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# Freedom of Religion in India: Current Issues and Supreme Court Acting as Clergy

*Faizan Mustafa\* and Jagteshwar Singh Sohi\*\**

*Religion is an indispensable part of human existence. Freedom of religion is considered as the third most important civil liberty after the right to life and personal liberty and the freedom of speech and expression. The Indian Constitution guarantees freedom of religion and acknowledges the individual's autonomy in his or her relationship with God. However, the Supreme Court of India, through the creation and continued use of the essentiality test, has tried to reform religion by restricting the scope of this freedom. The judiciary has taken over the role of clergy in determining what essential and non-essential religious practices are. Moreover, the Court has applied the test in an inconsistent manner, repeatedly changing the method of determining essentiality, seriously undermining religious liberty. This Article examines these judgments to demonstrate the adverse impact of the essentiality test on religious freedom.*

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## I. THE CASE FOR RELIGIOUS FREEDOM

Religion has been at the center of human societal existence since time immemorial.<sup>1</sup> Though some scholarship claims certain tribes or civilizations existed without religion,<sup>2</sup> it is not a well-accepted view.<sup>3</sup> Religion is, and has always been, an indispensable and ineffaceable

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1. Cicero, the great Roman orator, stated as much when he claimed “there is no race so uncivilized, no one in the world . . . so barbarous that his mind has no inkling of a belief in gods . . . .” CICERO, TUSCULAN DISPUTATIONS 37 (J.E. King trans., 1971). This argument is known as *consensus gentium*, meaning “from consent,” and has been reproduced since that time in one form or another. See generally Walter H. O’Brian, *Is There an Argument Consensus Gentium?*, 18 INT’L J. FOR PHIL. RELIGION 73, 73 (1985) (discussing the rise and fall of the *consensus gentium* argument for the existence of God).

2. Whether there were human societies without any form of religion was an important question that gripped the European intelligentsia. As new lands were explored—between the sixteenth and nineteenth century—these debates were engaged in time and again. Today, there remain only a few proponents that argue cultures without religion exist. See generally S.N. BALAGANGADHARA, ‘THE HEATHEN IN HIS BLINDNESS . . .’: ASIA, THE WEST AND THE DYNAMIC OF RELIGION (H.G. Kippenberg & E.T. Lawson eds., 1994); DANIEL DUBUISSON, THE WESTERN CONSTRUCTION OF RELIGION: MYTHS, KNOWLEDGE, AND IDEOLOGY (William Sayers trans., 2003) (1998); FRITS STAAL, RITUAL AND MANTRAS: RULES WITHOUT MEANINGS (1996).

3. Through the twentieth century, it has been generally accepted that all known cultures or societies have some kind of religion. See THOMAS FORD HOULT, THE SOCIOLOGY OF RELIGION 3 (1958) (“Wherever there is man there is religion. Manifestations of it are found universally.”); ALEXANDER LE ROY, THE RELIGION OF THE PRIMITIVES 286 (Newton Thompson trans., 1922) (“The first conclusion . . . is the fundamental universality, permanence, and identity of religions. This great fact is no longer disputed by any one . . . .”); JOSEP R. LLOBERA, AN INVITATION TO ANTHROPOLOGY: THE STRUCTURE, EVOLUTION AND CULTURAL IDENTITY OF HUMAN SOCIETIES 73 (2003) (“Religion . . . deals with supernatural beings from specific gods to vague forces . . . . [T]here is little doubt that religion is universal and that . . . it has existed in all societies for at least 40,000 years.”); BRIAN MORRIS, ANTHROPOLOGICAL STUDIES OF RELIGION: AN INTRODUCTORY TEXT I (1987) (“Few would deny that some form of religion is universal among mankind.”); ELIZABETH K. NOTTINGHAM, RELIGION AND SOCIETY I (1954) (“[Sociologists are] interested in religion as a universal function of human societies wherever they may be found.”); JOHN A. SALIBA, ‘HOMO RELIGIOSUS’ IN MIRCEA ELIADE: AN ANTHROPOLOGICAL EVALUATION 22 (1976) (“[R]eligion is a universal phenomenon . . . .”); ROBERT L. WINZELER, ANTHROPOLOGY AND RELIGION: WHAT WE KNOW, THINK, AND QUESTION 3–4 (2008) (examining the universality of religion).

part of our lives.<sup>4</sup> This tenet is especially evident in Indian culture. Man is incurably religious; but Indians most of all.<sup>5</sup>

Indian society “displays a[] . . . manifest tendency towards an outlook that is predominantly religious.”<sup>6</sup> Sir Harcourt Butler, in often quoted words, noted that “[t]he Indians are essentially religious as Europeans are essentially secular. Religion is still the alpha, and the omega of Indian life.”<sup>7</sup> The effect that religion has had on the progress of Indian society is tremendous.<sup>8</sup> Therefore, the emergence of India as a secular state in the mid-twentieth century was a remarkable social, political, and religious phenomenon.<sup>9</sup>

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4. Today, the scholarship in this regard gives an evolutionary-biological explanation of religion. See generally SCOTT ATRAN, IN GODS WE TRUST: THE EVOLUTIONARY LANDSCAPE OF RELIGION (2002); PASCAL BOYER, RELIGION EXPLAINED: THE EVOLUTIONARY ORIGINS OF RELIGIOUS THOUGHT (2001); MATT J. ROSSANO, SUPERNATURAL SELECTION: HOW RELIGION EVOLVED (2010); DAVID SLOAN WILSON, DARWIN’S CATHEDRAL: EVOLUTION, RELIGION, AND THE NATURE OF SOCIETY (2002).

5. See T.N. Madan, *Religion in India*, 118 DAEDALUS 114, 115–17 (1989) (discussing the central position religion holds in the cultures, traditions, and people of India).

6. ARNOLD J. TOYNBEE, A STUDY OF HISTORY 242 (D.C. Somervell ed., 1947).

7. RAJENDRA K. SHARMA, INDIAN SOCIETY, INSTITUTIONS AND CHANGE 186 (2004) (quoting SPENCER HARCOURT BUTLER, INDIA INSISTENT (1931)).

8. See Faizan Mustafa, *Freedom of Religion in India: Contemporary Challenges*, CENTRE FOR STUDY OF SOCIETY AND SECULARISM (May 14, 2015), <http://www.csss-islam.com/4th-aae-memorial-lecture-full-text/>.

9. In the original 1950 Constitution, as instituted by the people, Articles 25–28 established the “Right to Freedom of Religion.” INDIA CONST. art. 25–28. These rights were in Part III, which reflected the *Fundamental Rights* provided by the document. *Id.* These were enforceable against the State, and have, rightly, been referred to as the most important segment of the Constitution. This was further reinforced by the Constitution Act, 1976; section two of the Constitution Act added the word “secular” to the Preamble of the constitution, with effect on January 3, 1977. See The Constitution (Forty-second Amendment) Act, 1976, No. 91, Acts of Parliament, 1976 (India), <https://india.gov.in/my-government/constitution-india/amendments/constitution-india-forty-second-amendment-act-1976>. Prior to this, in 1973, the Indian Supreme Court held in *Keshavananda Bharti v. State of Kerala*, Writ. Pet. No. 135 of 1970 (India Apr. 24, 1973), that secularism is part of the basic structure of the Constitution. *Id.* § 307. Thus, the amendment simply made explicit what was already implicit. See Faizan Mustafa, *BJP & Secularism*, THE STATESMAN (Dec. 4, 2015, 8:18 PM), <http://www.thestatesman.com/opinion/bjp-amp-secularism-108501.html> (discussing the secularism debate surrounding the writing of the original Constitution). The present government’s Home Minister has asserted that secularism is the most abused word in India, and means only panthnirpekshata (denominational neutrality) and not dharamnirpekshata (religious neutrality). It seems that the Minister just wanted to give freedom to different sects or denominations under secularism rather than neutrality of the State in religious matters. This is a strange interpretation of secular polity as it merely refers to freedom within religions and tells us nothing about state-religion relationship. See *id.*

Though religion remains important in India, and still exists in the public sphere, the country has successfully retained its secular character.<sup>10</sup> Secularism became ideal in religious India due to communalism because the former was understood as an answer to the latter.<sup>11</sup> To make secularism acceptable, freedom of religion was guaranteed.<sup>12</sup>

This was made possible, in large part, because the framers of the Indian Constitution (the “Constitution”) wanted to base society on an understanding that man has an “inward association” with religion.<sup>13</sup> It helped that the most conspicuous characteristic of Indian culture was the life of the inner spirit,<sup>14</sup> meaning that it wasn’t any one religion per se that drove the Indian people, but a spiritual connection to a higher power.<sup>15</sup> The concept of *sarva dharma sambhava*, the idea that all religions are true, also furthered this

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10. See Ranbir Singh & Karamvir Singh, *Secularism in India: Challenges and Its Future*, 69 INDIAN J. POL. SCI. 597, 603 (2008).

11. See *id.* at 599. Communalism is the belief that because a group of people follows a particular religion, they have, as a result, common social, political, and economic interests. Inherent herein is that the social, cultural, economic, and political interests of different religious groups are dissimilar and divergent. See BIPAN CHANDRA, COMMUNALISM IN MODERN INDIA 15–17 (1984). Another commentator notes that “[c]ommunal ideology perceives Indian society as constituted of a number of religious communities and the identity of Indian society is seen essentially in these terms. Attempts are also made to see the reality of Indian politics in terms of such religious communities.” Romila Thapar, *Communalism and the Historical Legacy: Some Facets*, 18 SOC. SCIENTIST 4, 5 (1990).

12. See Singh & Singh, *supra* note 10, at 600.

13. See Ananya Mukherjee Reed, *Religious Freedom Versus Gender Equity in Contemporary India: What Constitutions Can and Cannot Do*, 25 ATLANTIS 42, 42 (2001).

[T]he framers of India’s Constitution sought to shape an overarching Indian identity by adopting a “secular” state based on three principles of equality, neutrality, and liberty. According to the principle of *equality*, the state was to give no preference to one religion over another. The principle of *neutrality* demanded that the state did not interfere in religious affairs or organizations of religious communities. According to the principle of *liberty*, the state was to permit the practice of any religion, within the limits set by certain other basic rights, which the state is also required to protect.

*Id.* at 43 (citation omitted).

