DOES YOUR GOD SATISFY THE CONSTITUTIONAL TEST? - ANALYSING THE 'ESSENTIAL RELIGIOUS PRACTICES DOCTRINE' IN LIGHT OF THE SABARIMALA VERDICT

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Abstract

It is not unknown to us that deciding questions of theology has always been a brain-wracking process for the judiciary. However, are we not in the first place supposed to question the capacity and competency of the courts of law in deciding these questions of religion? Another million-dollar question that has never been sufficiently acknowledged despite its relevance in the present-day tussle involving religious liberties is - Who is the State to dictate what is religion to man? Innumerable contemporary judgments are witness to this act of State interference into a domain that should be left to the discretion of man and man alone. Issues concerning religion are not just countless but centuries old, archaic to the extent that they were in place even when the State did not exist, to begin with. Quite a few verdicts of the courts in the recent past have

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led us to question the foundation of the basic religious doctrines, principles and tests that the State employs to dictate and restructure religion. Assuming for the sake of argument that the State does to a large extent enjoy the power to decide the constituents of religion, the factors on the grounds of which the State does so should not take away the power of the people to decide what they want their beliefs and ideologies to be. This paper seeks to analyse and critique these religious doctrines in light of the Sabarimala verdict and attempts to provide an alternative to the obsolete and seemingly redundant ways of the court.

I. INTRODUCTION

Religion has been the ethereal bond that has tied human beings together since time immemorial. Freedom of religion has always been acknowledged as a fundamental and human right by the liberal and democratic regimes, with an intent to allow the faithful to carry out their faith. It is quite often asserted that the struggle for freedom of religion preceded all other fundamental or human rights originating during the Greek ages.[1] Whether we talk about the treaty of Westphalia, granting equal rights to Catholics and Protestants in Rome in 1648 or the mid-1770s Turkey undertaking to protect Christianity within the Russian Empire, protection of freedom of

[1]PAUL SIEGHART, THE INTERNATIONAL PROTECTION OF HUMAN RIGHTS 324 (1983); Brice Dickson, *The United Nations and Freedom of Religion*, 44 INT. COMP. L. Q. 327–357 (1995) [hereinafter DICKSON].

religion has remained an issue of eminence before rulers throughout ages.[2]

In the United States, freedom of religion is every so often regarded as the 'first freedom', not because of its position in the First Amendment of the States but because it is principal to the operation of its democracy.[3] If citizens of a democracy cannot live equally, according to their deepest beliefs about what is right and good, how would they be able to contribute to the welfare of any democratic society?[4]

There have been innumerable attempts to convert religious beliefs into actions which have had consequences for the community as a whole. It is for this reason that law operates to regulate religion and prohibits unacceptable forms of behaviour such as *Sati*, human sacrifice, female foeticide, etc.[5] Nevertheless, keeping the extremes aside, there is barely any logic in restricting religious liberties.[6] Usually, no objection should be raised against the practices which only affect the voluntary adherents of that specific religion.[7] On the contrary, for the sustenance of a secular, plural and democratic society, the law ought to be more receptive towards the diversity and disagreement within the society it operates.[8] However, recent instances have proven otherwise. For example, the Supreme Court of India, in the recent Sabarimala verdict, declared the ban on the entry of women in the temple unconstitutional.[9] Similarly, in the case of *Mohammad Zubair v. Union of India*, the Supreme Court declared

[2]B. G. RAMCHARAN, THE CONCEPT AND PRESENT STATUS OF THE INTERNATIONAL PROTECTION OF HUMAN RIGHTS 13 (1989).
[3]Roger Trigg, *Freedom of Conscience and Freedom of Religion*, 99 AN IRISH QUARTERLY REVIEW 407-414 (Winter ed. 2010).
[4]*Id.*
[5]ROGER TRIGG, EQUALITY, FREEDOM, AND RELIGION 16 (2012).
[6]DICKSON, *supra* note 1.
[7]Satvinder S. Juss, *The Justiciability of Religion*, 32 J. L. & RELIGION 285 (2017).
[8]*Developments in the Law: Religion and the State*, 100 HARV. L. REV. 1606, 1781 (1987).
[9]Indian Young Lawyers Association and Ors. v. The State of Kerela, 2018 SCC OnLine SC 1690.

that keeping a beard is not an essential practice of the Islamic religion.[10] As far as the former case is concerned, the majority went with the so-called popular and rational belief, a belief that supports and promotes women empowerment. However, in this instance, the judiciary failed to pay due respect to our religion and cultural heritage. And instead of being a cause which helps empower women, this verdict reeks of redundant and conservative ideas and doctrines-doctrines that fail to acknowledge group reality. We understand that women's rights are necessary. However, when the society is by and large patriarchal in its mindset and practices, the reforms must take a balanced approach. Changing centuries old practices through a court order is not the right way to go about empowering women. Rather, it would make the people critical of the court's doings and the judiciary might lose its own credibility.

