



Dichotomy Of Application Of Essential Religious Practice Test In The Light Of Freedom Of Religion

Akshita Sharma
Student

Symbiosis Law School, Pune

1. Abstract

This research paper begins with the evolution of the Essential Religious Practice Test and various judicial precedents expanding and developing the essence of the doctrine. It highlights the dissenting and conflict of opinions of balancing the mantle of secularism divulged in the Indian constitution under fundamental rights of Article 25-28 and the advent of judicial activism by the dint of protection of interests of citizens under the ambit of equality and justice. It then includes comparative analysis of this test with others marking the different approach of state in the matters of religion leading to analytical study indicating the statistics of religion and state. The paper then points to the critical analysis of the test which underlines both the precedence and the dissension of the test making a dichotomy in its application in existence. It highlights the arbitrary and judge centric approach, subjectivity of interpreting religious texts, disregard of normative pluralism, rationalisation of the religion which is braced by this test but on the other side of the coin filtering of unjust and unreasonable practices that violate other fundamental rights such as Article 14 and 15, and the limitations of public order, health and morality mentioned under Article 25 justifying the origin of only protecting religious activities that are at the crux of the religion as emanated in the Essential Religious Practice Test. The paper concludes with encapsulation of the entire research paper and outlining certain suggestions or alternative practices that could be further incorporated.

2. Keywords: Religion, ERP Test, Fundamental Rights and Judiciary.

3. Introduction

"The religious conceptions in this country are so vast that they cover every aspect of life from birth to death here is nothing extraordinary in saying that we ought to strive hereafter to limit the definition of religion in such a manner that we shall not extend it beyond beliefs and such rituals as may be connected with ceremonials which are essentially religious"¹. Starting with a notable statement by Dr B R Ambedkar's in the Constituent Assembly during the debates on the codification of Hindu Law which states diversity in India to be protected and promoted needs be "subjected to only those religious are integral to a religion & taking away such practice should potentially change the fundamental characteristics of the religion. These practices are determined based on the historical backgrounds, principles, doctrines, & other essential religious practices". Thus, Article 25 of the Indian Constitution guarantees the "freedom of conscience and the right freely to profess, practise and propagate religion"². However, this right isn't absolute and is subject to public order, morality, health, and other fundamental rights. Thus, the ERP Test protects only those practices that are "essentially religious and not all religious practices"³ and such are adopted by judiciary through profuse approaches affirmed in multiple precedents which stems a dichotomy of relevance and application of ERP having both its advocates and dissenters.

4. Judicial Pronouncement

To understand the intrinsic nature and the existence of dichotomy of the ERP doctrine, it is imperative to take into consideration the evolvement of the test through various judicial pronouncements. "This test was first used in 1954 in the case of the *Commissioner, Hindu Religious Endowments, Madras v. Shri Lakshmindar Thirtha Swamiyar of Shri Shirur Mutt* wherein, the court in determining what qualifies as an important religious practice, the Court emphasised the significance of religious doctrines"⁴. In "*Sardar Syedna Taher Saifuddin Saheb v. State of Bombay*, the Court emphasized that the Essential Religious Practices are to be determined according to the texts and tenets of the religion"⁵. The transformation of the test from dealing with 'essentially religious' to 'essential to religion' can be traced through three cases. "The first being that of Venkatramana Devaru, where the Court asserted the importance of the courts in determining what essential practices were, contrary to the principle laid down in Shirur Mutt case"⁶. In *Mohd Qureshi v. State of Bihar*, the distinction between 'essentially religious' and 'essential to religion' becomes clearer. The petitioners claimed that an anti-cattle slaughter law infringed their right to freedom of religion. The Court opined that "it does not appear to be obligatory that a person must sacrifice a cow" and that "the very fact of an option seems to run counter to the notion of an obligatory duty." "The final step was the

¹ Constituent Assembly Debates, Vol. ii 781, Thursday, 2nd December 1948, available at <http://164.100.47.194/loksabha/writereaddata/cadebatefiles/C02121948.html>.

² INDIA CONST. art. 14.

³ Commissioner of Police and others v. Acharya Jagadishwarananda Avadhuta and others, (2004) 12 SCC 808

⁴ The Commissioner, Hindu Religious Endowments, Madras v. Shri Lakshmindar Thirtha Swamiyar of Shri Shirur Mutt, AIR 1954 SC 282.