14. See P.T. Raju, *Enquiry on Interrelations of Cultures: India’s Cultures and Its Problems*, UNITED NATIONS EDUCATIONAL, SCI. AND CULTURAL ORG. 1, 31–32 (Oct. 25, 1949), <http://unesdoc.unesco.org/images/0015/001550/155060eb.pdf> (summarizing the ideas of spirituality and solidarity in relation to religion and culture in India).

15. See L. S. S. O’MALLEY, POPULAR HINDUISM: THE RELIGION OF THE MASSES 45 (Weston La Barre ed., Johnson Reprint Corp., 1970) (1935) (“Intellectual Indians . . . assert that the outlook on, and conduct of, life are not merely religious but spiritual.”).

spiritual connection, justifying tolerance and accommodation of distinctive religious identities.<sup>16</sup> As such, the framers provided that no religion would be given preference over another and permitted the practice of any religion.<sup>17</sup> Citizens would be free to follow and practice their religion in their private affairs, and thus, the State would not impose a uniform civil code despite a constitutional mandate to do so.<sup>18</sup> Further, the State would not interfere in religious affairs so long as they did not affect certain other basic rights protected by the Constitution.<sup>19</sup> Thus, one could say that the management of constitutional diversity in India went beyond creating a “melting pot”<sup>20</sup> and genuinely provided for the preservation of distinctive identities.<sup>21</sup>

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16. See Asghar Ali Engineer, *Sacred and Secular: False Divide*, 32 *ECON. & POL. WKLY.*, Oct. 18, 1997, at 2653, 2653 (One emphasis in the debate over secularism is the idea that religion is the private affair of individuals, and all people should worship how they wish.).

17. See INDIA CONST. art. 25, § 1.

18. See *id.*

19. See *id.* (“Subject to public order, morality and health and to the other provisions of this Part . . .”).

20. The melting pot is a model of ethnic relations in which a nation-state’s constituent ethnic groups engage in a process of reciprocal fusion. See *ENCYCLOPAEDIA OF NATIONALISM* 177 (Athena S. Leoussi ed., 2001). It may be understood as assimilation, a process in which formerly distinct and separate groups come to share a common culture and merge together socially. See JOSEPH F. HEALEY, *DIVERSITY AND SOCIETY: RACE, ETHNICITY, AND GENDER* 44 (4th ed. 2014). India, on the other hand, has followed pluralism, meaning the groups maintain their individual identities. See *T.M.A.Pai Foundation & Ors v. State Of Karnataka & Ors*, (2002) 8 SCC 481 (India). In a pluralistic society, groups remain separate, and their cultural and social differences persist over time. But see ROBERT N. BELLAH ET AL., *HABITS OF THE HEART: INDIVIDUALISM AND COMMITMENT IN AMERICAN LIFE* (1996); PETER BRIMELOW, *ALIEN NATION: COMMON SENSE ABOUT AMERICA’S IMMIGRATION DISASTER* (1995); MICHAEL NOVAK, *THE RISE OF THE UNMELTABLE ETHNICS: POLITICS AND CULTURE IN THE SEVENTIES* (1972), for criticisms of the former being an abstract cultureless society.

21. See INDIA CONST. art. 29–30; see also GARY JEFFREY JACOBSON, *THE WHEEL OF LAW: INDIA’S SECULARISM IN COMPARATIVE CONSTITUTIONAL CONTEXT* 286 (2003). The author argues that American *assimilative secularism* would benefit by drawing from the Indian model the possibility of making the central religious practices of marginal social groups exempt from some of the laws applied to other citizens (i.e., allowing for preservation of distinctive identities). *Id.* at 283–84. He notes that secularism in India, which he calls positive secularism, is “a central component of a shared political identity that respects India’s various group identities and the State’s ameliorative project.” *Id.* at 286. For more on this point, see Anupama Roy, *Constitutional and Legal Ensemble: Anti-Discrimination and Differentiated Universals of Citizenship*, in *ROUTLEDGE HANDBOOK OF GENDER IN SOUTH ASIA* 62, 62–65 (Leela Fernandes ed., 2014).

Religious freedom, and its value, was understood in free India<sup>22</sup> from the very beginning.<sup>23</sup> Gandhi was convinced that genuine religion—which for him was a personal affair<sup>24</sup>—in its true, complete, and virtuous form, constructs bridges of solidarity between people.<sup>25</sup> In a country ravaged by partition and a society emaciated by untouchability, the framers hoped that liberty of belief, faith, and worship would bring about equality and promote fraternity.<sup>26</sup> Religious freedom—freedom to follow, introspect, and investigate—should allow one to authentically be religious. And this should create harmony and understanding, not propagate sectarianism.<sup>27</sup>

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22. Referring to post-colonial India.

23. See 10 CONSTITUENT ASSEMBLY DEBATES, 448 (2003) (Shri Brajeshwar Prasad speaking about including secularism in the Constitution); AIJAZ AHMAD, LINEAGES OF THE PRESENT: POLITICAL ESSAYS 313 (1996) (noting that the assembly was of the view that a secular state was inevitable for the foundation of a liberal democracy in the country).

24. This ties in with the inward association narrative spoken of above that was adopted in the form of religious freedom in the Indian Constitution. See *supra* note 13 and accompanying text. Gandhi stated that “[r]eligion is a matter of the heart. It is between a man and his God.” MAHATMA GANDHI, 97 THE COLLECTED WORKS OF MAHATMA GANDHI 74–75 (1999) (ebook), <http://www.gandhiashramsevagram.org/gandhi-literature/mahatma-gandhi-collected-works-volume-97.pdf> [hereinafter GANDHI, THE COLLECTED WORKS]. Many such quotations may be found in the publication cited, but for further documentation, see also C.F. ANDREWS, MAHATMA GANDHI’S IDEAS: INCLUDING SELECTIONS FROM HIS WRITINGS (1949); 1 D.G. TENDULKAR, MAHATMA: LIFE OF MOHANDAS KARAMCHAND GANDHI (new ed., rev. 1960).

25. Gandhi stated “religion does not mean sectarianism . . . . This religion transcends Hinduism, Islam, Christianity, etc. It does not supersede them. It harmonizes them and gives them reality.” MAHATMA GANDHI, ALL MEN ARE BROTHERS: AUTOBIOGRAPHICAL REFLECTIONS 54 (Krishna Kripalani ed., The Continuum Publ’g Corp. 1980) (1958). In speaking of religion bringing us together, he is not referring to it as distinct socio-cultural entities. Rather, he refers to religion as the singular, contrasted with irreligion. See *id.*

26. See JUSTICE R.C. LAHOTI, PREAMBLE: THE SPIRIT AND BACKBONE OF THE CONSTITUTION OF INDIA 10–11 (Rohan Thawani ed., 2004) (discussing the importance of belief in ensuring liberty); SACHCHIDANANDA, SOCIAL CHANGE IN VILLAGE INDIA 3–4 (1988) (examining the influence of liberty of belief and worship on establishing a democratic society).

27. See *generally* HANS KÜNG, ISLAM: PAST, PRESENT AND FUTURE (John Bowden trans., 2007). “No peace among the nations without peace among the religions. No peace among the religions without dialogue between the religions. No dialogue between the religions without investigation of the foundations of the religions.” *Id.* at xxiii. In a speech made during his trip to Albania in 2014, Pope Francis noted that, “[a]uthentic religion is a source of peace and not of violence[.]” *Pope to Albania’s Faith Leaders: Religion Is Source of Peace*, VATICAN RADIO (Sept. 21, 2014, 4:31 PM), [http://en.radiovaticana.va/news/2014/09/21/pope\\_to\\_albanias\\_faith\\_leaders\\_religion\\_is\\_source\\_of\\_peace/1107025](http://en.radiovaticana.va/news/2014/09/21/pope_to_albanias_faith_leaders_religion_is_source_of_peace/1107025). The Pontiff continued to explain that religious freedom cannot merely be a right “guaranteed solely by

Religious freedom is premised on the belief that every human being has inherent dignity to explore his or her conscience and pursue the truth.<sup>28</sup> Dr. Sarvepalli Radhakrishnan, former President of India and prominent member of the Indian Constituent Assembly, said that religion is a code of ethical rules and that the rituals, observances, ceremonies, and modes of worship are its outer manifestations.<sup>29</sup> Religion also identifies with “feeling, emotion and sentiment, instinct, cult and ritual, perception, belief and faith.”<sup>30</sup> Professor Alfred North Whitehead defined religion as “what the individual does with his own solitariness.”<sup>31</sup> Radhakrishnan argued that “[i]t is not true religion unless it ceases to be a traditional view and becomes personal experience.”<sup>32</sup> Religious experience is a unique personal experience for most who seek it. “It is an independent functioning of the human mind, something unique, possessing an autonomous character.”<sup>33</sup> In reality it is a relationship between the follower and his or her God. “It is something inward and personal, which unifies all values and organizes all experiences.”<sup>34</sup> This spiritual aspect of religions has been lost in new religiosity, in which rituals have become far more important than the essence and larger purpose of religions. Form has become more prominent than substance.

Unless one is able to interact with, interpret, and reinterpret his or her own religious sources, or shape and reshape his or her beliefs in light of changing social and political realities, progress can never

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existing legislation,” and that it must be a “shared space . . . of respect and cooperation that must be built with everyone’s participation . . .” *Id.*

28. John Milton, in AREOPAGITICA, argues that the freedom to acquire and spread religious knowledge is what leads us to the truth. *See generally* JOHN MILTON, AREOPAGITICA (Edward Arber ed., AMG Press, Inc. 1966) (1644). AREOPAGITICA is among history’s most influential and impassioned philosophical defenses of the principle of freedom of speech and expression, and is opposed to licensing and censorship. Milton offered several reasons why unlicensed printing would promote the discovery of truth. *Id.* One of these now familiar claims is that truth will prevail over falsehood in any free encounter. *See* JOHN H. GARVEY, WHAT ARE FREEDOMS FOR? (1996).

29. S. RADHAKRISHNAN, AN IDEALIST VIEW OF LIFE 84–126 (2d ed. 1957).

30. *Id.* at 87.

31. ALFRED NORTH WHITEHEAD, RELIGION IN THE MAKING: LOWELL LECTURES, 1926, at 16 (1957).

32. RADHAKRISHNAN, *supra* note 29, at 88.

33. *Id.*

34. *Id.*



be made.<sup>35</sup> As such, religious freedom is essential for religious reform. Without such organic progress, religions—and the societies they deeply affect—can become stunted.<sup>36</sup> Thus, only greater freedom for religions and other identity-based groups can lead to social harmony.<sup>37</sup> Repression, on the other hand, leads to violence.<sup>38</sup>

Long before the framing of the Constitution in India, the American Founding Fathers showed an understanding of “the vital role that religion plays in a free society. Far from shielding the American people from religious influence, the Founding Fathers promoted freedom of religion and praised the benefits it brings to

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35. Marc Gopin, *Religion, Violence, and Conflict Resolution*, 22 PEACE & CHANGE 1, 1 (1997).

