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**RIGHT TO WEAR RELIGIOUS CLOTHING IN PUBLIC PLACES AND THE EXCEPTIONS TO THE ESSENTIAL RELIGIOUS PRACTICE: A STUDY OF ARTICLE 25 OF THE INDIAN CONSTITUTION****AUTHOR** – AAKARSH MADHU PILLAI, STUDENT AT CHRIST (DEEMED TO BE UNIVERSITY)**BEST CITATION** – AAKARSH MADHU PILLAI, RIGHT TO WEAR RELIGIOUS CLOTHING IN PUBLIC PLACES AND THE EXCEPTIONS TO THE ESSENTIAL RELIGIOUS PRACTICE: A STUDY OF ARTICLE 25 OF THE INDIAN CONSTITUTION, INDIAN JOURNAL OF LEGAL REVIEW (IJLR), 4 (1) OF 2024, PG. 357-362, APIS – 3920 – 0001 & ISSN – 2583-2344.**ABSTRACT**

This research paper investigates the legal and practical dimensions of the right to wear religious clothing in public places in India, focusing on the provisions of Article 25 of the Indian Constitution. The study explores the intricate balance between religious freedoms and state regulations, particularly in the context of exceptions to essential religious practices. Central to the analysis is the examination of the Essential Religious Practices (ERP) Test, a judicial mechanism used to determine the fundamental nature of religious practices and their protection under Articles 25 and 26 of the Constitution. Through a qualitative research approach, this paper delves into the evolution of the ERP Test through landmark court judgments, highlighting its implications for religious autonomy and state intervention. The research critically evaluates the impact of exceptions to essential religious practices on the right to wear religious clothing in public spaces, with a specific focus on recent controversies such as the hijab ban in educational institutions. By dissecting key legal and practical considerations, the study sheds light on the challenges faced by religious minorities in exercising their faith within a secular framework. Furthermore, the paper explores the constitutional framework of secularism in India, emphasizing the state's commitment to treating all religions equally and protecting the rights of religious minorities. Drawing on significant cases like *S.R. Bommai v. Union of India*, the research underscores the importance of religious tolerance and equal treatment of diverse religious groups in upholding the principles of secularism. Through a comparative analysis of exemptions granted to various religious communities nationally and internationally, this study aims to provide a comprehensive understanding of the broader implications of religious freedoms and restrictions. By considering the cultural, social, and legal dimensions of religious practices, the research contributes to the ongoing discourse on individual rights, religious autonomy, and state intervention in a diverse society.

Keywords: Essential religious practices, ERP Test, secularism, religious minorities, religious autonomy, cultural implications.

**INTRODUCTION**

Article 25 of the Indian constitution is a fundamental right guaranteed by the state which confers on both citizens as well as non citizens within India. Article 25 of the Constitution guarantees the freedom of conscience and the right to freely

profess, practice and propagate religion<sup>739</sup>. The article further states that rules governing secular activities related to religion practises, whether they be political, economic, or otherwise, have the potential to be made by the State<sup>740</sup>. This right can not be termed as absolute since the state has the power to impose “reasonable restrictions”. The term

<sup>739</sup> Constitution of India, [https://www.constitutionofindia.net/constitution\\_of\\_india/fundamental\\_rights/articles/Article%2025](https://www.constitutionofindia.net/constitution_of_india/fundamental_rights/articles/Article%2025)

<sup>740</sup> Ibid.

reasonable restrictions has not been defined under this article but article 25 is subject to public order, morality and health. The Essential Religious Practices (ERP) Test is a tool used by the courts in India to determine if a practice is fundamental to a religion. If a practice is deemed essential, it gets the protection of Articles 25 and 26 of the Indian Constitution, which guarantee the freedom of religion.

The term 'secularism' which was amended into the preamble by the 42<sup>nd</sup> constitutional amendment in 1976 incorporating secularism into the Preamble of the Indian Constitution was done primarily to ensure that the Indian state would not be associated with any specific religion and would treat all religions equally. The rights of religious minorities were also seen to be safeguarded by secularism. In the landmark case of *S.R Bommai v Union of India*<sup>741</sup> the Supreme court stated that "religious tolerance and equal treatment of all religious groups and protection of their life and property and of the places of their worship are an essential part of secularism enshrined in our Constitution."<sup>742</sup> The Court's ruling has been upheld in subsequent cases, and it has helped to protect the rights of religious minorities in India.