⁵ Sardar Syedna Taher Saifuddin Saheb v. State of Bombay, 1962 Supp (2) SCR 496.

⁶ The Commissioner, Hindu Religious Endowments, Madras v. Shri Lakshmindar Thirtha Swamiyar of Shri Shirur Mutt, AIR 1954 SC 282.

Dargah Committee case wherein the Court reiterated the interpretation of the test laid down in the Mohd⁷. “The Supreme Court also rejected the claim of the ‘Ayyappans’ in the famous Sabarimala case by allowing women between the age of 10 and 50 to enter the Sabarimala Temple”⁸. However, a review petition has been filed and this case, coupled with cases such as entry of women to mosques and Female Genital Mutilation in Dawoodi Community, are pending before the Supreme Court.

The above judicial precedents highlights the constant development and the justification for the application of the ERP Test but there have been certain landmark dissenting opinions which is essential in maintaining constitutional democracy in the country. “The infamous Sabarimala case that challenged the prohibition of women from the temple premises of age between 10-50 years of age was held to be against the right to equality under article 14, they stated that the practice was discriminatory as per Article 15 as well as the practise of exclusion did not come under the Essential Religious Practice Test amounting to no protection under Article 25 of the Indian Constitution”⁹. The notorious dissenting opinion of Indu Malhotra in the respective case read as “Notions of rationality cannot be invoked in matters of religion,” and “What constitutes essential religious practice is for the religious community to decide, not for the court” marked as a contrasting opinions to the final judgment¹⁰. In another significant case of Hijab case which gave a split verdict of girl students wearing hijab in educational institutions where Justice Hemant upheld the Hijab not being part of ERP and compliance of wearing uniform in schools but on the other hand Justice Dhulia stated “If the belief is sincere, and it harms no one else, there can be no justifiable reasons for banning hijab in a classroom.”¹¹. Justice Dhulia said that under the Constitution, “the wearing of the hijab ought to be a matter of choice. It may not be an ERP but a matter of belief, conscience and expression”¹².

5. Comparative Study & Analytical Study

In comparatively understanding the predominance of relationship between state and religion, one can track the case of “*Sherbert v. Verner* where the USA judiciary declared held that the Free Exercise Clause of the First Amendment required the government to demonstrate both a compelling interest and that the law in question was narrowly tailored before it denied unemployment compensation to someone who was fired because her job requirements substantially conflicted with her religion”¹³. “In all Free Exercise cases where a religious person was significantly burdened by a law, the Sherbert Test, which was created as a result of this case, now requires proof of such a compelling interest and limited tailoring”¹⁴. The main elements of

⁷ Durgah Committee v. Syed Hussain Ali, (1962) 1 SCR 383.

⁸ The Indian Young Lawyers Assn. & Ors. v. State of Kerala & Ors., (2019) 11 SCC 1.

⁹ Ibid.

¹⁰ The Indian Young Lawyers Assn. & Ors. v. State of Kerala & Ors., (2019) 11 SCC 1.

¹¹ Aishat Shifa v. State of Karnataka and Ors., (2022) SC 842.

¹² FRONTLINE THE HINDU <https://frontline.thehindu.com/news/understanding-the-split-verdict-on-hijab-ban/article66014782.ece#:~:text=This%20was%20upheld%20by%20the,permissible%20and%20a%20reasonable%20restriction> (Last Visited April 13th 2023).

¹³ Sherbert v. Verner, 374 U.S. 398 (1963).

¹⁴ Ibid.

what is typically referred to as strict scrutiny are the circumstances. Further, in the *Wisconsin v. Yoder* it was stated that “Not all beliefs rise to the demands of the religious clause of the First Amendment. There needs to be evidence of true and objective religious practices, instead of an individual making his or her standards on such matters”¹⁵. In analytically understanding, the relationship between state and religion and the role of ERP test few statistical data in form of graphs and charts have been analysed to elaborate on the dichotomy.