36. JAY NEWMAN, ON RELIGIOUS FREEDOM 159–60 (1991).

From what source can the impetus to religious reform arise? We might be tempted to assume that there are many possible sources, insofar as, at the present stage of the development of civilization, we take for granted that religion is but one of many facets of life on earth, and that while religious experience and culture influence other aspects of life and nature, they are in turn influenced by these other aspects of life and nature. But what besides religion can generate the *values* necessary for altering the conception of religion itself? Ultimately, only a form of experience and culture can generate values; however important natural events may be in shaping our values, they can do so by way of the medium of thought or consciousness. As important as politics and economics are, these also depend on the valuation generated through some form of experience and culture. What, then, are the forms of experience and culture to which we can trace the incentive to reform our conceptions of religion, our religious conceptions, and our religious institutions? The ones that come to mind are art, history, philosophy and science. But art, history, and science can only play this role insofar as they have been infused with some religious or philosophical vision or, alternatively, insofar as their products have been subjected to some religious or philosophical interpretation. That leaves two possible sources, philosophy and religion. Since philosophy is an epiphenomenon of religion, that is, a form of experience and culture that grew out of religion and eventually attained some degree of independence and distinctness in relation to its source, we can say that in a sense the impetus to religious reform can only come from religion itself.

*Id.* (footnote call number omitted).

37. BRIAN J. GRIM & ROGER FINKE, THE PRICE OF FREEDOM DENIED: RELIGIOUS PERSECUTION AND CONFLICT IN THE TWENTY-FIRST CENTURY 2–4, 212–13 (2011). Though there are others who have pointed out, correctly, that some restrictions on religion are necessary—especially in today’s world to maintain order or preserve a peaceful religious homogeneity. *Id.* at 10.

38. See AMARTYA SEN, IDENTITY AND VIOLENCE: THE ILLUSION OF DESTINY (2006); Ellen Wiles, *Headscarves, Human Rights, and Harmonious Multicultural Society: Implications of the French Ban for Interpretations of Equality*, 41 L. & SOC’Y REV. 699, 732 (2007).

society.”<sup>39</sup> George Washington articulated this in his farewell address to the nation:

Of all the dispositions and habits which lead to political prosperity, religion and morality are indispensable supports. In vain would that man claim the tribute of patriotism who should labor to subvert these great pillars of human happiness—these firmest props of the duties of men and citizens. The mere politician, equally with the pious man, ought to respect and to cherish them. A volume could not trace all their connections with private and public felicity. Let it simply be asked, Where is the security for property, for reputation, for life, if the sense of religious obligation *desert* the oaths which are the instruments of investigation in courts of justice? And let us with caution indulge the supposition that morality can be maintained without religion. Whatever may be conceded to the influence of refined education on minds of peculiar structure, reason and experience both forbid us to expect that national morality can prevail in exclusion of religious principle.<sup>40</sup>

Since the last decade of the twentieth century, “considerable research has emerged that demonstrates the benefits of religious practice within society.”<sup>41</sup> “Religious practice promotes the well-

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39. Patrick F. Fagan, *Why Religion Matters Even More: The Impact of Religious Practice on Social Stability*, BACKGROUNDERS, no. 1992, 2006, at 1, <http://www.heritage.org/research/reports/2006/12/why-religion-matters-even-more-the-impact-of-religious-practice-on-social-stability>. “In 1639, a group of New England Puritans drafted a constitution affirming their faith in God and their intention to organize a Christian Nation.” FRANK LAMBERT, *THE FOUNDING FATHERS AND THE PLACE OF RELIGION IN AMERICA I* (2003). “[T]hose Puritan Fathers organized a Christian State.” *Id.* Moreover, citizenship . . . was directly tied to one’s religious faith.” *Id.* at 2. “One hundred and fifty years later, . . . unlike the work of the Puritan Fathers, the federal constitution made no reference whatever to God or divine providence, citing as its sole authority ‘the people of the United States.’” *Id.* “Instead of building a ‘Christian Commonwealth,’ the supreme law of the land established a secular state. The opening clause of its first amendment introduced the radical notion that the state had no voice concerning matters of conscience . . .” *Id.* “In debating the language of that amendment, the first House of Representatives rejected a Senate proposal that would have made possible the establishment of the Christian religion or of some aspect of Christian orthodoxy.” *Id.* Despite their recent history, they left the people ‘free’ in matters of religion. *Id.*; see MICHAEL NOVAK, *ON TWO WINGS: HUMBLE FAITH AND COMMON SENSE AT THE AMERICAN FOUNDING* (2002).

40. JAMES D. RICHARDSON, *George Washington Farewell Address*, in *1 A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS* 213, 220 (1897).

41. Fagan, *supra* note 39, at 1.

being of individuals, families, and the community.”<sup>42</sup> It turns out that the practice of religion has a significant effect on “happiness and an overall sense of [personal] well-being.”<sup>43</sup> And because “[h]appy people tend to be productive and law-abiding[,]” they make good citizens.<sup>44</sup>

On the other hand, religions can also be used to polarize societies. In India, religion has been used to divide people, initially by the British and later by those who believed in majoritarianism and indulged in communal politics.<sup>45</sup> Today, India continues to face this challenge. A report by the United States Commission on International Religious Freedom criticized undue restrictions placed on free exercise of freedom of religion in India.<sup>46</sup> Similarly, a report by the European Parliament categorized India among countries of

42. *Id.*; see Muninder K. Ahluwalia et al., *Sikhism and Positive Psychology, in* RELIGION AND SPIRITUALITY ACROSS CULTURES 125 (Chu Kim-Prieto ed., 2014). The author notes the social blessings of believing and urges policymakers to explore the benefits of religious practice. Fagan, *supra* note 39, at 1 n.1; see also 1 THE SOCIAL HISTORY OF THE AMERICAN FAMILY: AN ENCYCLOPEDIA 85 (Marilyn J. Coleman & Lawrence H. Ganong eds., 2014).

43. Fagan, *supra* note 39, at 9; see also ALEJO JOSÉ G. SISON, HAPPINESS AND VIRTUE ETHICS IN BUSINESS: THE ULTIMATE VALUE PROPOSITION 214–20 (2015); William V. D’Antonio, *The Family and Religion: Exploring a Changing Relationship*, 19 J. FOR SCI. STUDY RELIGION, 89, 89 (1980); Shobhna Joshi et al., *Religious Belief and Its Relation to Psychological Well-Being*, 34 J. INDIAN ACAD. APPLIED PSYCHOL. 345, 345–54 (2008); Shobhna Joshi & Shilpa Kumari, *Religious Beliefs and Mental Health: An Empirical Review*, 14 DELHI PSYCHIATRY J. 40, 40 (2011); David B. Larson & Susan S. Larson, *Religious Commitment and Health*, 17(1) SECOND OPINION 26, 26–40 (1991); David O. Moberg, *The Development of Social Indicators of Spiritual Well-Being for Quality of Life Research, in* SPIRITUAL WELL-BEING: SOCIOLOGICAL PERSPECTIVES 1 (David O. Moberg ed., 1979); Rodney Stark, *Psychopathology and Religious Commitment*, 12 REV. RELIGIOUS RES. 165, 165–76 (1971); David R. Williams et al., *Religion and Psychological Distress in a Community Sample*, 32 SOC. SCI. MED. 1257, 1257–62 (1991).

44. Fagan, *supra* note 39, at 9.

45. BIPAN CHANDRA ET AL., INDIA SINCE INDEPENDENCE (rev. ed. 2008). The authors note that Jawaharlal Nehru was one of the first leaders of the freedom movement to “see communalism as the Indian form of Fascism.” *Id.* at 38. Nehru wrote:

Communalism bears a shirking resemblance to the various forms of fascism that we have seen in other countries. It is in fact the Indian version of fascism. We know the evils that have flown from fascism. In India we have known also the evils and disasters that have resulted from communal conflict. A combination of these two is this something that can only bring grave perils and disasters in its train.

Souribandhu Kar, *Relevance of Jawaharlal Nehru*, ODISHA REV., Jan. 2015, at 56.

46. U.S. COMM’N ON INT’L RELIGIOUS FREEDOM, ANN. REP. 2015 149–53 (2015), <http://www.uscirf.gov/sites/default/files/USCIRF%20Annual%20Report%202015%20%28%29.pdf>.

particular concern.<sup>47</sup> The immediate attack on religious freedom through the use of identity politics comes from those who profess and swear to *Hindutva* ideology.<sup>48</sup> Adherents of *Hindutva* use political power and law to create social tensions.<sup>49</sup>

Having spoken of the importance and inherent social value of freedom in matters related to religion, we shall discuss the significance of secularism for the religious minorities in India. We will also examine how the Indian Supreme Court has narrowed the scope of constitutionally guaranteed freedom of religion by propounding the *essentiality* test.

We argue that the *essentiality* test denies religious adherents of constitutionally granted rights and impermissibly substitutes the judgment of the Court for religious conscience. We then cite two examples of the Court's use of the *essentiality* test to restrict religious freedom, as seen in the cases on conversion and affirmative action, and the cow slaughter ban. Next, we argue that one way to strengthen religious freedom in India would be to remove the *essentiality* test from Supreme Court jurisprudence. We argue that this test should ideally be rejected by the Court itself. If not, then it should be applied consistently based on the original method of determining the *essentiality* of a religious practice. This original

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47. EUROPEAN PARLIAMENT INTERGROUP ON FREEDOM OF RELIGION OR BELIEF AND RELIGIOUS TOLERANCE, 2014 ANNUAL REPORT: THE STATE OF FREEDOM OF RELIGION OR BELIEF IN THE WORLD 11, 40 (June 2015), <http://www.religiousfreedom.eu/file /2015/06/2014-Intergroup-Report-FINAL.pdf>.