However, this conception, that the free exercise of religion is at odds with the idea of a pluralist state, has steadily gained prominence. It is for this reason that multiple State judiciaries are now testing the importance of religious practices within that religion rather than testing whether the practice is religious at all.[11] Therefore, in order to practice one's religion, the community must not only prove to the court that practice is religious in nature but also that such practice is indispensable as far as the existence of that religion is concerned and it conforms to the other constitutional requirements. An example of such a doctrine in India is this test which is referred to as the Essential Religious Practices Test (hereinafter, "**ERPT**"), wherein the courts, and not the religious community, undertake the task of deciding which practices are essential to the religion.

[10]Mohd. Zubair Corporal v. Union of India, 2016 SCC OnLine SC 1472.

[11]The Commissioner, Hindu Religious Endowments, Madras v. Shri Lakshmindar Thirtha Swamiyar of Shri Shirur Mutt, 1954 AIR 282; Indian Young Lawyers Association and Ors. v. The State of Kerela, 2018 SCC OnLine SC 1690; Mohd. Zubair Corporal v. Union of India, 2016 SCC OnLine SC 1472; Syndicat Northcrest v. Amselem, (2004) 2 SCR (Canada), 576; HJ(Iran) and HT(Cameroon) v. Secretary of State of the Home Department, (2010) UKSC 31.

This paper, divided into three parts, discusses at length the validity of the ERPT in the modern Indian context. In Part I, the need for the populace to enjoy this liberty to ascertain what should constitute one's religion has been stressed upon. In Part II, the flaws in the ERPT, as applied in India, have been brought to light. Lastly, in Part III, new jurisprudence in place of the redundant ERPT has been proposed as a possible solution to this problem.

II. THE NEED TO ACKNOWLEDGE: THE SIGNIFICANCE OF PROTECTION OF RELIGIOUS FREEDOM

The introduction of the article discussed how freedom of religion has remained important over the ages. However, an important question that has remained unanswered is, why freedom is important at all. Why is it not advisable for the State to propose its own State religion, or remove it in its entirety? The answer is much more complex than this simple question. If the State tries to remove it, religion would find its own course and establish itself again as would be discussed in the course of this part.

The Sabarimala issue is an instance where the interference by the State violates religious freedom. The question that needs to be asked is, can a tradition that has lasted for centuries, a tradition that has formed roots in the heart of these people who out of nothing but pure devotion to their God have been following a practice, be done away with, in the blink of an eye? The State, in essence, is trying to mould public beliefs and ideologies to suit its own idea of morality. However, religion is not something that changes colours. It is something that asserts and re-asserts itself time and again.[12] It is impossible or at least not a suitable job for the State to step up to the

[12]Gabriel Moens, *The Action-Belief Dichotomy and Freedom of Religion*, 12 SYDNEY L. REV. 195, 217 (1989).

pedestal of the creator of this universe, as believed by many, and dictate what it wants and how it wants man to think.

In this Part, an attempt has been made towards emphasising the importance of freedom of religion and the need to allow people to decide what they want their religion to be. The very fact that religion even today is a force to be reckoned with, indicates that some protection is certainly important. It is argued that the freedom of religion must be protected on four grounds, (a) that religion is a basic human instinct, (b) that in a pluralist democracy, freedom of religion is akin to freedom of choice, (c) that freedom of religion is quintessential to the protection of the diversity of beliefs, and (d) that the freedom of religion is the right path to go about ensuring religious reforms in the long run.

A. *Religion is a basic human instinct.*

Religion can best be understood as a primary element of human nature, suppression of which would be comparable to suppression of any other need like air, water or sex. Therefore, the idea of protection of religion is akin to the protection of our natural rights. Farr, in his treatise '*World of Faith and Freedom*' mentions that the assertion of religious freedom is the affirmation of the claim of human nature on behalf of human beings.[13]

An argument in favour of the naturalness of religion emerges from the cognitive structure of the human mind. Teleology is deeply ingrained in the human mind.[14] Teleology is the explanation of phenomena in terms of the purpose they serve rather than the cause by which they arise.[15] Our 'natural' impulses may not be the best guides of truth but we are in any case most comfortable with them. Psychologists

[13]FARR, WORLD OF FAITH AND FREEDOM 21 (2008).
[14]*Teleology*, 2 BR. MED. J. 1, 410 (1909).
[15]*Teleology Definition of teleology in English by Oxford Dictionaries*, OXFORD DICTIONARIES (Jan. 9, 2019), https://en.oxforddictionaries.com/definition/teleology.

