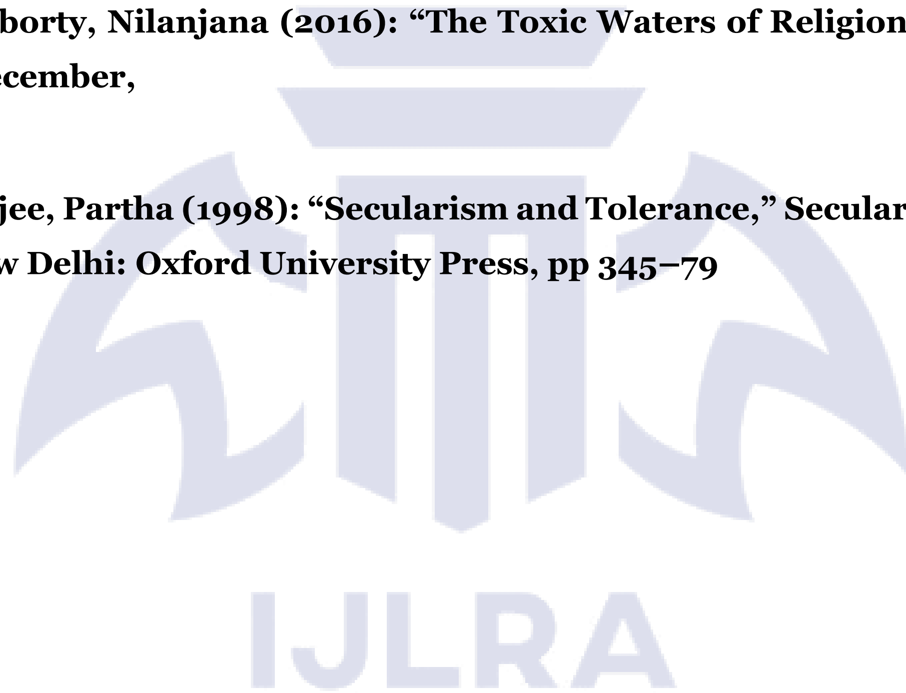
UNIVERSALIZATION OF DOMINANT CULTURAL NORMS

ERP Doctrine has universalized certain dominant values of religions. This universalization has hindered the appreciation of unique cultural norms within different religious communities. The court is incapableof appreciating the cultural values within a religion. When it defines an essential religious practice, the cultural sensibilities of the judges and the parties may significantly differ. The Sabrimala judgment is a



[13] *Indian Young Lawyers Association v. The State of Kerala, (2018) 11 SCC 1*

[14] Chakraborty, Nilanjana (2016): "The Toxic Waters of Religion," DNA, 15December,

[15] *Supra*

[16] Chatterjee, Partha (1998): "Secularism and Tolerance," Secularism and Its Critics,New Delhi: Oxford University Press, pp 345–79

classic example, where the dominant cultural sensibilities prevailed over the practices of culturally specific religious groups.[17]

Justice dhulia's opinion

While scholars criticize the ERP test, the Constitution's potential for reform is recognized, prompting thequestion of whether a balance can be struck to preserve religious freedom while upholding the ERP test's reformative function.

The ERP test proves effective in cases where the court protects individuals within a religious community from their own community's rights violations, as seen in instances like triple talaq and Sabarimala.

However, when a state action is deemed violative of an individual's or a community's religious freedom, the ERP test may not suffice. The subjective nature of religious practices makes it challenging to determine their essentiality, as observed in past cases where the court's interpretations have led to
non-essential practices being subject to state regulation. In light of this, Justice Dhulia's perspective in
Aishat Shifa gains prominence for safeguarding religious freedom against state actions.

Justice Dhulia argues that when an individual's religious freedom is restricted by the state, the ERP test should not be applied. The Constitution allows the state to interfere with religious practices only on specific grounds such as public order, health, morality, or violation of fundamental rights, regardless of the practice's essentiality. Justice Dhulia advocates the "assertion" test, whereby the court must protect a religious custom the moment an aggrieved party asserts its religious nature, placing the burden on the state to justify any regulations conflicting with such customs.[18]

Citing the Bijoe Emmanuel case,[19] Justice Dhulia emphasizes that the state must provide valid justifications for any action that curtails religious customs. Furthermore, he underscores the importance of "fraternity" in accommodating pluralism within the constitutional framework. Although his observations focus on individual rights, they can be extended to protect the religious rights of communities against state actions.

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Justice Dhulia's viewpoint contrasts with previous judgments where the ERP test was used not only for individual rights against the community but also against state actions. Despite his legal limitations, hisperspective may find support as similar issues await consideration by a larger Supreme Court bench.

Notably, Justice Dhulia's approach does not diminish the reformative power of the ERP test, which is often invoked by individuals or groups seeking to eliminate discriminatory or abusive religious practices within their community.[20]

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[17] *Indian Young Lawyers Association v. The State of Kerala, (2018) 11 SCC 1*

18 *Aishat Shifa v State of Karnataka,(2022) SCC OnLine SC 1394*

19 Bijoe Emmanuel & Ors v. State of Kerala & Ors, 1986 AIR 946, 1986 SCR (2) 518

20 *Aishat Shifa v State of Karnataka,(2022) SCC OnLine SC 1394*

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Justice Dhulia's application of the ERP test modifies the existing framework without undermining it, ensuring legal stability and aligning with legitimate judicial lawmaking. Despite his position on a smaller bench, his perspective may pave the way for the Supreme Court to effectively protect religious freedom from unwarranted state regulation without compromising its role in bringing about necessary reforms.

Conclusion and way forward

Eliminating the ERP test entirely or constraining it based on Justice Dhulia's rationale both present distinct sets of concerns. Considering the significant role of religion in Indian societies and the reformative mission of the Constitution, it appears improbable that the courts would completely abolish the ERP test. Nevertheless, given the criticisms leveled against the ERP test, constraining its scope appears to be a more legally prudent approach for the Court. This prompts the question of how the Court can restrict the application of the ERP test. Justice Dhulia offers a balanced alternative. However, Justice Dhulia's balanced approach is not the sole means to restrict the ERP test. For instance, Jaclyn Neo (2018)has suggested four "qualities" that the ERP test must integrate to address its shortcomings. Although Neo's observations pertain to courts in Singapore and Malaysia where the ERP test is utilized in cases involving freedom of religion, there is no reason why the Indian courts cannot benefit from these insights. This paper aims not to propose an ideal formula for limiting the ERP test while preserving its functionality, but to provide a general overview of the options within the realm of Indian jurisprudence available to the Court to tackle the issues arising from the ERP test. Whether the Court should adopt Justice Dhulia's approach remains to be seen, but one thing is clear: the Court must thoroughly reconsiderthe scope of the ERP test's application, while remaining mindful of the potential ramifications of any approach it might undertake.