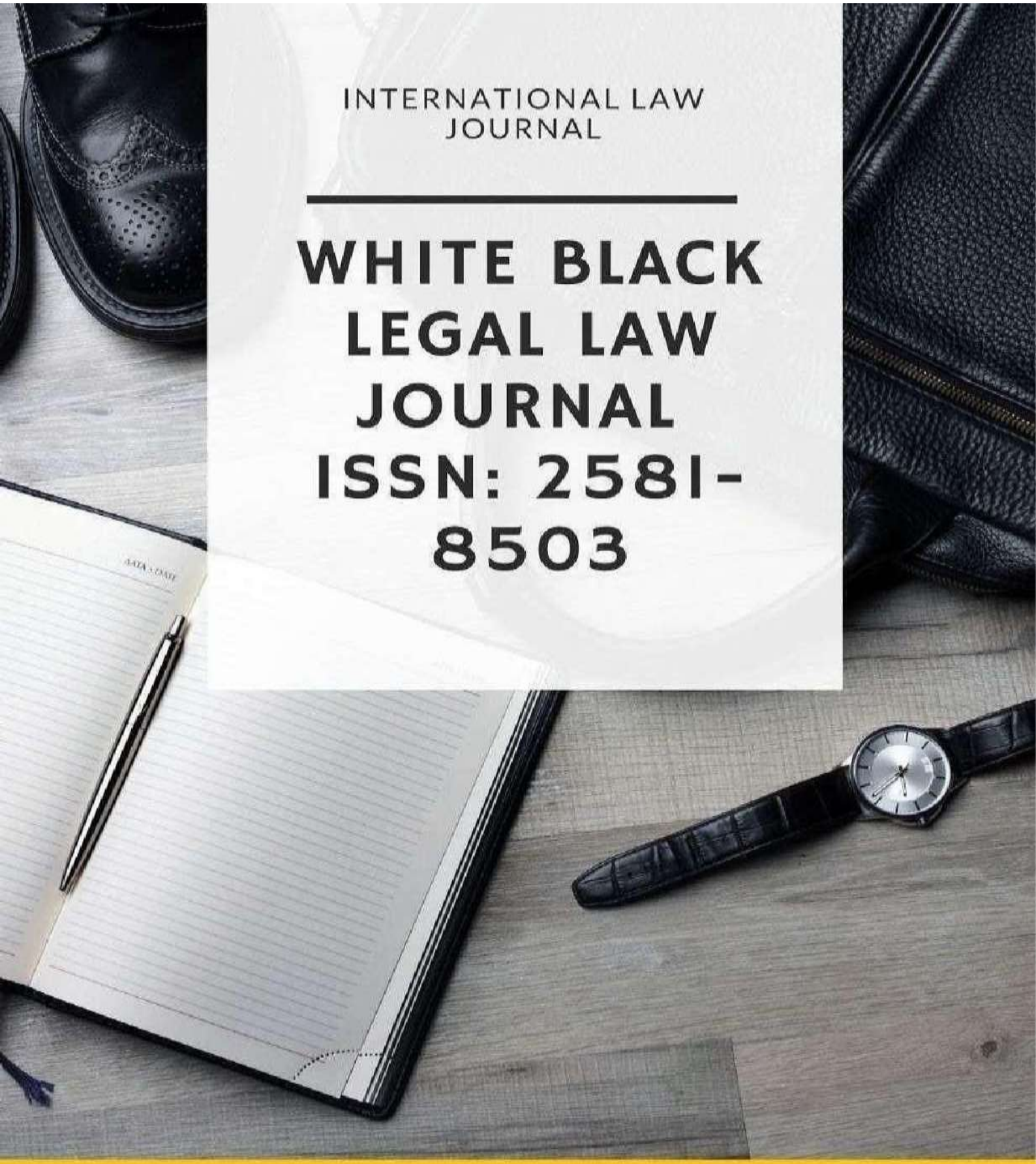

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WHITE BLACK LEGAL is an open access, peer-reviewed and refereed journal providededicated to express views on topical legal issues, thereby generating a cross current of ideas on emerging matters. This platform shall also ignite the initiative and desire of young law students to contribute in the field of law. The erudite response of legal luminaries shall be solicited to enable readers to explore challenges that lie before law makers, lawyers and the society at large, in the event of the ever changing social, economic and technological scenario.

With this thought, we hereby present to you

THE ESSENTIAL RELIGIOUS PRACTICES (ERP) TEST IS A JUDICIAL INNOVATION THAT UNDERCUTS RELIGIOUS FREEDOM AND HAS NO BASIS IN THE TEXT OF THE INDIAN CONSTITUTION.

AUTHORED BY – MANVI TALWAR

Introduction

Dr. B.R Ambedkar in the constituent assembly put forward the notion of limiting the definition of religion under fundamental rights to beliefs which are "essentially religious." There was a clear need for a test to determine what constitutes essentially religious leading the Essential Religious Practices test("ERP test"), however, there have been several problems with the application of this test. It is important to understand how the test has evolved over time and analyse its constitutional basis before addressing several concerns surrounding the application of the test.