Deborah Keleman and Evelyn Rosset state that human beings, from a very early age, start making teleological explanations of all the natural phenomena.[16] They state that "*from preschool, children attribute functions of entities like lions, mountains, and icebergs, viewing them as made for something*."[17] Thus, teleological explanations are the default settings of humans as they grow. Concepts such as an all-knowing God therefore naturally arise in a human mind. Religion is similarly formed by these basic teleological impulses.[18] Since religion is our basic impulse, it must be protected.

B. *In a pluralist democracy, freedom of religion is akin to freedom of choice.*

Individual choice is the basic tenet of liberty.[19] If a State has a duty to provide me with liberty, it must extend to all forms of liberty. Therefore, every individual, in principle, has a choice to align himself with the faith of his preference. He can even choose to opt out of it. He must have an individual choice in this regard.

Further, when every religious community would be liberated to assert and propound its beliefs in the society, there would be a broader landscape of different religious views and a wider spectrum of alternatives. As a consequence, every individual would have a greater occasion to make a choice that is best suited to his aspirations and desires.

Thus, religious choice, while being a significant end in itself, is also the cornerstone of self-determination and individual autonomy.

[16]Deborah Kelemen & Evelyn Rosset, *The Human Function Component: Teleological Explanation in Adults*, 111 COGNITION 138-143 (2009); ROGER TRIGG, EQUALITY, FREEDOM, AND RELIGION 16 (2012).
[17]*Id.*
[18]Mark Modak-Truran, *Law, Religion, and Human Rights in Global Perspective*, 22 MISS. C. L. REV. 165, 172 (2003).
[19]Fabio Macioce, *Individual Liberty and Self-Determination*, 3 LIBERTARIAN PAPERS 1, 18 (2011).

Choosing something as fundamental as religion therefore promotes greater liberty. Freedom of religion also leads to the formation of a more stable society as the freedom to choose a religion which best fits individual needs will result in a more satisfied society.

C. *Freedom of religion is quintessential to the protection of the diversity of beliefs.*

Freedom of religion, in essence, allows the diversity of faiths and differential beliefs within a faith to flourish in a conducive environment. As Heiner Bielefeldt puts it, not only in the modern world is diversity an irreversible fact, it should also be appreciated as a manifestation of the potential of human responsibility and therefore as intrinsically something positive.[20] Human diversity is itself a sign of moral earnestness.[21] The respect that we serve for the beliefs that we do not find true or reasonable is the normative denominator of our peaceful co-existence.[22]

Bielefeldt states that the respect that we are referring to here is not for the wrong or unreasonable beliefs of others but for the overarching ability of the men to have and develop deep beliefs and certitudes in the first place.[23] The practices that humans undertake in pursuance of religion are all manifestations of a responsible agency and therefore they deserve respect. This responsible agency thus forms the basis of human rights and pluralism that we experience in our everyday life, which helps us find a common ground for organizing our mutual co-existence.[24]

[20]Heiner Bielefeldt, *Freedom of Religion or Belief: A Human Right under Pressure*, 1 OXFORD J. L. RELIG. 15 – 35 (2012) [hereinafter BIELEFELDT].
[21]Heiner Bielefeldt, *Misperceptions of Freedom of Religion or Belief*, 35 HUM. RTS. Q. 33, 68 (2013).
[22]*Id.*
[23]BIELEFELDT, *supra* note 20.
[24]HEINER BIELEFELDT, SYMBOLIC REPRESENTATION IN KANT'S PRACTICAL PHILOSOPHY 101-04 (2003).

D. *The freedom of religion is the right path to go about ensuring religious reforms in the long run.*

In order to attain progress in the society, one needs to be free to interact and interpret one's own religious sources and change one's beliefs in light of the changing social reality.[25] Therefore, religious freedom is indispensable to society.[26] It is only through the organic process that religion can be reformed without which its growth would remain stunted.[27]

As Jay Newman puts it, while we may be tempted to assume various possibilities and ways of religious reforms, it is only religion which can generate values to alter itself.[28] It is only through the medium of thought and consciousness that natural events happening around us affect us, and it is this experience that is significant in generating and shaping our values.[29] Even politics and economics are a product of some form of values generated within us through experience. Then what are the forms of experience and culture which can change religion? According to Newman, it is philosophy, as it is the epiphenomenon of religion growing out of religion itself and has attained some level of independence from its source.[30] He thus concludes that in a sense, the impetus to reform religion comes from