48. The term *Hindutva* was coined by Vinayak Damodar Savarkar. It sought to define Indian culture as a manifestation of Hindu values. See VINAYAK DAMODAR SAVARKAR, *HINDUTVA: WHO IS A HINDU?* (5th ed. 1969). It is the militant Hindu ideology which believes that India belongs exclusively to Hindus and followers of Abrahamic religions have extra-territorial loyalties. While Hinduism is a highly tolerant and inclusive religion, *Hindutva* is entirely exclusionary. There have been frequent utterances by the RSS and BJP leaders and the Prime Minister has failed to take any concrete action against these leaders. See, e.g., Siddharth Varadarajan, *Shame on You, Mr. Culture Minister*, WIRE (Sept. 17, 2015), <http://thewire.in/10858/shame-on-you-mr-culture-minister/>. This, in turn, creates fear in the minds of religious minorities. Julio Ribeiro, a former Director General of Police, recently admitted that since the 2014 general elections he has lived in fear, and his small, peaceful community of Christians is being targeted. See Julio Ribeiro, *As a Christian, Suddenly I Am a Stranger in My Own Country, Writes Julio Ribeiro*, INDIAN EXPRESS, <http://indianexpress.com/article/opinion/columns/i-feel-i-am-on-a-hit-list/> (last updated Mar. 17, 2015). There are a number of such strands to pick at. However, we shall return to them in the last Part of this paper when we talk to social stability in particular.

49. See, e.g., Ribeiro, *supra* note 48; Varadarajan, *supra* note 48.

method relies only on the relevant religious scriptures or texts in accordance with the established rules of interpretation of those texts under a particular religion or religious denomination. Thus, Part II will discuss the idea of secularism as employed in India and the guarantees of religious freedom under the Indian constitutional scheme.<sup>50</sup> Part III will then consider the manner in which judicial tinkering has eroded religious freedom over the years.

## II. INDIAN SECULARISM, CONSTITUTION, AND THE *ESSENTIALITY TEST*

### *A. History of Secularism*

Secularism in India, unlike the West, was not designed to create a wall of separation between church and state.<sup>51</sup> It was shaped to assure minorities that their culture, religion, and identity would be protected and that a majoritarian view would not be imposed on them.<sup>52</sup> Thus, Indian secularism goes much beyond mere state

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50. The Preamble provides for justice—social, political, and economic—which is expected to create conditions ripe for liberty of thought, opinion, and beliefs. INDIA CONST. pmbl. The operational part of the Indian Constitution provides for freedom of religion as an individual's right, through Article 25. *Id.* at art. 25. This applies even to non-citizens. *Id.* There is also group application of this freedom through Article 26, which permits each denomination to own, acquire, and administer property. *Id.* art. 26, cls. b–c. While Articles 29 and 30 ensure cultural rights of minorities, *id.* arts. 29–30, Articles 14, 15, and 16 provide that religion cannot be used as grounds for discrimination, *id.* arts. 14–16. Article 51A, puts the onus on all citizens, as a fundamental duty, to promote the spirit of common brotherhood among all people transcending religious, linguistic, and regional or sectional diversities, *id.* art. 51A, cl. e, while valuing and preserving the rich heritage of composite culture, *id.* art. 51A, cl. f.

51. See DONALD EUGENE SMITH, *INDIA AS A SECULAR STATE* 3, 159 (1963). The term *secularism* implies three things in most Western democracies: freedom of religion, equal citizenship to each citizen regardless of his or her religion, and the separation of religion and state. *Id.* at 4.

One of the core principles in the constitutions of Western democracies has been this separation, with the state asserting its political authority in matters of law, while accepting every individual's right to pursue his or her own religion and the right of religion to shape its own concepts of spirituality. In the West everyone is equal under law, and subject to the same laws irrespective of his or her religion.

*Enhancing Religious Freedom in Developing Countries*, BUDAPEST INT'L MODEL UNITED NATIONS 4 (6th session), [http://www.bimun.hu/documents/cgs/HRC\\_Enhancing\\_religious\\_freedom.pdf](http://www.bimun.hu/documents/cgs/HRC_Enhancing_religious_freedom.pdf) (last visited Oct. 6, 2016) [hereinafter *Enhancing Religious Freedom*].

52. Secularism in India “means equal treatment of all religions.” SMITH, *supra* note 51, at 4. “Religion in India continues to assert its political authority in matters of personal law.”

neutrality in matters of religion. Protection of minority rights is an essential facet of Indian secularism. Minorities have almost an absolute right to preserve their languages, scripts, and cultures. They are also entitled to establish and administer educational institutions, including universities, of their choice. Such institutions cannot be denied State aid just because they are managed by minorities. These rights are opposed by the rightist parties who consider them as an appeasement of minorities.

Taking the European experience as the reference point of secularism, some scholars have argued that secularism is an alien concept in India.<sup>53</sup> They claim that it does not match either the configuration of Indian society or the convictions of its people.<sup>54</sup> However, such claims overlook the important reasons for adopting secularism as an organizing principle of Indian society—reasons that are both moral as well as pragmatic.<sup>55</sup> These claims forget that secularism presents perhaps the only feasible option to regulate intergroup behavior, at least in the circumstances that have ensnared Indian society since the early twentieth century.<sup>56</sup> Secularism was

*Id.*; see RELIGION AND PERSONAL LAW IN SECULAR INDIA: A CALL TO JUDGMENT 2–3 (Gerald James Larson ed., 2001).

53. See, e.g., T.N. Madan, *Secularism in Its Place*, in SECULARISM AND ITS CRITICS, 297, 298–99 (Rajeev Bhargava ed., 1998) (arguing that for a majority of the people, secularism is a “vacuous word” as it does not know “whether it is desirable to privatize religion, and if it is, how this may be done”). The author claims that it is “moral arrogance” and “political folly,” for a secularist minority “to stigmatize the majority as primordialistically oriented and to preach secularism to the latter as the law of human existence.” *Id.* at 298–99. He makes this argument because he claims that religion is especially important to the people of South Asia. *Id.* at 299.

54. For more on arguments around “Indian Secularism,” see generally STUART CORBRIDGE & JOHN HARRISS, REINVENTING INDIA: LIBERALIZATION, HINDU NATIONALISM AND POPULAR DEMOCRACY (2000); SECULARISM: CONCEPT AND PRACTICE 105–07 (A.K. Lal ed., 1998); Romila Thapar, Public Lecture in Memory of Dr. Asghar Ali Engineer (Oct. 26, 2015), <http://www.csss-islam.com/wp-content/uploads/2015/08/Romila-Thapars-Lecture1.pdf>.

55. Neera Chandhoke, *Why is Secularism Important for India*, in CONTEMPORARY INDIA: ECONOMY, SOCIETY, POLITICS 288, 292–305 (Neera Chandhoke & Praveen Priyadarshi eds., 2009).

56. See SHWETA DAMLE, SECULARISM AND SECULAR ACTION 16 (2007).

The 25 years period between 1920s and 1940s had witnessed momentous and decisive political events, which culminated in the partition of India in 1947. . . . Mahatma Gandhi emerged as a national leader . . . . [P]reviously marginalized groups were politically mobilized and Indian society was united as never before. But the deep social divisions were never erased. The hold of religion on the popular

adopted as an organizing principle of Indian society for primarily two reasons. First, it “manage[s] the irreconcilable tension between religious groups” by “provid[ing] for equality of all religions,”<sup>57</sup> and second, it “spell[s] out the relationship between the state and different religious groups” by “distanc[ing] the state from all religious groups,”<sup>58</sup> thereby establishing that the “majority group (Hindus) would not be privileged in any manner.”<sup>59</sup> The goal was to discourage even the pretense that a majority group had any right to stamp the body politic with its ethos; thus, secularism was meant to assure minorities that they had a legitimate place in the country and that they would not be discriminated against. It was in pursuit of these objectives that Pandit Nehru declared: “The government of a country like India, with many religions that have secured great and devoted followings for generations, can never function satisfactorily in the modern age except on a secular basis.”<sup>60</sup>

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psyche was always there. Religion was politicized and made the propellant of a political movement which finally led to partition. The post-partition period saw large-scale massacres, abductions and communal frenzy. The ideology of secularism was adopted not as it was conceived in the west in opposition to religion, but as suited for Indian society—in opposition to communalism.

*Id.*

57. The Constitution contains three articles, which forbid the State to discriminate against its citizens on the basis of, among other things, religion. INDIA CONST. art. 15, § 1. The general statement, and the most important, is the first clause of Article 15. *Id.* The second clause of the same article ensures non-discrimination in regard to “access” of public spaces. *Id.* art. 15, § 2. Similarly, Article 16 prohibits discrimination with regard to “employment under the State,” and Article 29 prohibits discrimination with regard to admission in “educational institutions” either maintained by the State or receiving aid out of State funds. *Id.* art. 16, §§ 1–2, art. 29, § 2; *see also* Erik Reenberg Sand, *State and Religion in India: The Indian Secular Model*, 19 NORDIC J. RELIGION & SOC., no. 2, 2006, at 3, 4, 7.

58. This “distancing” has been noted by various authors who suggest that in countries where there is a plurality of religions, like India, the secular state often sees itself as neutral in its relationship to these religions. Charles Taylor, *Modes of Secularism*, in SECULARISM AND ITS CRITICS 31–53 (Rajeev Bhargava ed., 1998). Two constitutional provisions are instructive in this regard—the first is Article 27—which forbids the State to collect taxes for the purpose of promoting religion. INDIA CONST. art. 27. The other is Article 28, which rules out any religious instruction from an educational institution wholly maintained by State funds. *Id.* art. 28, § 1.

59. *The Secularism in India*, HUBPAGES (June 16, 2016), <http://hubpages.com/politics/The-Secularism-in-India>.

60. This statement has been quoted by many authors. *See* SMITH, *supra* note 51, at 139 (quoting Nehru in *The Hindu* on Sept. 13, 1950); *see also* Tariq Hameed Bhatti, *Political Legacy of the Muslims in India: An Overview*, 18 J. POL. STUD., 225, 231–32 (2011); Kuldip

The first reason secularism was adopted as a fundamental principle is that it helps prevent religious strife by establishing equality between all religions. This principle of equality goes beyond the assurance that everyone has the freedom to practice their religion, which was codified in Article 25 of the fundamental rights chapter of the Constitution.<sup>61</sup> Nehru stated:

Now, strictly speaking, we do not need to proclaim secularism in order to grant religious freedom. This freedom can emerge from, and form part of the Fundamental Rights that are assured to every citizen. But a secular State cannot stop at granting the right to religion. The principle of secularism goes further and establishes equality between all religious groups.<sup>62</sup>

The concept of equality or sameness of all religions was inspired by the Hindu doctrine of *sarva dharma sambhava*, which permeated Gandhi's understanding of religious tolerance.<sup>63</sup> Dr. Radhakrishnan phrased it this way:

We hold that no one religion should be given preferential status, or unique distinction, that no one religion should be accorded special privileges in national life or international relations for that would be a violation of the basic principles of democracy and contrary to the best interest of religion and government. . . . No group of

Nayar, Editorial, *Between the Lines Not by Bread Alone*, DAILY STAR, (Oct. 21, 2003), <http://archive.thedailystar.net/2003/10/21/d31021020427.htm>.