The fundamental rights under Part III of the constitution include Articles 25 and 26. Article 25 gives the right to freedom of religion, while Article 26 provides freedom to manage religious affairs to all religious denominations. These rights are subject to "public order, morality and health," and article 25 is also subject to the other fundamental rights. The ERP test was introduced to provide an objective and balanced measure[1] to determine the restriction provided to the state laws.

Evolution of the ERP test

The ERP Test was a judicial innovation by the Apex Court in 1954 in the Shirur Mutt case,[2] which emphasised that the definition of religion, for Articles 25 and 26, only covers those religious practices that are "integral" and "essential". It further clarified that religious scriptures and beliefs are self-governing forming the basis of determining the fundamentals of religious practices while differentiating between religious and secular.[3]

This test has evolved over time and been used in several landmark judgements despite subjective

[1] AS Narayana v State of Andhra Pradesh, (1996) AIR 1996 SC 1765.
[2] Commr, Hindu Religious Endowments v Sri Lakshmindra Thirtha Swamiar of Sri Shirur Mutt, (1954) SCR 1005.
[3] Ibid.

judicial interpretation. The Supreme Court of India("SC") has clarified that courts play an important role in determining what constitutes an essential religious practice allowing for subjectivity by differing judges.[4] The Apex Court has also spelled out that secular and superstitious beliefs do not fall under the purview of religion since they are not essential to any particular religion.[5] In 2004, a test for "essential" was laid out when the SC put forth 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."[6] The Shayara Bano v Union of India judgement also clarified that just because something is permitted by a religion doesn't mean it is an essential aspect of that religion declaring Triple Talaq unconstitutional.[7] The difference between an essential religious practice and essentially religious has also been as only an essential religious practice is covered by religion under Articles 25 and 26. [8]

The changing judicial interpretation and application of the test can be understood through the dispute surrounding the Sardar Syedna Taher Saifuddin case that is now being questioned before the SC.[9] The ERP test as applied in 1962 did not account for constitutional morality which is a further step in the application of the ERP test in the modern context as put forth by the current Chief Justice of India.[10] This case originally clarified the role of what the community believed was essential and the value of the religious leaders opinion. However, in a modern context greater emphasis can be placed on constitutional morality rather than the religious leader themself. This interpretation can be inferred through the anti-exclusion principle that creates a constitutionally rooted implementation of the ERP test.[11] This question before the nine-judge bench of the SC is to determine the modern context of the ERP test.[12]

Constitutional basis of the ERP test

[4] Sri Venkataramana Devaruand v The State of Mysore, (1958) 1 SCR 895.
[5] Durgah Committee, Ajmer v Syed Hussain Ali, (1962) 1 SCR 383.
[6] Commissioner of Police v Acharya Jagadisharananda Avadhuta, (1983) 4 SCC 522.
[7] Shayara Bano v Union of India, (2017) 9 SCC 1.
[8] Mohd. Hanif Qureshi & Others v The State Of Bihar, (1959) 1 SCR 629.
[9] Sardar Syedna Taher Saifuddin v The State Of Bombay, (1962) Supp(2) SCR 496.
[10] Indian Young Lawyers Association and Ors vs The State of Kerala and Ors, (2019) 11 SCC 1.
[11] Bhatia G, "The Sabarimala Judgment – II: Justice Malhotra, Group Autonomy, and Cultural Dissent" (Indian Constitutional Law and Philosophy, October 6, 2018).
[12] Central Board Of Dawooodi Bohra v The State Of Maharashtra, (2005) 2 SCC 673.

The paradoxical question that arises when analysing if the ERP test is rooted in the constitution is the primary need to determine the definition of religion under Articles 25 and 26 while determining if the test itself is violative of Articles 25 and 26. It is pertinent to recognise that religious freedom is already restricted by the constitution itself, hence, the constituent assembly has already acknowledged the requirement to regulate this freedom. This freedom has only been further regulated through the judicial interpretation of the ERP test.

The ERP test analyses what constitutes religion to fall within the rights enshrined. The test also analyses how certain practices such as secular practices do not fall under the definition of religion and actually belong to a different category.[13] The restriction is also within permittable limits as such restrictions are required to abolish social evils like "Sati" which may be religious in nature but are abhorrent to the social conscience.[14] During the constituent assembly debate on the right to freedom of religion under Art. 19 of the draft constitution[15] Pandit Thakur clearly pointed out the need for the SC to have authority in determining whether a law enacted is unjust or unreasonable to ensure an equitable restriction on this fundamental right.[16] The essential religious practices test is the judicial innovation dealing with the problem highlighted in the constituent assembly debate to ensure justice in line with the preamble.[17]