[25]Faizan Mustafa & Jagteshwar Singh Sohi, *Freedom of Religion in India: Current Issues and Supreme Court Acting as Clergy*, 2017 BYU L. REV. 915, 956 (2017) [hereinafter FAIZAN].
[26]DAVID SLOAN WILSON, DARWIN'S CATHEDRAL: EVOLUTION, RELIGION, AND THE NATURE OF SOCIETY (2002) [hereinafter WILSON]; Michael W. McConnell, *Why Is Religious Liberty the First Freedom*, 21 CARDOZO L. REV. 1243, 1266 (2000) [hereinafter MCCONNELL].
[27]FAIZAN, *supra* note 25.
[28]JAY NEWMAN, ON RELIGIOUS FREEDOM 159–60 (1991).
[29]*Id.*
[30]*Id.*

religion itself.[31] Only greater religious autonomy will lead to religious reform[32] while repression may lead to violence.[33]

Therefore, protection of religion is akin to the protection of democracy and liberty in the world. Liberty, in the true sense of its meaning, would only be protected when individuals are allowed to decide their own beliefs rather than being dictated upon. When we are capable of establishing a society where each individual is free to choose his or her beliefs and basic instincts, we would be making a more satisfied and a tolerant society, which is a hallmark of democracy.

III. THE PROBLEM

As discussed previously, religion has been an indispensable part of our lives.[34] It is more so in the case of Indians,[35] who are referred to as '*essentially religious*' by some scholars.[36] Despite religion being of such importance, India has successfully been able to retain its secular character.[37] However, a trend has gained prominence wherein, though India appears to be secular from the outside where all religions are freely practised, it is upon the courts of law to decide what practices constitute religion, and consequently, what is protected. The courts have named this weapon the ERPT where they interpret the religious texts to decide which part of religion is essential to the religion and which is not. It is the best example of how archaic our beliefs and

[31]*Id.*; FAIZAN, *supra* note 25.
[32]BRIAN J. GRIM & ROGER FINKE, THE PRICE OF FREEDOM DENIED: RELIGIOUS PERSECUTION AND CONFLICT IN THE TWENTY-FIRST CENTURY 2–4, 212–13 (2011).
[33]*Id.*
[34]WILSON, *supra* note 26; MCCONNELL, *supra* note 26.
[35]T.N. Madan, *Religion in India*, 118 DAEDALUS 114, 115–17 (1989).
[36]RAJENDRA K. SHARMA, INDIAN SOCIETY, INSTITUTIONS AND CHANGE 186 (2004).
[37]Ranbir Singh & Karamvir Singh, *Secularism in India: Challenges and Its Future*, 69 INDIAN J. POL. SCI. 597, 603 (2008).

ideologies are. A recent example of the application of this test was seen in the Sabarimala verdict, as has already been discussed. Therein, the court went on to apply not just this test, but also set an example for the State to avail future opportunities of such impingement on religious liberties.

The test was coined by the Supreme Court in the *Shirur Mutt* case way back in 1954.[38] The court held that only those beliefs and practices which are integral to the religion would be protected by Article 25 of the Constitution.[39] It would be upon the judiciary to decide what is integral and what is not. B. Parmeshwara Rao, in his paper gives the procedure that the courts use in the application of the essentiality test.[40] First, the matters of religion would be distinguished from the secular matters, second, the court would decide whether the practice is integral to the religion or not, third, the court would see that the practice must not have sprung from a superstitious belief and last, the Court would scrutinize the claims of religious practices for the protection of Article 26(b) of the Constitution.[41]

Derrett, while discussing relationship of courts and religion in India in his treatise, states that, "*the courts can discard as non-essentials anything which is not proved to their satisfaction… and they are not religious leaders or in any relevant fashion qualified in such matters…to be essential, with the result that it would have no constitutional protection*."[42]

Similarly, Dhavan and Fali S. Nariman, in their work, give an even more critical reckoning, stating, "*with a power greater than that of a high priest, Molvi or Dharma-Shastri, judges have virtually assumed*

[38]Commissioner, Hindu Religious Endowments, Madras v. Sri Lakshmindra Thirtha Swamiar of Sri Shirur Mutt, 1954 SCR 1005, 1021.
[39]INDIA CONST. art. 25.
[40]B.P. Rao, *Matters of Religion*, 5 JOURNAL OF INDIAN LAW INSTITUTE 509, 512 (1963).
[41]*Id.*
[42]J. DUNCAN M. DERRETT, RELIGION, LAW AND THE STATE IN INDIA 447 (1999).

the theological authority to determine which tenets of a faith are 'essential' to any faith and emphatically underscored their constitutional power to strike down those essential tenets of a faith that conflict with the dispensation of the Constitution. Few religious pontiffs possess this kind of power and authority."[43]

The courts hold a significant authority as far as the dispensation of justice is concerned. The importance of this role increases manifold when something as integral as religion is in question. In this part of the Article, the fundamental flaws in the Essential Religious Practices Doctrine employed by the judiciary are pointed out. It is argued that the ERPT cannot be an appropriate test for deciding religious matters on the grounds (a) that the courts of law are incapable of deciding matters of theology, (b) that religion, in essence, is relative in nature and therefore, one definition of religion is not possible, (c) that the ERPT limits the scope of natural reformation of religion, and (d) that the ERPT attempts to rationalize religion and mould it to the court's liking.