61. INDIA CONST. art. 25.

62. Chandhoke, *supra* note 55, at 297–98; *see also* GARY JEFFREY JACOBSON, *THE WHEEL OF LAW: INDIA'S SECULARISM IN COMPARATIVE CONSTITUTIONAL CONTEXT* 147 (2003) (“Secularism is . . . more than a passive attitude of religious tolerance. It is a positive concept of equal treatment of all religions.”).

63. For *sarva dharma sambhava* as the Gandhian understanding of religious tolerance, *see* SECULARISM: CONCEPT AND PRACTICE, *supra* note 54. With respect to the idea of “equality” of Indian secularism—“equal respect,” *see* James Chiriyankandath, ‘*Creating a Secular State in a Religious Country*’: *The Debate in the Indian Constituent Assembly*, J. COMMONWEALTH & COMP. POL., July 2000, at 1, 10; Shefali Jha, *Secularism in the Constituent Assembly Debates, 1946–50*, 2002 ECON. & POL. WKLY. 3175, 3176–80. For “state equidistance,” *see* SHREE GOVIND MISHRA, *DEMOCRACY IN INDIA* (2000). For “symmetry of treatment,” *see* AMARTYA SEN, *THE ARGUMENTATIVE INDIAN: WRITINGS ON INDIAN HISTORY, CULTURE AND IDENTITY* (2005). *See generally* Rina Verma Williams & Laura Dudley Jenkins, *Secular Anxieties and Transnational Engagements in India*, in *MULTIPLE SECULARITIES BEYOND THE WEST: RELIGION AND MODERNITY IN THE GLOBAL AGE* (Marian Burchardt et al. eds., 2015) (discussing India's unique approach to secularism and how it has been shaped).



citizens shall arrogate to itself rights and privileges which it denies to others. No person shall suffer any form of disability or discrimination because of his religion but all alike should be free to share to the fullest degree in the common life.<sup>64</sup>

If we were to stop here, secularism would be rendered redundant because “just as the freedom of religion does not necessarily need secularism to support it, equality of religions can be established via the fundamental right of equality.”<sup>65</sup> But secularism is not mere equality of religions.

The second reason that secularism was adopted as a fundamental principle is that “secularism extends beyond equality and freedom to declare that the state is not aligned to any particular religion.”<sup>66</sup> Thus, secularism was also intended to assure minorities that the religion of the majority community would not be given any preference by the State. It is “this particular commitment that establishes the credentials of a Secular state.”<sup>67</sup> For example, since Pakistan had become a theocratic state, such an assurance for Indian Muslims was essential.<sup>68</sup> Due to this assurance, a massive majority of Muslims decided to stay in India.

The Indian position on secularism during the initial years of the Republic, in the words of the liberal Nehru, was that “[a]nything

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64. RADHAKRISHNAN, RECOVERY OF FAITH 202 (1955).

65. *The Secularism in India*, *supra* note 59.

66. *Id.*

67. Chandhoke, *supra* note 55, at 298. “Secularism, by outstripping freedom and equality, stipulates that the state will maintain an attitude of principled distance from all religious groups. It also contracts that the state would neither align itself with any particular religion, especially the majority religion, nor pursue any religious tasks of its own.” NEERA CHANDHOKE, BEYOND SECULARISM: THE RIGHTS OF RELIGIOUS MINORITIES (1999).

68. This can be seen clearly from Dr. B.R. Ambedkar’s response in the Constituent Assembly to Congressman Mahavir Tyagi. 3 CONSTITUENT ASSEMBLY OF INDIA DEBATES (May 1, 1947), <http://164.100.47.192/Loksabha/Debates/cadebatefiles/C01051947.html> (statement of Dr. B.R. Ambedkar). Then later, in light of wide-scale rioting, massacres, and looting of property during the Partition, it was suggested that any consideration of minority rights should be postponed until Pakistan’s stance on the issue became clear. *Id.* The former responded:

Rights of minorities should be absolute rights. They should not be subject to any consideration as to what another party may like to do to minorities within its jurisdiction. . . . I think that the rights which are indicated in clause 18 are rights which every minority, irrespective of any other consideration is entitled to claim.

*Id.* As such, Indian secularism was about managing the differences and providing a semblance of protection to the minorities—whether religious, cultural, or identity based.

that creates such an apprehension [of discrimination] in the minds of any group in India is to be deprecated. It tends to disturb and it is opposed to our secular ideal,”<sup>69</sup> in that it tends to remove a society from its democratic ideals. In sum, secularism was designed to regulate debilitating religious strife, to assure the minorities of their safety, and to calm any apprehension that the country would align itself with the dominant religion. It follows, then, that religion itself was not sought to be discouraged.<sup>70</sup>

Alongside balancing the diverse milieu of the nation by providing for its own blend of secularism, the Indian Constitution also sought to create a progressive society based on scientific temper. It thus mandated that the State should intervene in religious affairs only if social welfare demanded it.<sup>71</sup> The question then arises—how to decide whether an activity is religious or secular? This brings forth other questions—what is *religion* and which practices are *religious*?

### B. The Supreme Court as Clergy

The Indian Supreme Court answered this question in the *Shirur Mutt* case.<sup>72</sup> It held that the term “religion” in Article 25 covers all rituals and practices that are *integral* to the religion.<sup>73</sup> In this manner, the judiciary took it upon itself to determine what is integral to religion.<sup>74</sup> In doing so, it impliedly rejected the “assertion test”

69. Victor Z. Narivelil, *Nehru and the Secular State of India* (Feb. 1968) (unpublished M.A. thesis, Loyola University), [http://ecommons.luc.edu/luc\\_theses/2302](http://ecommons.luc.edu/luc_theses/2302) (quoting Jawaharlal Nehru in *Circular to the Pradesh Congress Committees* (Aug. 1954)).

70. See BRENDA COSSMAN & RATNA KAPUR, *SECULARISM’S LAST SIGH? HINDUTVA AND THE (MIS)RULE OF LAW* (1999); JAWAHARLAL NEHRU: AN ANTHOLOGY 327 (S. Gopal ed., 1980).

71. *Gandhi v. State of Bombay*, 1954 SCR 1035, 1062 (India). The State has the power to regulate secular activities associated with religious practice, but not the regulation of “religious practices” as such. *Id.* at 1060. The court noted that the activities, which the State seeks to regulate, must be of an “economic, commercial or political character though they are associated with religious practices”. *Id.* at 1063.

72. *Comm’r, Hindu Religious Endowments, Madras v. Sri Lakshmindra Thirtha Swamiar of Sri Shirur Mutt*, 1954 SCR 1005, 1021 (India) [hereinafter *Shirur Mutt*].

73. The question is, where is the line to be drawn between what are matters of religion and what are not. *Id.* at 1022

74. A commissioner of Hindu Religious and Charitable Endowments is empowered, under the Madras Hindu Religious and Charitable Endowments Act of 1951, to frame and settle a scheme if he had a reason to believe that the religious institution was mismanaging the funds placed under its care. *Id.* at 1008. In this case, he exercised this power over the Shirur

used in the United States, “whereby a [plaintiff] could . . . assert that a particular practice was a religious practice” and courts would not probe any further.<sup>75</sup> “This exercise of determining the essential practice of a religion leads to obscure results and tends to lead the court into an area which . . . is beyond its competence.”<sup>76</sup> Nonetheless, it is the judge-made law that determines the scope of religion in India.<sup>77</sup>

The Indian Supreme Court’s test for arriving at the definition of core religious practices entitled to protection by freedom of religion

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Mutt. *Id.* The Mutt challenged this interference as being a violation of its freedom of religion under Articles 25(1) and 26. *Id.* The State argued that it was allowed to do so under Article 25(2)(a) as it was regulating the secular function of the Mutt and that Article 25(1) only covered the relationship between the followers and the deity. *Id.* The Supreme Court rejected this narrow understanding of religion. *Id.* However, the court didn’t base its judgment on an *assertion* by the Mutt; but answered the question of what a *religion* is. *Id.* at 1023–24. Thereby, it took upon itself the power to do so again. This, over the years, has led to curtailing the religious freedoms, especially when involving minorities.

75. Rajeev Dhavan, *Religious Freedom in India*, 35 AM. J. COMP. L. 209, 220 (1987).

76. Mustafa, *supra* note 8. During the British period, courts had historically relied upon the advice of pandits and maulvis when “called upon to decide on matters pertaining to religious rights of the Indians.” *Id.* As texts were translated into English, “courts took over completely.” *Id.* Judges began “treat[ing] these translated texts as law in themselves.” *Id.* However, they overlooked the fact that they were but a part of the entire universe of knowledge. A few wrong decisions, which in the past would be remedied from one case to another, got entrenched in the “doctrine of precedent.” *Id.* This brought rigidity into personal laws, which are certain civil, primarily family, laws that vary by religious community. *Id.* Most common examples relate to laws around marriage, divorce, succession, etc. *Id.* Post-Independence, “[w]ith regard to freedom of religion, the courts continued the British practice of interpreting texts and other evidence [casting aside men, either learned or the common masses] to come to [the] conclusion as to the existence and centrality of the religious practice.” *Id.* This has led to the situation where the judiciary is defining what religion is; and this is in violation of the liberty given to religion by the Magna Carta itself. In this context, see Dhavan, *supra* note 75, at 219–20. Dhavan also argues that in the process of ascribing an interpretation to religion, many “egregious blunders” were committed by the British. *Id.* These blunders led to rigidity in the personal law space. *Id.* Continuing to follow the same pattern post-independence only enhanced the problem. *Id.*