Critique of the ERP test

The problems with the ERP test arise out of the subjective application of the test. The SC has adapted an extremely narrow definition of the word religion. The lack of constitutional protection to all religious practices is in itself a ground for contention.[18] This narrow definition further leads to a question of interpretation as different judges have selectively applied the test, scholars have argued that the basis of application of the test is not as much religious as reformative such as the ban of Triple Talaq is more reformative in nature as a push for woman's rights rather than the lack of evidence supporting the historical practice. [19]

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[13] Shirur Mutt, (n 2).
[14] de Souza, J. Patrocinio. "THE FREEDOM OF RELIGION UNDER THE INDIAN CONSTITUTION." (*The Indian Journal of Political Science*, vol 13, no 3/4, 1952, pp, 70 *JSTOR*).
[15] Draft Constitution of India, 1948, Art 19.
[16] Constituent Assembly of India Debates (proceedings), Volume VII, (1948).
[17] Constitution of India, 1950, preamble.
[18] Jaclyn L. Neo, "Definitional Imbroglios: A Critique of the Definition of Religion and Essential Practice Tests in Religious Freedom Adjudication " (2018, 16 Int'l J Const L 574, 576).
[19] Jacobsohn, Gary Jeffrey, "The Wheel of Law: India's Secularism in Comparative Constitutional Context," (Princeton University Press), 743.

Another concern surrounding this test is the claim that superstitious beliefs are not essentially religious[20] as it may cause a roadblock in the understanding of religion. Several people believe that all religious beliefs are superstitious in nature and if this is applied then no religious practices will be constitutionally protected.[21] The lack of objectivity in determining when a belief is so essential and when it is merely is a superstition creates even more subjectivity in the application of the ERP test.

There is also a widespread opinion regarding the misinterpretation of Ambedkar's context of "essentially religious."[22] When discussing the freedom to religion Ambedkar attempted to differentiate between secular and religious activities, this interpretation was initially followed by the SC, [23] however the Allahabad High Court in 1957 while determining whether a law prohibiting public employees from bigamous relationships was constitutional changed the interpretation of essential religious from determining the nature to be secular or religious to quantifying its importance in the particular religion.[24] The SC then adopted this interpretation one year later leading to a shift in the judicial understanding of the essential religious practices test from its original intention.[25]

Lastly, a political concern arises out of the interpretation of the ERP test. This is highlighted by Ronojoy Sen who argues that although the SC has attempted to create uniformity and rationality among religious practices with a liberal-democratic foundation of secularism using the ERP test its application is actually highly influenced by the changes in Hindu Nationalism.[26] Over time the judicial undertones of Hinduism have been questioned by many as in the aftermath of the Indian Young Lawyers Association vs The State Of Kerala judgement.[27] Whether or not there is an impact of modern Hindu Nationalism on the judiciary is a complex question, however, it is imperative to note that the subjective application of the ERP test can leave room for judge bias and bring into question the objectivity of the judicial system.

Keeping in mind the above inconsistencies we can revert to Justice DY Chandrachud's proposed

[20] Shirur Mutt, (n 2).
[21] Groves, Harry E. "RELIGIOUS FREEDOM," (Journal of the Indian Law Institute 4, no 2, 1962, pp 191–204).
[22] Constituent assembly debate, 781
[23] Shirur Mutt, (n 2).
[24] Ram Prasad Seth v State of UP, (1957) SCC Online All 61.
[25] Qureshi, (n 8).
[26] Bhatia G, "The Sabarimala Judgment – II: Justice Malhotra, Group Autonomy, and Cultural Dissent" (Indian Constitutional Law and PhilosophyOctober 6, 2018)
[27] Indian Young Lawyers Association, (n 10).

alternative doctrine of anti-exclusion. This doctrine is based on the court and state applying the "extrernal norm of constitutional anti-discrimination" to limit the right to religious freedom.[28] This doctrine promotes the understanding of fundamental rights as a whole.[29] This alternative also faces a variety of challenges like the need create a balance between anti-discrimination while maintaining the dignity and autonomy of religious institutions.[30]

Conclusion

There is a need to regulate the fundamental right to religious freedom as can be seen in the exceptions provided within Articles 25 and 26. The ERP test attempts to further narrow down and define what constitutes religion for the purposes of these sections[31], while accounting for reformative action. Despite the need for such a test the subjectivity of application creates a challenge in implementation. The questions surrounding secularism and the basis of the doctrine is a matter of question that needs to be clarified. The ERP test does not undercut religious freedom rather defines it but this definition needs to be determined on a more objectively religious basis to ensure religious freedom as aimed by the Constituent Assembly. This can be used alongside the principle of anti-exclusion to create a balance between essential religious practices and anti-discrimination when applying the right to religious freedom.

[28] Ibid.
[29] Suhrith Parthasarathy, "An Equal Right to Freedom of Religion: A Reading of the Supreme Court's Judgment in Sabarimala" (Suhrith Parthasarathy May 26, 2020)
[30] Indian Young Lawyers Association, (n 10).
[31] COI, (n 18), Art 25,26.