A. *The courts of law are incapable of deciding matters of theology.*

"*The power of civil government relates only to ... civil interests are confined to the care of the things of this world, and hath nothing to do with the world to come.*"[44]

Justice Iacobucci of the Canadian Supreme Court while pronouncing his judgment in *Syndicat Northcrest v. Amselem*, observed that "*the State is no position to be, nor should it become, the arbiter of religious dogma*."[45] The basic premise of this idea is that it would be very dangerous for the State to start telling a religious community what their main beliefs are as per their religion or whether their entire

[43]R. DHAWAN & FALI S. NARIMAN, SUPREME BUT NOT INFALLIBLE 257, 259 (2000).
[44]PHILIP B. KURLAND & R. LERNER, THE FOUNDERS' CONSTITUTION 52 (1987).
[45]Syndicat Northcrest v. Amselem, (2004) 2 SCR (Canada) 576.

faith is correct at all. This may lead to a secular ideology dictating terms to religious one. It would become quite simple for the State to dismiss various beliefs by putting them through strict constitutional tests of equality and liberty. However, what must be understood is that religion does not function like any other law where strict constitutional standards can be applied.

Our point of concern here is that we have quite conveniently assigned the right to the State to determine and decide which action is to be accorded protection under Article 25 of the Indian Constitution. However, the scholars of law who sit on the bench are completely incapable of deciding the intricate religious issues. After all, the texts and manuscripts of religion do not function like the ordinary statutes and constitutions. The liberal ideology of the judges is often inconsistent with the orthodox religious practices, and therefore, one might witness decisions where radical reforms are attempted. Moving forward on this line of thought, this test essentially attempts to re-shape and re-structure the foundation of a religion. By dictating what is and what is not essential to the religion, this test is controlling the beliefs of an individual.

Lord Hope of the United Kingdom's Supreme Court, while dealing with the issue of asylum for homosexuals in Africa started condemning the beliefs of the community when found disagreeable with his liberal ideology.[46] He claimed that such an action *was* "*fanned by misguided but vigorous religious doctrine*".[47] He stated that this was because of "*ultra-conservative interpretation of the Islamic law*" and also because of the rampant "*homophobic teaching that the right-wing evangelical Christians churches indulge in Africa*".[48] Now, where did Lord Hope go wrong? It was when he

[46]HJ(Iran) and HT(Cameroon) v. Secretary of State of the Home Department, (2010) UKSC 31.
[47]*Id.*
[48]*Id.*

started an attack on the religious beliefs and held that they were wrong interpretations of the religion itself. Recognizing the plight of homosexuals can be understood, but it goes way beyond the authority of any court to start deciding how misguided peoples' beliefs are, which must rather be left to theological examination.

In India, on multiple occasions, the courts have tried to interpret religions to suit their own whims. In *Shastri Yagnapurushdasji v. Muldas,*[49] a group claimed recognition as an independent denomination following the teachings of Swaminarayan. The court, in this case, stated that this claim was "*founded on superstition, ignorance and a complete misunderstanding of the true teachings of the Hindu religion and of the real significance of the tenets and philosophy taught by Swaminarayan himself*."[50] No matter how misguided the followers were, it is not within the scope of the court's authority to grant or restrict any person's beliefs unless it contradicts the requirements of Article 25. There have been numerous instances where the courts have decided matters in a similar fashion, whether it be the essential practice of keeping the beard for a Muslim man[51] or whether the *Tandava* dance merits protection.[52] The court in such cases attempts to dictate to a group of people what their religion in reality propagates. The real problem is with the courts explaining whether one should believe in something or not, rather than protecting those beliefs, thus defeating the entire purpose of incorporating Article 25 in the Constitution of India.

B. Religion, in essence, is relative in nature and therefore, one definition of religion is not possible.

For the sake of argument, accepting the idea that courts have and would continue to hold the authority to discuss religion, ERPT still

[49]Shastri Yagnapurushdasji v. Muldas, 1966 SCR (3) 242.
[50]*Id.*
[51]Mohd. Zubair Corporal v. Union of India, 2016 SCC OnLine SC 1472.
[52]SP Mittal v. Union of India, 983 SCR (1) 729.

cannot be considered to be a good test for legal scrutiny of religion. An argument in favour of this idea is that religion is a relative concept. Thus, what might be essential to the religion in one place may be completely irrelevant in another. For instance, during Dussehra, an effigy of *Ravana* is burnt across India, and this act is considered to be a symbol of victory of '*Dharma*' over '*Adharma*'. However, there are certain places such as Mandore in Jodhpur, where doing so is prohibited by the natives. According to the legends, Mandore is where *Mandodari* married *Ravana* and therefore the natives of the place believe *Ravana* to be their son-in-law. It is because of this reason that instead of burning the effigy, '*Shraadh*' and '*Pind Daan*' are performed as per the Hindu customs for the demon-king *Ravana*.[53] Applying the ERPT in such a scenario, we would find that the burning of this effigy of *Ravana* is an essential practice in the rest of India, while in Mandore, the same cannot be thought of in the worst of nightmares.