77. In *Maharaj v. State of Rajasthan*, 1964 SCR (1) 561 (India), the court observed that it could be possible that while determining the centrality of a practice to a particular community, the evidence could reveal that the community has varied opinions with regard to the importance of the practice in question. In such cases, they stated that it would be for the court to decide whether the practice is of a religious character and integral to the community. *Id.* at 621. Thus, the court ascribed for itself the role of a pandit, maulvi, or clergy—something that they clearly are not entitled to under the Constitution. *Id.*

under the Indian Constitution is called the *essentiality* test.<sup>78</sup> The Supreme Court decides the issue of *essentiality* in the following manner: “First, matters of religion w[ill] be distinguished from secular practices.”<sup>79</sup> This is indeed quite a task. Second, a religious community must consider the practice in question an integral part of its religion.<sup>80</sup> For example:

The “essentiality test” was originally crystallised in the temple entry case. The court engaged itself with the question of whether untouchability, manifested in restrictions on temple entry was an “essential part of the Hindu religion.” The court after examining selective Hindu texts came to the conclusion that untouchability was not an essential Hindu practice.<sup>81</sup>

Third, even if a practice is considered an “essential and integral part of” its religion, such a practice “w[ill] not be automatically deemed ‘a matter of religion’ if it is found . . . to have sprung from superstitious beliefs.”<sup>82</sup> Finally, “the Court will carefully scrutinise the claims of religious practices for the protection of Art. 26(b).”<sup>83</sup>

The mischief of this *essentiality* test is evident in the *Gram Sabha* case.<sup>84</sup> In this case, members of a particular sect claimed that capturing and worshiping a live cobra during *Nagpanchami*, a festival in which snakes are worshipped and offered milk, was an

78. “Under this test before granting constitutional protection, the court goes into the question of the nature of the particular belief and the degree of importance attached to the belief by the concerned community.” Mustafa, *supra* note 8.

79. B. Parameswara Rao, “*Matters of Religion*,” 5 J. INDIAN L. INST. 509, 512 (1963).

80. *Id.*

81. Faizan Mustafa, *Haji Ali Verdict: Can We Permit Sati, Polygamy If They Are Essential Practices*, HINDUSTAN TIMES (Aug. 30, 2016, 00:23 IST), <http://www.hindustantimes.com/analysis/haji-ali-verdict-can-we-permit-sati-polygamy-if-they-are-essential-practices/story-PHmqkV18kpx8ImMoE2hmHM.html>; *see also* Devaruand v. State of Mysore, 1958 SCR 895 (India). A more nuanced approach was adopted in *Adithayan v. Travancore Devaswom Bd.*, Civ. App. No. 6965 of 1996 (India Oct. 3, 2002), where the Court relied on Article 17 to reject a freedom of religion argument for appointing only Brahmin priests.

82. Rao, *supra* note 79, at 512.

83. *Id.*

84. *Gram Sabha of Village Battis Shirala v. Union of India*, Writ Pet. No. 8645 of 2013 & Pub. Interest Litig. No. 75 of 2011, § 11 (Bombay H.C. July 15, 2014) [hereinafter *Gram Sabha*].

essential part of their religion.<sup>85</sup> Whereas the plaintiffs relied on the text of *Shrinath Lilamrut*, a local religious text that prescribes the practice, the judiciary relied on a scholarly history of the *Dharma Shastras*, which are the general religious texts of Hindus.<sup>86</sup> Based on the scholar's treatment of the text, the Court held that the act could not have been an essential practice of the petitioners' religion.<sup>87</sup> India is a huge country with huge diversity in the religious and cultural norms of its people. The apex court should have kept this diversity in mind. Neither Hindus nor Muslims nor Christians are homogenous communities. There are Muslim sects, like Khojas and Memons, who follow several Hindu practices. Similarly, the Hindu caste system to some extent is prevalent even among Christians.

In another case, a Muslim police officer in the Kerala High Court challenged a regulation that prohibited him from growing a beard.<sup>88</sup> In this matter, instead of looking at sources of Islamic law on the essentiality of beards in Islam, the court rejected the petition and based its opinion on the irrelevant fact that certain Muslim dignitaries did not have beards and that the petitioner himself had

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85. *Id.* § 5.

86. *Id.* §§ 5, 13–14.

87. We can group this case with *Quareshi v. State of Bihar*, 1959 SCR 629, 672, 689–90 (India), and *Ramesh Sharma v. State of Himachal Pradesh*, CWP No. 9257 of 2011, §§ 31, 81, 85 (Himachal Pradesh H.C. Sept. 26, 2014). In these matters, empirical evidence of widespread practice was overlooked in holdings against animal sacrifice. While we do not support the practice, we do believe that, constitutionally, the right to accept or reject these practices lies with religious observers themselves. The protection under Article 25, in its truest sense, was meant to guarantee freedom to practice one's own beliefs. *See* INDIA CONST. art. 25. The Supreme Court acknowledged this construction when it observed that, "subject to the restrictions which this article imposes, every person has a fundamental right under our Constitution . . . to entertain such religious belief as may be approved of by his judgment or conscience." *Gandhi v. State of Bombay*, 1954 SCR 1035, 1062 (India). "The essential practice test is antithetical to this fundamental constitutional principle. Under the test, the court privileges certain religious practices over others by granting them legal protection." Mustafa, *supra* note 8. In our humble opinion, the court does not have the expertise to decide which religious practice or ritual is essential or nonessential.

88. *See Fasi v. Superintendent of Police*, 1985 ILLJ Ker 463, §§ 1–2 (Kerala HC Feb. 20), <https://indiankanoon.org/doc/72808/> [hereinafter *Fasi*]. Recently, a thirty-four-year-old Muslim soldier in the Indian army was fired after nearly a decade of service for insisting on growing a beard. S. Anandan, *The Beard Truth: Army Wants Soldiers to Have a Clean Shave*, HINDU (June 2, 2016, 23:53 IST), <http://www.thehindu.com/news/national/the-beard-truth-army-wants-soldiers-to-have-a-clean-shave/article8682647.ece> (last updated Oct. 18, 2016, 15:10 IST).

not sported a beard in previous years.<sup>89</sup> Therefore, the court relied on unscientifically gathered anecdotal evidence of practice, rather than on religious texts. In direct opposition to this reliance on anecdotal evidence, “animal sacrifice” amongst Hindus in a different case was denied protection despite empirical evidence to the contrary.<sup>90</sup> Regardless, even if a few Muslims do not have beards, it does not mean that having a beard is not an essential practice of Islam. The apex court itself had laid down that the essentiality of religious practices is to be decided keeping in view religious texts of the concerned religious group.

Another interesting matter is that of the *Tandava* Dance case,<sup>91</sup> in which the Calcutta High Court found that the *tandava* dance was an essential practice of the *Ananda Margi* faith, only to be overturned by the Supreme Court.<sup>92</sup> The apex court stated that the *Ananda Margi* faith had come into existence in 1955 but the *tandava* dance was adopted only in 1966; therefore, the court claimed that as the faith had existed without the practice at one point, the dance could not ever be accepted as an essential feature of the faith.<sup>93</sup> The approach of the Supreme Court seems to identify a religious practice as an integral practice only if it existed when the religion was founded.<sup>94</sup> This absurd logic would freeze religious

89. *Fasi*, *supra* note 88, § 4. The petitioner had placed reliance on the Sahih Al-Bukhari. *Id.* § 3. The teachings and practices of the Prophet Muhammad, called the Hadith, are the second most important source of Islamic law, and the al-Bukhari is one version of the Hadith. AISHA Y. MUSA, HADITH AS SCRIPTURE: DISCUSSIONS ON THE AUTHORITY OF PROPHETIC TRADITIONS IN ISLAM 1, 22 (2008).

90. *Ramesh Sharma*, CWP No. 9257 of 2011, §§ 30–31. In *Sharma*, the court rejected to provide animal sacrifice the protection of Article 25 by holding it to be a practice unsupported by religion. *Id.*

91. *Comm’r of Police v. Avadhuta*, Civ. App. No. 6230 of 1990 (India Mar. 11, 2004).

92. *Id.* §§ 1–6.

93. The court ignored the fact that Anant Murthiji, the religious head of the *Ananda Margis*, had prescribed the *tandava* dance in the revised version of *Carya Carya*—the only authoritative text of the faith. The fact that court made such a flimsy argument while overlooking the religious texts shows the manifest error in having an *essentiality* test. It is important to note that the dissenting opinion in this case relies on this authoritative text to grant the protection of Article 25 to the *tandava* dance.

94. By extension of this logic, one could claim that any practice of Islam adopted after the Prophet’s death would be considered optional and non-essential; and thus, not protected by Article 25. Similarly, no Christian or Jewish practice would be protected if it did not exist during the life of Jesus and Moses. These absurd decisions hamper the dynamic growth of religion.

practices in time so that no religious reform could ever take place. This regressive decision has virtually closed the doors on reform and evolution for religions.

The *essentiality* test reached absurd levels in *Faruqui*, when the Supreme Court dealt with the issue of the State acquiring the land over which the Ram Janma Bhoomi-Babri Masjid stood.<sup>95</sup> One of the legal issues before the Court was whether the State had the power to acquire a mosque.<sup>96</sup> Instead of settling the issue in favor of the State by relying on the principle of eminent domain, the Court questioned whether praying in the mosque was an essential practice of Islam.<sup>97</sup> Under The Land Acquisition, 1894, government did have the power to acquire land for ‘public purposes.’ Thus this particular acquisition was well within governmental powers. There was no need at all to examine the issue whether a mosque was or was not an essential feature of Islam. The Court’s finding that a mosque may be acquired if there is a compelling State purpose was correct,<sup>98</sup> but its determination on the status of the practice to pray in the mosque was absolutely fallacious.

Before we conclude this Part, we must stress that freedom of religion, as intended by the framers of the Indian Constitution, was meant to guarantee freedom to practice one’s own beliefs based on

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95. *Faruqui v. Union of India*, AIR 1995 SC 605 A, §§ 3, 6, 13 (India), <https://indiankanoon.org/doc/37494799/> [hereinafter *Faruqui*]. Janma Bhoomi-Babri Masjid was a mosque for more than four centuries. *Id.* § 6. Two years after independence, in 1949, unknown people placed idols at the mosque, leading to the claim that the Hindu God Rama was born there. *Id.* Hence, the name ‘Ram Janma Bhoomi-Babri Masjid (which means ‘birthplace of Rama-Babri Mosque’). *Id.* The matter went to the civil court and doors of the mosque were locked. On December 6, 1992, the mosque was demolished by a mob of Hindu rightists led by leading members of the current political party in power (i.e., BJP). Two former BJP presidents and one current cabinet minister are still facing charges of criminal conspiracy. Even the Modi government told the Supreme Court in 2017 that prosecution has ample evidence against these three and therefore trial in the conspiracy should start. A lower court has previously absolved them from the charges. The main civil appeal on the title of property will be heard by a three-judge bench of the Supreme Court in December 2017.