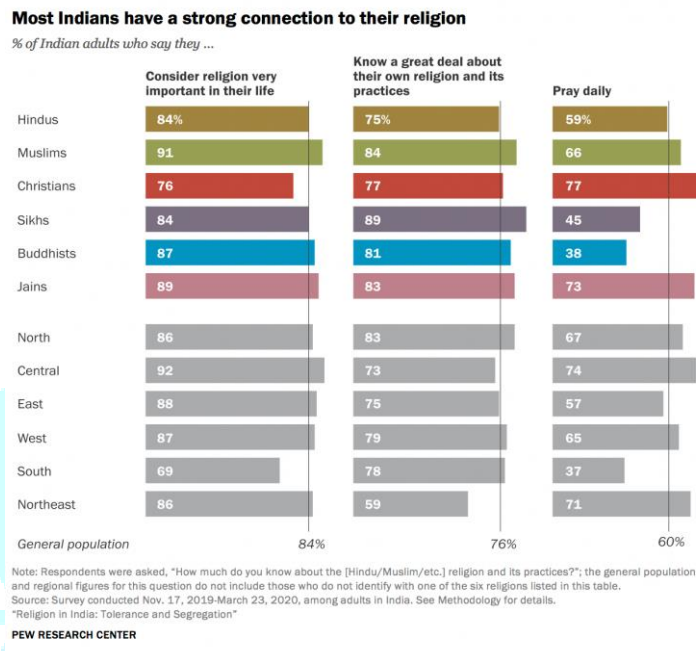


Figure 1: It is imperative to point that most Indians have a very strong connection to their religion and thus the applicability of the Essential Religious Practice comes into debates¹⁶.

Some religious beliefs and practices shared across religious groups in India

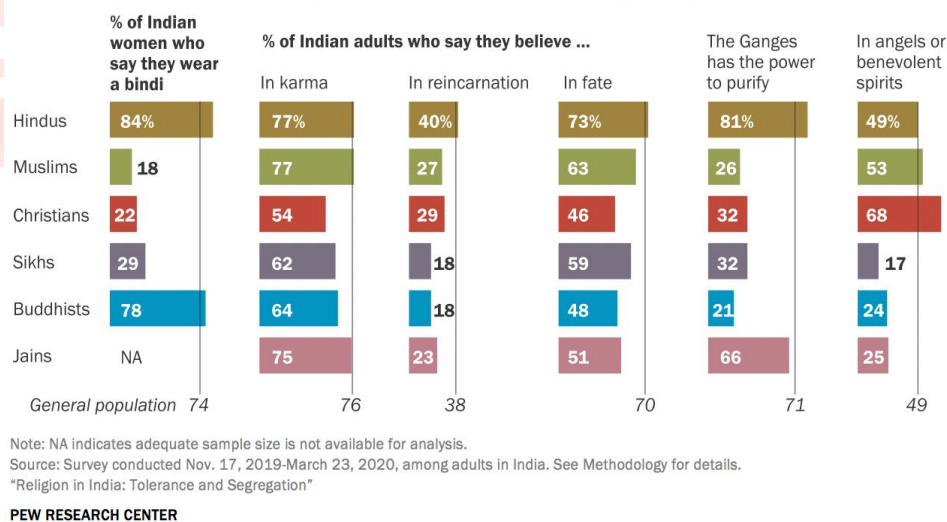


Figure 2: The above figure highlights some shared practices across various religious groups and makes one wonder the flexible, dynamic and overlapping nature of religion and puts the core religious practices or crux of religion as determined by judiciary with help of ERP Test in doubt¹⁷.

¹⁵ *Wisconsin v. Yoder*, 406 U.S. 205 (1972).

¹⁶ PAW RESEARCH CENTRE <https://www.pewresearch.org/religion/2021/06/29/religion-in-india-tolerance-and-segregation/> (Last Visited April 13 2023).

¹⁷ *Ibid.*

Tradition, Modernity and Religion

	My religion should ...					
	Preserve traditional beliefs/practices	Adjust to new circumstances	Adopt modern beliefs/practices	Other	Don't know	
	%	%	%	%	%	
Total affiliated	44	35	12	1	7	=100
Protestant	49	32	10	2	8	=100
Evangelical churches	59	25	7	2	7	=100
Mainline churches	34	42	14	1	8	=100
Hist. black churches	48	28	12	2	10	=100
Catholic	36	42	15	1	7	=100
Mormon	68	23	3	3	3	=100
Jehovah's Witness	61	21	3	4	11	=100
Orthodox	49	31	10	1	9	=100
Jewish	26	46	19	1	7	=100
Muslim	39	30	21	1	9	=100
Buddhist	18	51	20	2	9	=100
Hindu	16	47	23	2	12	=100

Results based on those reporting a religious affiliation.
 Question: IIF AFFILIATED WITH A RELIGION, ASK: Thinking about your religion, which of the following statements comes closest to your view? My church or denomination should preserve its traditional beliefs and practices OR adjust traditional beliefs and practices in light of new circumstances OR adopt modern beliefs and practices.