One example is the *Gram Sabha case*,[54] where members of a particular sect claimed that capturing and worshipping a live cobra during the festival of *Nagpanchami* was an essential religious practice of their religion. The plaintiffs relied on the local text, *Shrinath Lilamrat* in making their claim, while the court, on the contrary, relied on the *Dharam shastras* (general Hindu text) in holding that the act was not an essential religious practice and thus cannot be protected. Again, the fact is that India is a land of diversity and therefore no religion, Hinduism in the present case, can be fitted into a single compartment.

As far as the Sabarimala issue is concerned, women of menstruating age are not allowed to enter the residing place of Lord Ayappa and

[53] *8 places in India where Ravana will not be set on fire*, THE STATESMAN (Jan. 9, 2019), https://www.thestatesman.com/india/8-places-in-india-where-ravana-will-not-be-set-on-fire-1502698429.html.

[54] Gram Sabha of Village Battis Shirala v. Union of India, 2014 SCC OnLine Bom 1395.

such belief of the people should be respected. It is said that Ayappa resides in the Sabarimala temple in the form of *Naishtik Brahamchari*, that is, the eternal celibate. The God's vow of celibacy demands him to refrain from any menstruating woman, meaning, neither can he touch nor see a woman of such age. If a woman is allowed to enter the temple, his vow would be broken and his unique form of *Naishtik Brahamcharya* would be disturbed.[55] For the members of the community who believe in this idea of Ayappa's celibacy, the application of the ERPT would be demeaning their beliefs. What is more concerning is the assumption of absolute power by the State. Such concentration of power does not and should not have any place in a democracy.

The reason behind stating the above situation is that what may be construed as essential to one place need not be necessarily essential in another. The Sabarimala case is a unique one. The practices of one temple in Kerala are different from practices in others. There are temples where entry of men is not allowed, temples where the God is offered the lamb in *prasadam*, but do these unique practices make such temples anti-Hindu? Certainly not, these practices are respected despite being relative in nature and so must be the issue in Sabarimala. It is simply a temple with unique and relative practices.

There is no straight jacket formula to ascertain what is essential to religion. The judiciary cannot turn a blind eye to the relativity and subjectivity that comes along with religion. Scrutinizing the minuscule details of religion from a cold, calculated and objective approach is not the right way to go about protecting this natural and fundamental right of the citizens of our country. As soon as we start attempting to categorize beliefs into compartments of right and wrong, we start to ignore the grey areas and the possibilities that

[55] *Here's why women are barred from Sabarimala; It is not because they are 'unclean'*, FIRST POST (Jan. 9, 2019), https://www.firstpost.com/india/why-women-are-barred-from-sabarimala-its-not-because-they-are-unclean-2583694.html.

come with the diversity that exists in India. The assortment of beliefs, values and cultures is what makes India a country of such uniqueness. Simply because there is a group of people who dissent and disagree with such a belief, the court cannot test specific practices on a general understanding of religious norms. On the contrary, there would definitely be a large fraction of people who would be invested in such a practice for years. The purpose of law is finding equilibrium between dissent and acceptance and we cannot go on measuring and testing customs and values by blatantly applying the principles of equality or fairness in every situation. Thus, everything boils down to the bottom line that religion is relative. The words, right and wrong, fair and unfair, have no place where religion is concerned.

C. The ERPT limits the scope of natural reformation of religion.

One of the features of the ERPT is that only those religious practices are considered to be essential to a religion which have been in existence since the time of birth of that religion. In the case of *Commissioner of Police v. Avadhut,*[56] the Calcutta High Court had held that the *Tandava* dance was an essential practice of the *Ananda Margi* faith. This decision was overturned on appeal, by the Supreme Court on the pretext that the *Ananda Margi* faith had come into existence in the year 1955 while *Tandava* dance was introduced only in 1966.[57] Therefore, the religion did exist without that practice, and as such, it cannot be referred to as an essential practice of the religion. Though the court in the aforementioned case ignored an important fact that Shri. Anant Murthiji, the head of that faith had provided for the incorporation of the *Tandava* dance in the revised version of *Karya*, the only religious text on *Ananda Margi*. The dissenting

[56]Commissioner of Police and Ors. v. Acharya Jagadishwarananda Avadhuta and Anr., (2004) 12 SCC 770.
[57]*Id.*

opinion, in this case, did rely on the *Karya*, to give protection to the practice under Article 25.[58]

This case sets a precedent that religious practice can only be considered integral if it had existed since the foundation of religion. This regressive logic thus freezes religious growth as any reform in the religion would never be considered essential to it.[59] Extending this to major religions such as Islam and Christianity would result in any practice evolved after the death of Prophet Mohammed and Jesus Christ respectively to be considered unimportant. Thus, this absurd reasoning prevents the natural growth of a religion, which is an important feature of the freedom of religion.

