

The End of a Dream?

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*"I do not expect India of my dream to develop one religion, i.e., to be wholly Hindu, or wholly Christian, or wholly Musalman, but I want it to be wholly tolerant, with its religions working side by side with one another."*¹⁾

The Bharatiya Janata Party (BJP) may have *officially* declared war on the hijab in 2022, but the Hindu right's battle strategy has been set in place since at least 2014 when the BJP rose to power under the leadership of Narendra Modi. A tenacious master of populism, the BJP has successfully altered the mainstream Hindu perception of the Muslim as a threat to secularism. Within this imaginary, Muslims are believed to constantly seek exemptions from the secular regulations constraining the Hindu community. The strategy is uncreative at best, *tired* at worst, but its efficiency speaks for itself. Consider the [2022 hijab controversy](#), which concerned a decision by a college in Udupi, Karnataka, to ban the hijab in the classroom. In the following weeks, Muslim students staged protests across the state, demanding access to education and respect for their religious freedom. In response, federal and state right-wing groups incited counter-protests by Hindu students donning saffron scarves to decry the alleged differential benefits granted to Muslims. The unrest culminated in the government issuing an Order requiring State public schools to adhere to the established uniform, effectively validating the hijab ban.²⁾ In schools that did not have a uniform, the Order mandated the implementation of a code that "does not threaten equality, unity, and public order."³⁾

Several Muslim students petitioned the Karnataka High Court to declare the ban unconstitutional for violating religious freedom per [Article 25](#) of the Constitution.⁴⁾ Relying on the Essential Practices Doctrine (EPD), in *Aishat Shifa v State of Karnataka & Ors. (Aishat Shifa)*, the High Court upheld the ban, concluding that, as the hijab is not an essential religious practice, the protections provided in Article 25 do not apply.⁵⁾ The matter was appealed to the Supreme Court where Justices Gupta and Dhulia delivered a split verdict.⁶⁾ [India's apex court maintained the ban](#) while the Chief Justice referred the matter to a larger Bench. In a twist of events, in May 2023, the BJP lost the state elections to the Congress Party, which announced, in December of that year, [its intention to overturn the hijab Order](#). The saga is far from over, however, as India remains embroiled in political unrest over religious differences and an increasing rollback of minority rights. In any case, the Supreme Court decision reveals a bigger problem. If the BJP has destroyed India's secularism, so too has the Essential Practices Doctrine (EPD).

Though I am sympathetic to the initial rationale behind the adoption of the EPD as a tool to mediate religious differences in the newly formed Indian state, the doctrine is so patently *anti*-secular that its *present* application by the courts is indefensible. The test enables the judiciary to adjudicate theological matters in a

State defined as secular precisely because it is held to be agnostic to theological matters. The upholding of the hijab ban based on the EPD by the High Court and by Justice Gupta drives this point home. Courts limit constitutional protections to such beliefs and practices that *they* consider essential to the faith, rather than protecting those which are *sincerely* held. In a secular system, a court's authority to interpret religion is antithetical to the principle of secularism itself.⁷⁾ Where courts privilege one religious interpretation over another, the effect is to render religious freedom rights tautological; a claimant has no right to State-granted protections because the practice they seek to protect is non-essential, and such practice is non-essential because the State argued so.

For the judiciary to be the arbiter of religious dogma is certainly *not* secular. When a protection is sought under the constitutional right to freedom of religion, "it is not required for an individual to establish that what he or she asserts is an [essential religious practice]."⁸⁾ Drawing from Canadian jurisprudence, I argue for a sincerity-based approach, where questions of essentiality are best left to the believer herself, keeping courts out of theology and theology out of courts.

The Essential Practice Doctrine

Guaranteeing minority rights and religious freedom were necessary conditions for postcolonial India's pluralist democracy. At the same time, India's transformative Constitution empowered the state to reform the worst excesses of religion. Article 25 entrenches religious freedom, simultaneously establishing a "principled distance"⁹⁾ between the State and religion and mandating religious reform of Hindu institutions.¹⁰⁾ Though the right provided in Article 25 is subject to public order, morality and health and to the other provisions of the Constitution, the extent to which it permitted the State to reform and regulate religion was left to the judiciary who developed the Essential Practice Doctrine.¹¹⁾ This doctrine allowed courts to distinguish between those aspects of religion that are to be protected by constitutional guarantees of religious freedom—"essential"—and those that are subject to state regulation—"non-essential."¹²⁾

The need for this distinction was first invoked by Dr. Ambedkar during the Constituent Assembly Debates, to enjoin the legislature to "reform our social system which is so full of inequities, so full of inequalities, discriminations, and other things which conflict with our fundamental rights."¹³⁾ The EPD first appeared in jurisprudence in the 1954 Supreme Court case, *Shirur Mutt*.¹⁴⁾ The Court held that "what constitutes the essential part of a religion is primarily to be ascertained with reference to the doctrines of that religion itself."¹⁵⁾ Further, a religious denomination "enjoys complete autonomy in deciding which rites and ceremonies are essential [...] and no outside authority has the jurisdiction to interfere with their decision in such matters."¹⁶⁾ However, subsequently, this test was modified, limiting religious

denominations' autonomy to determine the essential practices of their religion, adopting instead an active judicial investigatory role into the question.¹⁷⁾