As the hijab ban case is posted for a later day to a larger bench a critical question arises: "What are the key legal and practical considerations surrounding the right to wear religious clothing in public places in India as outlined in Article 25 of the Indian Constitution, and how do exceptions to essential religious practices impact this right?"

This research paper aims to delve into these questions, exploring the potential legal, social, and cultural implications that could arise from implementing a ban on the hijab might entail. This paper concludes that the ban is ultra vires Article 14 and Article 25 of the Indian Constitution.

The methodology followed will be a qualitative research method to ensure a comprehensive

analysis of the subject matter including a detailed study of how judiciary has interpreted Article 25 and has evolved the essential practices test through important landmark judgements decided till date. This research paper also outlines the shortcomings of the essential practices test. and a comparative analysis of similar exemptions, if any, provided to other communities within India and internationally. This will help in understanding the broader context and implications of such exemptions.

### **A Study of Article 25 and Essential Religious Practices**

Article 25 of the Indian constitution guarantees 'freedom of conscience and free profession, practice and propagation of religion'<sup>743</sup> while as Article 26 provides for the 'freedom to manage religious affairs.'<sup>744</sup> These two fundamental clauses pertaining to religion have frequently raised the question of what constitutes a religious and secular divide. Therefore in order to provide a clarity on this question the courts have laid out a test named 'essential religious practice'. The essential religious practice test determines the validity of certain practices that are present in the society in the name of religion. This test was first laid down by the court in the case of *Shirur Matt (1954)*<sup>745</sup> in this case, the court first made a distinction between religious and secular activities. In this landmark, the Court clarified what it meant for a practise to be considered "essentially religious" to a particular sect if it is one of its core principles. In order for these practises to be protected under Article 26(b) of the Constitution, the Court expanded the definition of religion by making it clear that a practise is still religious even if it involves financial outlays, the hiring of priests and servants, or the use of marketable goods.<sup>746</sup>

<sup>743</sup> Constitution of India, [https://www.constitutionofindia.net/constitution\\_of\\_india/fundamental\\_rights/articles/Article%2025](https://www.constitutionofindia.net/constitution_of_india/fundamental_rights/articles/Article%2025)

<sup>744</sup> Ibid.

<sup>745</sup> *Commissioner, Hindu Religious Endowments, Madras vs. Sri Lakshmindra Thirtha Swamiar of Sri Shirur Mutt*, AIR 1954 SC 282.

<sup>746</sup> Ibid.

<sup>741</sup> *S.R. Bommai v. Union of India*, (1994) 3 SCC 1

<sup>742</sup> Ibid.



Transition From 'ESSENTIALLY RELIGIOUS' To 'ESSENTIAL TO RELIGION'

The court applied a similar test in the case of *Sardar Syedna Taher v. State of Bombay*<sup>747</sup> where the court underlined that the standards and doctrine of the faith should be used to establish what constitutes an Essential Religious Practise. The courts then changed the standard, realising how crucial it was to move from "essentially religious" to "essential to religious." The courts came to such a conclusion from a previously decided landmark case of *Mohd Qureshi v. State of Bihar*<sup>748</sup> the petitioners in this case the petitioners disputed as a complete ban on cow slaughter, which would have prevented them from performing a sacrifice, as they claimed was a religious ritual and practise mandated by the Holy Quran. Because it had not been proven that the sacrifice of cows on the holy holiday of Bakra-Eid is an obligatory or vital aspect of Islamic religion, the Court in this case held that restrictions on the slaughter of cows did not violate the petitioner's freedom to practise their religion.