D. The ERPT attempts to rationalize religion and mould it to the court's liking.

One of the significant drawbacks of the ERPT is that it attempts to rationalize religion rather than accepting the belief or practice in its original form. Consequently, it also leads to the suppression of popular religion in favour of the elite religion, as the texts and religious literature on which the court mostly relies is often supportive of the latter. One such case is the *Gram Sabha*[60] case, where feeding snakes by a specific sect was held to be non-essential as it was not supported by the general Hindu text of *Dharamshastras*.

Justice Gajendragadkar in the *Durgah Committee case*[61] stated that "*even practices though religious may have sprung from merely superstitious beliefs and may in that sense be extraneous and unessential accretions to religion itself*." Consequently, the court differentiated between the real religion and the superstition. What the

[58]*Id.*
[59]FAIZAN, *supra* note 25.
[60]Gram Sabha of Village Battis Shirala v. Union of India, 2014 SCC OnLine Bom 1395.
[61]Durgah Committee v. Hussain Ali, AIR 1961 SC 1402.

court failed to understand was a much-accepted proposition in the realm of law, as pointed out by Chief Justice Latham in the *Jehovah's witnesses'* case- "*What is a religion to one is superstition to another.*"[62]

In the case of *Shastri Yagnapurushdasji v. Muldas,* a group of *Satsangis* were claiming protection under the Bombay Harijan Temple Entry Act.[63] Justice Gajendragadkar in his judgment stated that "*it may be conceded that the genesis of the suit is… founded on superstition, ignorance and complete misunderstanding of the true teachings of Hindu religion and of the real significance of the tenets and philosophy taught by Swaminarayan himself.*"[64]

On analysing the texts and the teachings, it appears that the courts have relied upon a much reformed and elite form of religion rather than the popular one. One must understand that religion is a popular phenomenon and may often derive its sanction not from any virtuous texts, but from popular practices going on since time immemorial. Had the religion been all virtuous in itself, a need to protect it would not have ever arisen in the first place.

Justice Ramaswamy, in the case of *A.S. Narayana Deekshitulu v. the State of A.P.*,[65] stated that the idea of *Dharma,* or the core religion is what is protected by the Constitution, rather than the conventional religion. According to him, "*Dharma is that which approves oneself or good consciousness or springs from due deliberation for one's own happiness and also for the welfare of all beings free from fear, desire, cherishing good feelings and sense of brotherhood, unity and friendship for integration of Bharat. This is the core religion which the Constitution accords protection…The religious freedom guaranteed by Articles 25 and 26, therefore, is intended to be a guide*

[62]Adelaide Co of Jehovah's Witnesses Inc v. Commonwealth, (1943) 67 CLR 116.
[63]Shastri Yagnapurushdasji v. Muldas, 1966 SCR (3) 242.
[64]*Id.*
[65]A.S. Narayana Deekshitulu v. State of Andhra Pradesh, AIR 1996 SC 1765.

to a community-life and ordain every religion to act according to its cultural and social demands to establish an egalitarian social order." Justice Ramaswamy, in essence, stated that the ultimate aim of religious freedom is not to protect beliefs and practices but rather to establish a utopian world where religion is brought in consonance with social and cultural demands. This was certainly not in the minds of Constitution framers when they inserted a clause for religious protection.

Further, most of the judges in India are often influenced by the rationalist Hinduism, as propounded by the Vedic scholars.[66] Most of the time, reformists such as Vivekananda or Radhakrishna are cited as authoritative scholars of Hindu religion, whereas in reality, their works propound a much reformed idea of it.[67] The courts have methodically been tempted to give rationalist Vedic scholars legitimacy in the Indian religious discourse.[68] In doing so, the courts having contracted the '*institutional space for personal faith*', and have also side-lined popular religion by, as Ashis Nandy states, treating it as "*parts of an enormous structure of irrationality and self-deceit, and assure markers of an atavistic, regressive way of life*".[69]

Justice Indu Malhotra rightly points out in her opinion –

"*Constitutional morality in a pluralistic society and secular polity would reflect that the followers of various sects have the freedom to practise their faith in accordance with the tenets of their religion. It is*