Figure 3: The above figure highlights that most people from different religions when questioned about preserving their traditional beliefs/ practices were in favour of it highlighting the direct attachment of people and religion acting opposing to the ERP Test¹⁸.

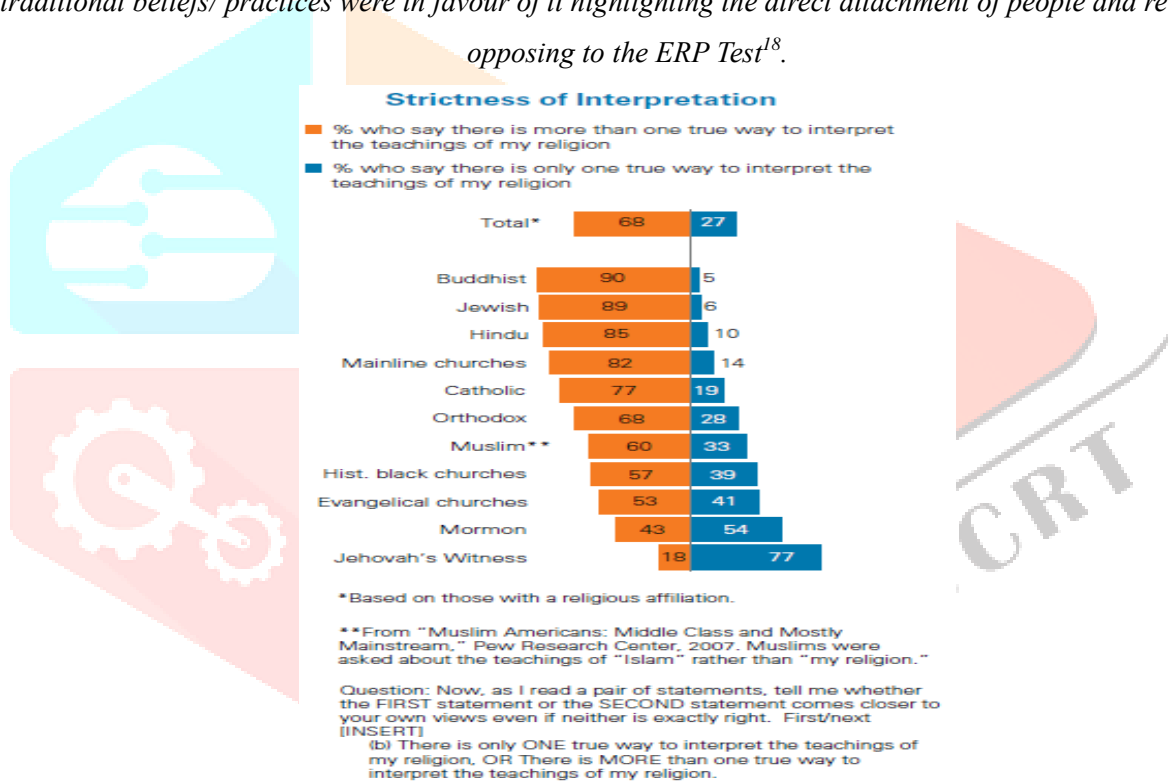


Figure 4: The above figure highlights the strictness of interpretation of religion and as seen more people are in support of interpreting the teachings of the religion in more than one true way and thus supports the argument of judiciary and ERP classifying as a religious practice essential to the religion or not¹⁹.

¹⁸ PAW RESEARCH CENTRE <https://www.pewresearch.org/religion/2008/06/01/chapter-1-religious-beliefs-and-practices/> (Last Visited April 13 2023).

¹⁹ Ibid.

Restrictions on religion among the world's 25 most populous countries

Among the world's 25 most populous countries, Egypt, India, Russia, Pakistan and Indonesia stand out as having the most restrictions on religions (as of 2017) when both government restrictions and religious hostilities are taken into account. (Countries in the upper right of the chart have the most restrictions and hostilities.) Japan, South Korea, South Africa, Philippines and Brazil have the least restrictions and hostilities. (Countries in the lower left have the least restrictions and hostilities.) Scores are for calendar year 2017.