### Static and Permanent Aspects of Religion

In the landmark case of *Anand Margi (1983)*<sup>749</sup> where the essential practices test was invoked by court to determine whether the practice of the 'Tandava Dance' in public falls under the ambit of essential practices of the religion. The Court ruled that it was not an essential religious practice as the practice was of recent origin.<sup>750</sup> It observed that the Anand Margi order was established in 1955 and it was only in 1966 that tandava dance was introduced as a part of religious rights of the order. The Court based its ruling in part on the fact that Anand Margi's holy scripture, "carya carya," does not list tandava dancing as a required religious practise. However, the tandava dance was

mandated as a compulsory rite in the later updated edition of the carya carya. In a later judgement, The Hon'ble Calcutta High Court concluded that "taking out Tandava dance in public carrying a skull, trident etc is an essential part of Ananda Margi faith and the Commissioner of Police could not impose conditions to it.

The decision was further appealed to the supreme court where a 2-1 majority decision overturned the ruling. It stated that the High Court "had the incorrect idea that a fundamental component of religion could be changed at any time in the future and that 'there cannot be any additions or subtraction' from fundamental components." It is only 'such permanent and essential parts' which are protected under the law and alterable portions can only be treated as 'mere embellishments'. It was also stated by the court that "If the taking away of that part or practice could result in a fundamental change in the character of that religion or in its belief, then such part could be treated as an essential or integral part."<sup>751</sup>

The decision in this case establishes a very high standard for a practise to be considered essential, and it also proposes a very exacting and rigorous examination to determine what constitutes an essential practise. Religious protection is greatly diminished when it is limited to only essential practises and is then combined with a high standard of proof for essentiality.

### Essential Practices Test Concerned With Public Order and Morality

i) Public order:

According to the Supreme Court, "public order" necessitates a significant degree of disturbance. It was held in *Gulam Abbas v. State of UP*, that the state cannot impose restrictions on a minor section of the community because it is "convenient", rather than preventing the threat and violence of a larger section.<sup>752</sup> Mere

<sup>747</sup> *Sardar Syedna Taher Saifuddin Saheb v. State of Bombay*, AIR 1962 SC 853

<sup>748</sup> 1958 AIR 731 1959 SCR 629

<sup>749</sup> *Acharya Jagdishwaranand Avadhuta and Others v. Commissioner of Police, Calcutta and Others*, AIR 1984 SC 51.

<sup>750</sup> Another ground on which it rejected the argument was for lack of prescription of the practice in the 'religious' text.

<sup>751</sup> *Commissioner of Police v. Acharya Jagdishwarananda Avadhuta*, AIR 1991 Cal 263.

<sup>752</sup> *Gulam Abbas v. State of UP*, (1981) AIR 2198.

law and order disturbances are insufficient to fulfil this clause.

ii) Morality:

In *Indian Young Lawyers Association v. State of Kerala*<sup>753</sup> often referred to as the Sabarimala case, significantly touched upon concepts of morality and equality. The case revolved around the restriction that prevented women of menstruating age from entering the Sabarimala temple in Kerala, India. The court in this case held that any form of discrimination based on biological characteristics was unfounded, indefensible, and implausible. It further highlighted that this practice violated the fundamental rights to equality, liberty, and freedom of religion, governed by Articles 14, 15, 19(1), 21, and 25(1) of the Indian Constitution. In this case the ERP test fails to account for the fact that religions and cultures are not homogenous.

Justice Misra observed that 'public morality is synonymous with constitutional morality.' Constitutional morality means adherence to constitutional values. The Supreme Court has repeatedly held that the Constitution protects those who differ from the majority and resist the imposition of homogenous societal values.<sup>754</sup>

### Short Comings of The Essential Practices Test

Several issues arise when scrutinizing the ERP Test. One significant concern is the idea of judicial overreach. The question arises whether it is appropriate for the judiciary to decide what constitutes an essential part of a religion, which could be seen as an intrusion into religious doctrine (Law School Policy Review).

Another concern is the subjectivity of the test. What constitutes an "essential" practice can vary widely even within the same religious community, making it impossible for a uniform judicial standard to accurately determine what is essential.

Inconsistency in judgments is another issue. The ERP Test has resulted in inconsistent judgments, primarily due to its subjective nature. The focus on community practices rather than individual rights is another point of critique, suggesting that the test fails to take into account the rights of individuals within religious communities.