96. *Id.* § 3.

97. *Id.* § 81. Much like the *Temple Entry* case, in *Devaruand v. State of Mysore*, 1958 SCR 895, 914-15 (India), the Court needlessly went where it didn’t need to go, providing a rationale that is manifestly wrong. The Court notes that while the offering of prayers is an essential practice, the offering of such prayers in the mosque is not, unless the place has a certain religious significance in itself. *Faruqui*, *supra* note 95, § 81. This holding overlooks the centrality of congregational prayer to Islam and the essential nature of mosques.

98. *Faruqui*, *supra* note 95, § 95.

the concept of inward association of man with God. The Supreme Court has itself acknowledged as much by noting that “every person has a fundamental right . . . to entertain such religious belief as may be approved of by his judgment or conscience . . . .”<sup>99</sup> The framers of the Indian Constitution wanted to give this autonomy to each individual. The *essentiality* test impinges on this autonomy because the judiciary assumes the power to decide what the essential or non-essential parts of religious practices are. This test stands in direct contrast to the Court’s own words that “[n]o outside authority has any right to say that these are not essential parts of religion and it[] is not open to the secular authority of the State to restrict or prohibit them in any manner they like.”<sup>100</sup> Moreover, the Supreme Court has itself acknowledged that “what constitutes the essential part of a religion is primarily to be ascertained with reference to the doctrines of that religion itself.”<sup>101</sup> Each religion must have the autonomy to decide what its essential features and practices are, keeping in view its own religious texts (this is referred to as the autonomy thesis).<sup>102</sup> In *Singh*, the Supreme Court further elaborated on the autonomy thesis by observing: “[A] religious denomination or [o]rganisation enjoys complete autonomy in the matter of deciding as to what rites and ceremonies are essential according to the tenets of the religion they hold . . . .”<sup>103</sup> No outside authority has any jurisdiction to interfere with their decision in such matters.

Thus, freedom of religion is an individual right under Article 25(1) of the Indian Constitution as far as inward association of beliefs is concerned.<sup>104</sup> It is a group right under Article 26(b) if the religious group recognizes the religious practices as essential.<sup>105</sup> As United States Supreme Court Justice Black rightly held in *Engel v. Vitale*, “[R]eligion is too personal, too sacred, too holy to permit its ‘unhallowed perversion’ by a civil magistrate.”<sup>106</sup>

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99. *Gandhi v. State of Bombay*, 1954 SCR 1035, 1062 (India).

100. *Id.* at 1065.

101. *Shirur Mutt*, *supra* note 72, at 1025.

102. *Id.*

103. *Singh v. State of Punjab*, 1959 SCR Supp. (2) 499, 509 (India).

104. *See Saheb v. State of Bombay*, 1962 SCR Supp. (2) 496, 520–22 (India).

105. *See id.*

106. *Engel v. Vitale*, 370 U.S. 421, 432 (1962).



As such, even a single nun is well within her right to consider a scarf essential to her faith.<sup>107</sup> The cases discussed demonstrate that the judiciary has styled itself as the religious reformer<sup>108</sup> to “cleanse” religions of superstitions and to reform them to suit its own idea of twenty-first-century rationality.<sup>109</sup> The Supreme Court’s insistence on applying the *essentiality* test has struck at the very foundation of religious freedom in India.<sup>110</sup> Due to the Court’s insistence on the doctrine of *essentiality*, the religious autonomy of the individual and an individual’s religious group outside of foundational text seemingly has no value.

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107. This was a matter that has received some publicity in the last few months. In the lead-up to a pre-medical exam, the Supreme Court refused to let in students wearing a hijab. Utkarsh Anand, *SC To PMT Students: Faith Won’t Disappear If You Don’t Wear Scarf (Hijab) One Day*, INDIAN EXPRESS (July 25, 2015, 2:09 PM), <http://indianexpress.com/article/india/india-others/aipmt-supreme-court-refuses-to-allow-hijab-in-test/>; see also Krishnadas Rajagopal, *SC Refuses To Entertain Plea On Allowing Hijab During AIPMT Exams*, HINDU (July 24, 2015, 19:06 IST), <http://www.thehindu.com/news/national/sc-refuses-to-entertain-plea-on-allowing-hijab-during-aipmt-exams/article7461056.ece>. Thereafter, on the day of the exam, a nun who refused to remove her veil was ‘barred’ from taking the exam. Shaju Philip, *Nun In Headscarf ‘Barred’ From Medical Entrance Test*, INDIAN EXPRESS, (July 26, 2015, 7:46 AM), <http://indianexpress.com/article/india/india-others/keralite-nun-refuses-to-take-aipmt-without-veil-holy-cross/>. In the same exam, two students did receive the permission to wear the hijab, on grounds of freedom of religion from the Kerala High Court. See Anand, *supra*.

108. In this context, one author refers to the Indian courts as the “schizophrenic defender[s] of constitutional secularism.” Smita Narula, Book Review, 4 INT’L J. CONST. L. 741, 746 (2006) (reviewing GARY JEFFREY JACOBSON, *THE WHEEL OF LAW: INDIA’S SECULARISM IN COMPARATIVE CONSTITUTIONAL CONTEXT* (2003)).

109. The court tries to apply the certainty of law to religious questions, where there is always a divergence of opinion. Faizan Mustafa, *The Unfreedom of Religion*, INDIAN EXPRESS (May 5, 2015, 12:04 AM), <http://indianexpress.com/article/opinion/columns/the-unfreedom-of-religion/>. On a parallel path, Ronald Niezen—speaking of rights of First Nations in Canada as interpreted by the judiciary—helps clarify the fact that the judiciary prefers more bright-line answers, whereas the very nature of culture is subjective. See Ronald Niezen, *Culture and the Judiciary: The Meaning of the Culture Concept as a Source of Aboriginal Rights in Canada*, 18 CAN. J.L. & SOC’Y 1, 13 (2003). Connecting this observation to religion, Justice Chinnappa Reddy accepted that religion had a similar nature and was incapable of precise definition. *S.P. Mittal v. Union of India*, 1983 SCR (1) 729, 737 (India) (Reddy, J., dissenting). Religion, like culture, is uncertain, and it is beyond the mandate of Article 25 to judicially create certainty in religious matters.

110. This reformist zeal also goes against the initial assurance provided by the court to the religious leaders that it would determine the essential religious practices in accordance with the doctrines of the religion and the position enjoyed by the practices in the community. See *Shirur Mutt*, *supra* note 72, at 1005.

Ideally, Indian courts should have followed the wise words of Chief Justice Latham, of the Australian High Court, who explicitly observed, “What is religion to one is superstition to another.”<sup>111</sup> Moreover, the inward association thesis (the idea that each individual should be able to determine for themselves the essentiality of a religious practice) receives support from Article 29 of the Indian Constitution, which guarantees to every Indian citizen “having a distinct language, script or culture of [his] own . . . the right to conserve the same.”<sup>112</sup> Cultures have a close affinity with religions. For example, Muslim Personal Law is a facet of Muslim culture in India. Moreover, religions and cultures influence and closely interact with each other.<sup>113</sup> Thus, freedom of religion is an individualistic right under Article 25, and, therefore, an individual should be free to decide for himself what he considers essential or non-essential features of his religion.

### III. THE POLITICS OF RELIGION, DENIAL OF INDIVIDUAL CHOICE, AND SOCIAL INSTABILITY

In this Part, we point out the various judicial decisions and political rhetoric, or, dare we say, narratives, that militate against the constitutional ideals of religious freedoms. There are three specific examples of religious instability in India today: anti-conversion laws, affirmative action, and the cow slaughter ban.

#### *A. Anti-Conversion Laws*

One of the most significant restrictions on religious freedom is the suppression of religious conversions.<sup>114</sup> We believe that the

111. *Adelaide Co of Jehovah Witnesses v Commonwealth* (1943) 67 CLR 116, 123 (Austl.).

112. INDIA CONST. art. 29, § 1.

113. See Abdul Aziz Said & Nathan C. Funk, *The Role of Faith in Cross-Cultural Conflict Resolution*, 9 PEACE & CONFLICT STUD. 37, 37 (2002).

114. Anti-conversion laws have arisen from a long history of religious activity in India. See Jonathan K. Stubbs, *Persuading Thy Neighbor to be as Thyself: Constitutional Limits on Evangelism in the United States and India*, 12 UCLA PAC. BASIN L.J. 360, 363–71 (1994). Many Hindu princely states had promulgated anti-conversion laws “in an attempt to preserve Hindu religious identity in the face of British missionaries.” James Andrew Huff, *Religious Freedom in India and Analysis of the Constitutionality of Anti-Conversion Laws*, 10 RUTGERS J.L. & RELIGION 1, 4 (2009); see also Laura Dudley Jenkins, *Legal Limits on Religious Conversion in India*, 71 L. & CONTEMP. PROBS. 109, 113–14 (2008). Some of these laws

decision of the Supreme Court in *Stainislaus*<sup>115</sup>—the most important case on the matter—inappropriately limits an individual’s freedom of religion. In this case, the constitutionality of the anti-conversion laws of the State of Madhya Pradesh and State of Orissa were examined by the Supreme Court. Orissa High Court had in fact held such a law as unconstitutional but the apex court upheld its constitutionality.