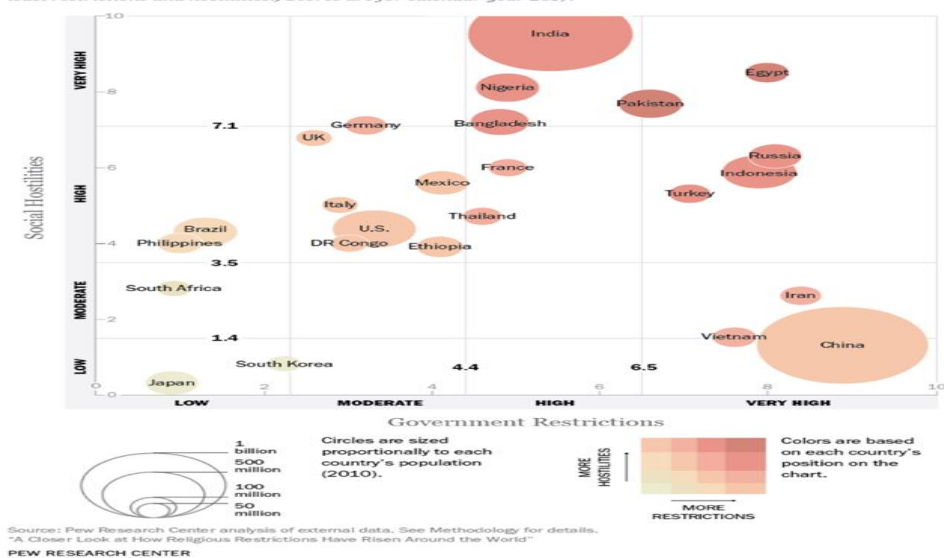


Figure 5: The above figure highlights the restrictions on religion among the world's 25 most populous countries in which India is seen with a great number of restrictions which leads us to wonder if the Right to religion as a fundamental right has been fruitfully guaranteed to all or not²⁰.

6. Critical Analysis

While critically analysing the test and its application in freedom of religion two fringes of standpoints have been framed just like two sides of coin exist. Some critique pointers of the essential religious practices are as follows:

A] Arbitrary Judge Centric and Inconsistent Nature Approach

It should be emphasised that the courts have taken many inconsistent positions throughout the years as a result of using the concept to determine what is and is not "essential" to religion. This is due to how unique each case is. The court is aware that each case has unique facts and circumstances, hence there cannot be a set precedent for the same. For instance, in the Sabarimala Case, the judgement to permit women admission into the temple only applies to that particular temple and not to all other temples in the country that forbid it²¹. In the same case, Justice D.Y. Chandrachud made a valid point: "Judges are now adopting a theological mantle, which we are not supposed to do, due to this essentiality theory".²² Because of this, the judge's judgement has greater sway than an entire religion. Justice Chandrachud suggested that the theory be changed as a result, saying that the test ought to determine if a practice adheres to the Constitution regardless of whether it is essential or not.

²⁰ PAW RESEARCH CENTRE https://www.pewresearch.org/religion/2019/07/15/a-closer-look-at-how-religious-restrictions-have-risen-around-the-world/pf_07-15-19_religiousrestrictions-0-09/ (Last Visited April 13 2023).

²¹ Indian Young Lawyers Assn. and Ors. v. State of Kerala and Ors., (2019) 11 SCC 1

²² Ibid.

B) Notions of Rationality cannot be invoked in matters of religion

“The Court granted the Anandamargis the status of a separate religious denomination in the case of *Acharya Jagadiswaranand Avadhuta and Ors. v. Comm. of Police Calcutta and Ors.*, but held that the tandava dance could not be regarded as an essential component of the religious denomination due to its recent affirmation”²³. The Supreme Court rejected the Tandava dance's claim to be a fundamental religious activity for the second time in *Comm of Police v. Acharya J. Avadhuta*²⁴. However, the absurdity and irrationality of the majority judgement is brought to light by Judge AR Lakshmanan's dissent in this case. This dissent effectively illustrates how the Court itself lacks consistency and even clarity over what constitutes essential religious practice. The Apex Court receded the constitutional validity of Triple Talaq on the basis of it not being an essential religious practice of Islam rather than rejecting it on the grounds of violating the right to equality of Muslim women. The subjectivity of views and opinions in such cases limits the constitutionally established right to freedom of religion.