While the ERP Test plays a crucial role in determining the contours of religious freedom, its suitability and effectiveness in doing so have been subjects of ongoing debate and scrutiny. It remains to be seen how this judicial tool will evolve to address the complex interplay of religion, law, and individual rights in India.

### International Landmark Case:

In the case of *KwaZulu-Natal and Others v Pillay*<sup>755</sup> The Durban Girls' High School informed Sunali Pillay, a Hindu student, that she was not permitted to wear nose studs, which is a customary practice in the Hindu religion which symbolises womanhood. Pillay contested the policy, claiming it infringed upon her right to religious freedom at the school. The court held that

"The School further argued that the nose stud is not central to Sunali's religion or culture, but it is only an optional practice. I agree that the centrality of a practice or a belief must play a role in determining how far another party must go to accommodate that belief. The essence of reasonable accommodation is an exercise of proportionality. The hon'ble courts should not involve themselves in determining the objective centrality of practices, as this would require them to substitute their judgement of the meaning of a practice for that of the person before them and often to take sides in bitter internal disputes. This is true both for religious and cultural practices. If Sunali states that the nose stud is central to her as a South Indian Tamil Hindu, it is not for the Court to tell her that she is wrong because others do not relate to that religion or culture in the same way."<sup>756</sup>

<sup>753</sup> *Indian Young Lawyers' Association v. State of Kerala*, (2017) 10 SCC 689.  
<sup>754</sup> *Ibid*.

<sup>755</sup> *KwaZulu-Natal and Others v Pillay* (CCT 51/06) [2007] ZACC 21.  
<sup>756</sup> *Ibid*.

Ultimately the court held that “Allowing the stud would not have imposed an undue burden on the School. A reasonable accommodation would have been achieved by allowing Sunali to wear the nose stud.”<sup>757</sup> The court also noted that the nose stud is not a sign of a political affiliation or a symbol of violence.

### Applying The Test of Indirect Discrimination

Article 14 of the Indian Constitution states that “the State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India, on grounds of religion, race, caste, sex or place of birth.”<sup>758</sup> In *Nitisha v. UOI*<sup>759</sup>, the Supreme Court focused on how analysing Article 14 requires taking both direct and indirect discrimination into account. The following are some of the key findings of the Supreme Court in *Nitisha v. UOI*<sup>760</sup>:

- Indirect discrimination is a violation of the right to equality under Article 14 of the Constitution.
- Indirect discrimination occurs when a seemingly neutral rule or practice has a disparate impact on a particular group of people.
- The burden of proof in indirect discrimination cases lies with the plaintiff to show that the rule or practice has a disparate impact.
- The defendant may rebut the plaintiff's burden of proof by showing that the rule or practice is necessary to achieve a legitimate goal.

The test of indirect discrimination can be applied in the case of the hijab ban in India to analyze its constitutionality. Indirect discrimination occurs when a seemingly neutral rule or policy disproportionately impacts a particular group. In the context of the hijab controversy, even though uniform rules in educational institutions may appear to be

neutral, they may disproportionately affect Muslim girls who wear the hijab as part of their religious practice.

Applying the test of indirect discrimination to the hijab ban, it can be seen that the ban, while not explicitly targeting Muslim women, has a disproportionate impact on them, as it prevents them from practicing an aspect of their faith. This can lead to exclusion and marginalization, thereby infringing on their constitutional rights to equality and non-discrimination.

In the context of the hijab ban, the idea of intersectionality also becomes relevant. The term “intersectionality” describes how social identities and associated oppressive, dominating, or discriminatory systems overlap or intersect. Girls who identify as Muslim and wear the hijab may experience prejudice based on both their gender and religion. This intersection of gender and religious discrimination further amplifies the impact of the hijab ban<sup>761</sup>

### Hijab Ban Controversy

In the case of *Aishat Shifa v. The State of Karnataka*<sup>762</sup> where in the high court of Karnataka issued an order directing that uniforms should be worn mandatory, and wearing the hijab may not be an exception. This order was implemented by various educational institutions within the state and barred muslim women wearing the headscarf (Hijab) from entering these institutions. This order was challenged before the high court of Karnataka, Despite the students' attempts to seek remedy from the Hon'ble Court, their petitions were not granted by the Karnataka High Court. Therefore a subsequent appeal was raised before a two judge bench in the Supreme court against the orders of the Karnataka high court. Subsequently the supreme court gave a split verdict on this appeal, wherein Justice Hemant Gupta concurred with the High Court and

<sup>757</sup> *KwaZulu-Natal and Others v Pillay* (CCT 51/06) [2007] ZACC 21.