A Crisis of Secularism

The distinction between essential and non-essential aspects of religion was intended to permit the courts "to cleanse religion of practices which were derogatory to individual dignity."¹⁸⁾ Yet, by appropriating the authority to distinguish between the two, courts have necessarily adopted a theological *mantle*.¹⁹⁾ "[A]djudging on what does or does not form an essential part of religion blurs the distinction between the religious-secular divide and the essential/inessential approach."²⁰⁾ This inherently contradictory dynamic has been challenged, most notably by Chief Justice Chandrachud in *Sabarimala* where he questioned the theological role expected of the judiciary by virtue of the EPD.²¹⁾ He argued that since the EPD test renders State-intervention contingent on the essentiality of a religious practice, the limits imposed on Article 25 by competing Fundamental Rights are largely ignored.²²⁾ As judges are preoccupied with arbitrarily settling theological questions, the courts' duty to "ensure that what is protected is in conformity with fundamental constitutional values and guarantees and accords with constitutional morality" is forgotten.²³⁾ The Constitutional primacy granted to "dignity, liberty and equality" is rendered moot as Article 25 fixates on the essentiality of practices to determine their legitimacy rather than on whether they "detract from these foundational values."²⁴⁾

Most recently, on appeal, in *Aishat Shifa*, Justice Dhulia's judgment highlighted the EPD's transgressive nature in a secular system by revealing the questions it obscures. Consider, for example, Justice Gupta's opposing opinion that the hijab ban must be upheld since "religious belief cannot be carried to a secular school maintained out of State funds."²⁵⁾ The problem with this reasoning is that it discharges the State from its obligation to substantiate the link between the wearing of the hijab and the erosion of secular education. Since the EPD does not consider the sincerity of the claimant's beliefs, where a religious practice is found non-essential, the EPD preempts any inquiry on rational nexus between the purpose of the law and its means and on proportionality, minimal impairment and relatedly the state's duty of reasonable accommodation.

In contrast, Justice Dhulia finds the question of the essential nature, or lack thereof, of the veil completely irrelevant, arguing that "wearing a hijab should be simply a matter of Choice. It may or may not be a matter of essential religious practice, but it still is a matter of conscience, belief, and expression."²⁶⁾ This finding obliges the State to justify restraints on constitutional rights under the permissible exceptions, such as demonstrating that the presence of the hijab in the classroom is a threat to public order, morality or health.²⁷⁾ These interrogations are basic tenets of the checks-and-balances mechanism. It puts the onus on the State seeking to legislate a restriction on dress to establish a rational nexus with the object of the law and

deems any arbitrary “constraint imposed on the appearance of Muslim women and their choice of self-presentation” constitutionally impermissible.²⁸⁾ It is this notion of *choice* or sincerely-held belief that animates Justice Dhulia’s argument on the doctrinally indefensible nature of the EPD.

As the narrative of Muslims receiving special treatment through constitutional religious freedom exemptions is a key aspect of the Hindu nationalist project, the EPD unintentionally obfuscates constitutional issues that are common to *all* Indians. The right to dress, for example, cannot be disassociated from the rights to privacy, dignity, and education.²⁹⁾ Highlighting the interconnectedness of religious freedom, freedom of expression, gender equality, and access to education may have optimized these rights for the Hindu community as well.

Salvaging Secularism: Lessons from Canada

If the EPD has no place in a secular system, the question remains what analytical approach best complements Article 25? Indian courts have erred in rejecting the sincerity-based test. Fears of potential abuse or the normalization of existing oppressive practices do not constitute valid grounds since, as the Canadian experiment demonstrates, sincerely undertaken practices must *still* be balanced against competing constitutional rights.³⁰⁾ Here, India’s Supreme Court missed an opportunity to develop a robust jurisprudence on proportionality. Rather than provide guidelines on the balancing of competing interests, the Court focused on “judicially interpreting and determining a subjective understanding of a religious requirement, custom or ritual.”³¹⁾

It is useful to draw on the Supreme Court of Canada’s decision in *Amselem*,³²⁾ where the Court established that a sincerity-based test was the only suitable approach to religious freedom guarantees.³³⁾ If the argument is radical, it is nonetheless difficult to refute. In a secular, democratic society where a constitution provides protections against State abusive intervention, religious freedom must be defined as the freedom to undertake practices and hold beliefs which have a nexus with religion and “which an individual demonstrates he or she sincerely believes or is sincerely undertaking [...] irrespective of whether a particular practice or belief is required by official religious dogma or is in conformity with the position of religious officials.”³⁴⁾ Only such an approach preempts “an intrusive government inquiry into the nature of a claimant’s beliefs,” which “would in itself threaten the values of religious liberty.”³⁵⁾

Conclusion

The EPD negates the essence of India’s Constitution. Upholding secularism necessitates a robust understanding of the right to religious freedom read in conjunction with other fundamental rights. Any attempts to limit it must be reasonably

and demonstrably justified by the State.³⁶⁾ The “secularism” preached by the BJP – a euphemism for non-Hindu erasure – deviates from the Gandhian understanding of secularism as whole tolerance and not whole *identity*.³⁷⁾ Paradoxically, as the courts failed to inquire as to how the presence of the hijab in public spaces threatens secularism, the prohibition of the hijab in classrooms constituted an arbitrary regulation of religion by the State, and, hence, an affront to secularism. The EDP and its normalization of the secularism-versus-minority rights binary indicate that so-called secularism in India has been weaponized to usher in a nightmarish ethnostate.

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