[66]Ronojoy Sen, *The Indian Supreme Court and the quest for a 'rational' Hinduism*, 1 SOUTH ASIAN HISTORY AND CULTURE 86–104 (2009).
[67]*Id.*
[68]*Id.*
[69]Ashis Nandy, *The Twilight of Certitudes: Secularism, Hindu Nationalism, and other Masks of Deculturation*, 22 ALTERNATIVES: GLOBAL, LOCAL, POLITICAL 157–176 (1997).

irrelevant whether the practice is rational or logical. Notions of rationality cannot be invoked in matters of religion by courts."[70]

It can therefore be inferred that the ERPT is laden with some fundamental flaws that are not in consonance with the idea of religious liberty. Therefore, there is a need to find an alternative to this doctrine to ensure that a pluralist democracy such India does not fall prey to the luring trap of impractical and a far-fetched reality of radical religious reformation, especially by those who do not understand it in its entirety.

IV. CONCLUSION: DEVELOPING A NEW RELIGIOUS JURISPRUDENCE

This article has tried to examine the ERPT through a new prism. The importance of religious freedom and the problems deep-seated in the given test are seemingly clear now. However, having grasped the flaws in the stand of the judiciary, it is important that we provide an alternative to the ways adopted by the courts.

Moving forward, the court must reorient its jurisprudence in the following manner- Firstly, the courts in usual circumstances should refrain from deciding religious questions. At most, the courts may decide whether a practice is religious or not, rather than how religious the practice is. As Dr. B.R. Ambedkar had put it, the practices which are '*essentially religious*' must be protected, not the '*essential practices of a religion*'.[71] The courts must look to the precedent set by another South-East Asian country, Sri Lanka, where the Supreme Court held in the case of *Premalal Perera* v. *Weerasuriya*, "*the Court*

[70] Indian Young Lawyers Association and Ors. v. The State of Kerela, 2018 SCC OnLine SC 1690.

[71]Constitutional Assembly Debates, Dec. 2, 1946 speech by Dr. B.R. Ambedkar, http://parliamentofindia.nic.in/ls/debates/vol1p5.htm.

would consider only whether the professed belief is rooted in religion and whether the claimant honestly and sincerely entertained and held such belief."[72]

Secondly, whenever there lies a confusion between the religious protection and government regulation, the benefit of doubt should always be given to religious protection. In *Ananda Margi,* the court did the opposite. It observed that "*Ananda Margi as a religious order is of recent origin and the tandava dance as a part of the religious rites of that order is still more recent. It is doubtful as to whether in such circumstances the tandava dance can be taken as an essential religious rite of the Ananda Margi.*" This implies that whenever there has been a doubt with regard to the essentiality of the practice, the benefit of doubt has been given to the regulation. We propose that the opposite is what should be followed. Obviously, it is more useful to grant freedom than take it away in case of doubt.

Thirdly, we propose that the State should be able to regulate religion only when there exists a legitimate aim, the non-achievement of which would compromise the State's security or character to an intolerable degree. Applying the formula given by the jurist Gustav Radbruch, also known as the Radbruch's formula, where a statutory law is disregarded only when requirements of justice are compromised to an intolerable degree,[73] freedom of religion must also be compromised only when the State's security or character is threatened to an intolerable degree. What would constitute 'intolerable degree' is a matter of fact. However, cases where a temple for its own distinct reasons does not allow entry of females within its premises, or a man because of his religious reasons keeps on his beard, certainly do not breach this threshold. On the contrary, cases where a certain section of the society are called 'untouchables'

[72]Peremal Perera v. Weerasuriya, (1956) 2 Sri LR 177.

[73]Gustav Radbruch, *Statutory Lawlessness and Supra-Statutory Law (1946),* 26 OXF. J. LEG. STUD. 1–11 (2006).

throughout the nation and are treated as second class citizens would be an area where the national character is compromised to an intolerable degree.

Lastly, we propose that in cases of necessity, the State should be allowed to regulate religion. For example, in a situation where goats have become an endangered species or their numbers are seriously threatened, the State should have the right to prohibit goat sacrifice on Bakr-id till the required population is restored. Similarly, if the milk production has seriously taken a setback in the nation, the State should have the authority to prohibit the presentation of milk to Lord Shiva on Nagpanchami for a temporary period or allow for a compulsory milk collection mechanism in all such temples.

While we do not claim that the above suggestions are conclusive in nature, we have proposed them as the first step towards the making of a more inclusive religious doctrine. The doctrine that we follow presently neglects sections and subsections of society whose practices are not as popular as those of others. While giving importance to the ideals of the reformists is a positive step taken by the court, neglecting religious understanding of others places a serious doubt on the way we see freedom of religion in our pluralist democracy.