<sup>758</sup> The Constitution of India, Part III, Article 14.

<sup>759</sup> *Lt Col Nitisha and Ors. v. Union of India*, (2021) SCC OnLine SC 261.

<sup>760</sup> *Ibid.*

<sup>761</sup> Samyuktha Kannan, *Anatomising the Hijab Row through the Lens of Intersectionality, Indirect Discrimination, and the Test of Essentiality*, 5 *INT'L J.L. MGMT. & HUMAN.* 2062 (2022).

<sup>762</sup> *Aishat Shifa (Hijab Case-2 J.) v. State of Karnataka*, (2023) 2 SCC 1



upheld the restriction and Justice Sudhanshu Dhulia disagreed with the High Court and overturned the order.

### Conclusion

The purpose of The Karnataka Education Act 1983, under which the hijab ban was justified, is to regulate education, such that it is secular, inclusive, sensitive and accommodating to religious differences, as opposed to religious discrimination and any action which affects the religious sentiments of any class of citizens.<sup>763</sup> The right to wear a hijab could fall under the umbrella of 'practicing and propagating religion,' as it is a part of the religious dress code followed by Muslim women in India. However, because the restriction is arbitrary and irrational and falsely distinguishes Muslim students from other students, it violates Article 14.

On the other hand, the judiciary has fully assumed the role of distinguishing between all components of religious practice that are essential and non-essential. The judiciary's role may conflict with the religious community's constitutionally granted right to determine what its essential practices are. Using its own interpretation of religion, the Court nonetheless classifies them into limited categories of "essential/non-essential" and "exclusive/non-exclusive denominations," dismissing any differences before putting them to the test against the principles of the Constitution. This creates a gap between the judges' cultural understanding and the

religious devotees. Consequently, the Essential Religious Practice (ERP) test effectively nullifies the effect of Articles 25 and 26, as they do not acknowledge religious autonomy or permit social reform initiatives within a religion. Furthermore, the practice of not really gathering facts in cases requiring the ERP test has given the Court the freedom to rely on religious texts and testimonials, which frequently represent the majoritarian viewpoint within a religion, to shape religion according to its own viewpoints.

In the case of *KwaZulu-Natal and Others v Pillay* wherein the court mentioned allowing the student would not have imposed an undue burden on the School.<sup>764</sup> A reasonable accommodation would have been achieved by allowing the student to wear the nose stud. Just like how wearing of turban in Sikhism would not create an undue burden on the school and would create a reasonable accommodation, a similar instance can be drawn on the hijab issue. Allowing of hijab would not create an undue burden on the school and would only strive to create a reasonable accommodation within the society. With respect to Public order, The State has not demonstrated that wearing the hijab itself causes a disturbance to public order. With respect to morality The hijab promotes constitutional ideals, such as the freedom of religion practice, rather than working against them.

With respect to Hijab ban the court can take the Essential and Integral Religious Practices Approach (EIRP) approach which was reflected in *Abdul Nazeer, J's dissent in Ayodhya Reference*.<sup>765</sup> Nazeer J. Taking issue with the Court's previous ruling that the mosque is not an essential element of Islam, the argument was made that both essential and integral components of religion are protected and that the mosque should be recognised as an integral part of Islam and be given protection under Section 25. To uphold these diverse constitutional values, the state must thereby defend the hijab. The hijab is more than just a head covering, it also reflects individuals' mind. It gives a woman respect, dignity and protection.

<sup>763</sup> Karnataka Education Act 1983, §39

<sup>764</sup> *KwaZulu-Natal and Others v Pillay* (CCT 51/06) [2007] ZACC 21.

<sup>765</sup> *M.Siddiq v. Mahant Suresh Das*, AIR 2018 SC 5134.