C) Disregards normative pluralism by invading the internal autonomy of religions

Consequently, it is challenging to say with surety what is and is not protected because religion is a more complicated right than other rights. Such ambiguity aids in the imposition of additional limitations on religious freedom in addition to the ones already stated. In order to give religion definition, substance, and meaning, interpretive exercises like ERP are used, which subsequently limits the scope of religious freedom. The scope of religious freedom in India has been reduced as a result of such application by constitutional tribunals, along with inconsistent outcomes. “Using ERP, the Supreme Court ruled, for instance, that the roles of an Archaka (a traditional helper) in a temple fell under the purview of the secular and were therefore susceptible to statutory abolition”²⁵. The Tandava dance is not necessary to the Anand Margis' religion, they were told. “Despite the fact that Pinda and Shradh deserved constitutional protection, the court in *Ismail Faruqi v. Union of India* considered the relative importance of different religious sites of prayer and noted that a mosque is not fundamental to Islam”²⁶. The Rajasthan High Court ruled that Santhara is not an essential component of Jainism.

D) Reasonable practices to be filtered from the unreasonable and obstructive as mentioned under fundamental rights specific to Article 14 and Article 15

The standard of arbitrariness required that if a law was “disproportionate, excessive or otherwise manifestly unreasonable”, then it would be struck down under Article 14²⁷. “As seen in the *Shayara Bano v Union of India* where it was declared that triple talaq was not an essential practice and could not be offered constitutional protection under Article 25”²⁸. The core problem with instantaneous triple talaq was not its

²³ Acharya Jagadiswaranand Avadhuta and Ors. v. Comm. of Police Calcutta and Ors., AIR 1984 SC 51

²⁴ Commissioner of Police and Ors. v. Acharya Jagadishwarananda Avadhuta and Ors., (2004) 12 SCC 808.

²⁵ Commissioner of Police and Ors. v. Acharya Jagadishwarananda Avadhuta and Ors., (2004) 12 SCC 808.

²⁶ Ismail Faruqi v. UOI, (1994) 6 SCC 360

²⁷ Shayara Bano v. UOI, (2017) 9 SCC 1

²⁸ Ibid.;

arbitrariness, but how, in giving men a unilateral power of instant divorce, it discriminated against Muslim women. It was more a question of unequal power & inequality (Article 15) than the rule of law (Article 14).

E] Limitations mentioned under Article 25/26- Public Order, Morality and Health

As per the Article 26 of the Indian Constitution states that “Freedom to manage religious affairs Subject to public order, morality and health”²⁹. The cow-protection legislation and laws prohibiting propagation of religion for the purposes of conversion, by force, fraud, inducement or allurement, have been made with the objectives to maintain public order in the State. “In the case of *Maulana Mufti v. State of West Bengal* restrictions were placed on the use of microphones before 7 am”³⁰. “It was held by the Calcutta High Court that Azan is an integral and necessary part of the religion but certainly not the use of microphones. It violates the basic human and fundamental right of the citizens to sleep and leisure”³¹.

7. Conclusion and Suggestions

In order to fathom the anomalies and to resolve the dichotomy to maintain a balance between the interference of judiciary and the protection of fundamental rights of the citizens certain suggestions have been drawn for the same. Firstly, focusing on historical evidence rather than relying solely on the opinions of religious experts, courts could also consider historical evidence to determine whether a religious practice is essential to a particular religion. Secondly, use of Proportionality test, instead of determining whether a religious practice is essential, courts could use a proportionality test to balance the right to religious freedom against other constitutional values such as equality and public order. This would involve weighing the importance of the religious practice against the harm caused by it to others or to society as a whole. Thirdly, Comparative analysis, courts could also compare the disputed practice to similar practices in other religions to determine whether it is unique to the religion in question or common across multiple religions. Thus, concluding this research paper stating the dichotomy of application of the ERP Test, it is imperative to dissect a balancing mechanism between the two sides of the coin and institute a middle ground for protecting fundamental rights of all.

²⁹ INDIA CONST. art. 14.

³⁰ *Moulana Mufti Syed v. State of West Bengal*, 1998 SCC OnLine Cal 73.

³¹ *Ibid.*

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