If freedom of religion is required to promote individual beliefs emanating from the inward association doctrine, an individual must have freedom to change his or her beliefs and religion. Restricting one’s freedom to change his or her religion has a chilling effect on the concept of freedom of religion.<sup>116</sup> Religious conversion is generally preceded by some crisis, which may be religious, psychological, cultural, or by a life situation that opens people up to new options.<sup>117</sup> Thus, religious conversion can be a fundamental coping mechanism for an individual,<sup>118</sup> or a quest for a fresh perspective through a new religion.<sup>119</sup> Restricting this individual choice to adopt a new religion seriously undermines the fundamental idea of inward association on which the freedom of religion in India is based. Religious conversion is a dynamic, multifaceted process of

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included “[t]he Raigarh State Conversion Act 1936, the Patna Freedom of Religion Act of 1942, the Sarguja State Apostasy Act 1945 and the Udaipur State Anti-Conversion Act 1946.” Huff, *supra*. Additionally, there were other laws “in Bikaner, Jodhpur, Kalahandi and Kota,” *id.*, most of them being enacted “to counter Christian missionary activity and to ‘awaken tribesmen [to] their true Hindu identity.’” Faisal Mohammad Ali, *Christian Anger at Conversion Law*, BBC NEWS (Aug. 4, 2006, 16:08 GMT), [http://news.bbc.co.uk/2/hi/south\\_asia/5246328.stm](http://news.bbc.co.uk/2/hi/south_asia/5246328.stm). See generally FAIZAN MUSTAFA & ANURAG SHARMA, CONVERSION: CONSTITUTIONAL AND LEGAL IMPLICATIONS (2003); Faizan Mustafa, *Let’s Talk About Poverty First Before Faith and Conversions*, HINDUSTAN TIMES (Dec. 25, 2014, 4:34 IST), <http://www.hindustantimes.com/comment/let-s-talk-about-poverty-first-before-faith-and-conversions/story-iQr3XBh591LhUD2yIh19N.html>.

115. See *Rev. Stainislaus v. State of Madhya Pradesh*, 1977 SCR (2) 611 (India).

116. Heiner Bielefeldt, *Limitations on Religions Freedom Have ‘Chilling Effect,’* NEW EUROPE (Nov. 15, 2010), <https://www.neweurope.eu/article/limitations-religions-freedom-have-chilling-effect/>.

117. LEWIS R. RAMBO, UNDERSTANDING RELIGIOUS CONVERSION 44 (1993).

118. See generally MUSTAFA & SHARMA, *supra* note 114. An individual under stress may change his religion to find solace in the new religion. Every convert undergoes a serious personal mental crisis before he decides to change his religion.

119. See PEW FORUM ON RELIGION & PUB. LIFE, *FAITH IN FLUX: CHANGES IN RELIGIOUS AFFILIATION IN THE U.S.* (Apr. 2009), <http://www.pewforum.org/files/2009/04/fullreport.pdf>.

individual choice, which, at times, may have an element of rejection and disillusionment with his or her existing religion or its practices. Conversion entails a transformation of an individual's "sense of 'root reality'" and a major change in one's self-identification within a community.<sup>120</sup> It is a state of dramatic personal upheaval. The State has no role to play in imposing this choice on its citizens. All persons should have the freedom to follow or convert to whichever religion they choose.

However, this freedom has been challenged by anti-conversion laws.<sup>121</sup> It has been argued that such laws are contrary to the Constitution as they pose a hindrance to the "propagation" of religion.<sup>122</sup> Yet, the Indian Supreme Court has upheld their validity.<sup>123</sup> In explaining the ambit of Article 25, the Supreme Court

120. RALPH W. HOOD, JR., PETER C. HILL & BERNARD SPILKA, *THE PSYCHOLOGY OF RELIGION: AN EMPIRICAL APPROACH* 210 (4th ed. 2009).

121. Two of these anti-conversion laws were the Orissa Freedom of Religion Act, 1967, No. 2, Acts of Parliament, 1968 (India), and the Madhya Pradesh Freedom of Religion Act, 1968, No. 27, Acts of Parliament, 1968 (India). The court allowed both to stand. Today, this sort of legislation has mushroomed and as of now, five Indian states—Orissa, Madhya Pradesh, Gujarat, Chhattisgarh, and Himachal Pradesh—have anti-conversion laws in place to prevent "forced conversions." Apart from this, Arunachal Pradesh has an anti-conversion law, but the government has not framed the rules needed to enforce it, and Rajasthan has a bill that has yet to be turned into law. The laws are strikingly similar; apart from the Himachal Pradesh legislation, all the laws were passed by Bharatiya Janata Party, the right-wing, pro-Hindutva political party. They all prohibit conversion from one religion to another by the use of force or allurement or by fraudulent means. *See* Orissa Freedom of Religion Act, 1967; Madhya Pradesh Freedom of Religion Act, 1968. Allurement—also called inducement—is defined as a gift or material benefit, and force is defined as the threat of injury "including threat of divine displeasure or social excommunication." Orissa Freedom of Religion Act, 1967; Madhya Pradesh Freedom of Religion Act, 1968. Less surprisingly, they do not prohibit "returning to one's religion" or what is termed as Ghar Vapsi, which means that if Hindus reconvert to Hinduism, it will not be considered conversion under these anti-conversion laws. Mustafa, *supra* note 114.

122. This argument had been accepted by the Orissa High Court in *Hyde v. State of Orissa*, AIR 1973 Ori 116 (Orissa HC Oct. 4, 1972), <https://indiankanoon.org/doc/453517/> [hereinafter *Hyde*], where the petitioners expressly averred that conversion was a part of the Christian religion. The Orissa High Court had noted that: "several petitioners have freely quoted from several Christian Scriptures of undoubted authority to show that propagating religion with a view to its spreading is a part of religious duty for every Christian and, therefore, must be considered as a part of religion. Learned Government Advocate[s] [did] not dispute this assertion of fact." *Id.* § 4(h). It had finally recorded a finding that "Article 25(1) guarantees propagation of religion and conversion is a part of Christian religion." *Id.* § 12(1).

123. The Indian Supreme Court, while reversing the judgment of the Orissa High Court, made no attempt to show that the question raised and decided was either irrelevant, or was

held that Clause 1 of the provision “does not grant [the] right to convert . . . [another] person to one’s own religion but to transmit or spread one’s religion by an exposition of its tenets.”<sup>124</sup> The Court stated that “Article 25(1) guarantees ‘freedom of conscience’ to every citizen,” and “if a person purposely undertakes the conversion of another person to his religion, as distinguished from his effort to transmit or spread the tenets of his religion, that would impinge on” such a guarantee.<sup>125</sup>

The Supreme Court failed to discuss the definitions of *inducement* and *allurement*, which was the primary bone of contention.<sup>126</sup> It also did not revert to the legislative history of Article 25—the term *propagate* was included in the Constitution as a compromise to assure Christians that it would include freedom to convert.<sup>127</sup> Moreover, if one takes the reductionist understanding of propagation—given the court in this case<sup>128</sup>—the inclusion of such a term in the Indian Constitution would be rendered meaningless. The mere right to propagate for the enlightenment of others would already be covered under the right to free speech and expression under Article 19(1)(a) of the Indian Constitution. Thus, we submit

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wrongly decided. Not only this, the proposition was not even controverted by counsel appearing on behalf of the State. *See Rev. Stainislaus v. State of Madhya Pradesh*, 1977 SCR (2) 611, 908 (India); Faizan Mustafa, *Constitutionality of Anti-Conversion Laws*, STATESMAN (Jan. 15, 2015), <http://www.thestatesman.com/news/law/constitutionality-of-anti-conversion-laws/44674.html>.

124. *Rev. Stainislaus*, 1977 SCR (2) at 908.

125. *Id.* For a distinction between conversion and propagation simply for “the edification of others” the court has relied upon *Gandhi v. State of Bombay*, 1954 SCR 1035 (India). However, as stated by Robert D. Baird: “Whatever else might be said about these bills and their treatment by the Supreme Court, they at least present a constriction upon religion as constitutionally understood.” Robert D. Baird, *Traditional Values, Governmental Values, and Religious Conflict in Contemporary India*, 1998 BYU L. REV. 337, 353 (1998).

126. Mustafa, *supra* note 8.

127. The entire debate—with calls by Loknath Misra, Pandit Lakshmi, Kanta Maitra, T.T. Krishnamachari, and K.M. Munshi for this fundamental right not to be converted—is part of the legislative history of the Indian Constitution. The court overlooked these words, dialogues and discussions of the framers. *See* 7 CONSTITUENT ASSEMBLY DEBATES (Dec. 6, 1948), <http://parliamentofindia.nic.in/ls/debates/vol7p20a.htm>; 2 H.M. SEERVAI, CONSTITUTIONAL LAW OF INDIA: A CRITICAL COMMENTARY 1287 (4th ed. 1999). Seervai, probably one of India’s greatest constitutional jurists, refers to the *Stainislaus* decision as “productive of the greatest public mischief.” SEERVAI, *supra*, at 1290.

128. The reductionist understanding of *propagation* being that though one may transmit or spread the tenets of his religion, resultant conversion (if it occurs) of another person to his religion cannot be constitutionally protected.

that the right to convert was actually included in Article 25, and, as such, the decision of the Supreme Court in *Stainislaus* not only was erroneous but also led to instability in society,<sup>129</sup> as Indian Christians feel they have been cheated in this matter.<sup>130</sup> The assurances given to them in the Constituent Assembly on the inclusion of the word *propagate* have not been fulfilled, and the government has done nothing to remedy the situation arising out of the highly restrictive interpretation of the term *propagation* by the Supreme Court.

### B. Affirmative Action

Another provision of law that impinges on freedom of religion and causes social instability is the presidential order under which only Hindus are entitled to the benefits of affirmative action.<sup>131</sup> Non-Hindus are not included in the definition of the Scheduled Caste.<sup>132</sup> Since 1951, political leaders have tried to control citizens' freedom of choice by not allowing them to exit the Hindu religion, even when their inner consciousness prompts conversion to a different religion.<sup>133</sup> By coercing people to stay within the Hindu religion, the

129. See *The United States Commission on International Religious Freedom Annual Report 2015*, which notes,

[s]ince the [2014 general] election, religious minority communities have been subject to derogatory comments by politicians linked to the ruling Bharatiya Janata Party (BJP) and numerous violent attacks and forced conversions by Hindu nationalist groups, such as Rashtriya Swayamsevak Sangh (RSS) and Vishva Hindu Parishad (VHP). Christian NGOs and leaders report that their community is particularly at risk in states that have adopted 'Freedom of Religion Act(s),' commonly referred to as anti-conversion laws.

U.S. COMM'N ON INT'L RELIGIOUS FREEDOM, *supra* note 46, at 149–53 (there are entire segments within the report on forced conversions and anti-conversion laws). The recently released 2016 report also notes the sense of insecurity amongst religious minorities. U.S. COMM'N ON INT'L RELIGIOUS FREEDOM, ANN. REP 2016, 159–65 (2016), <http://www.uscirf.gov/sites/default/files/USCIRF%202016%20Annual%20Report.pdf>.

130. See Vishal Arora, *Court Questions State's 'Anti-Conversion' Law*, WORLD WATCH MONITOR (Sep. 15, 2011), [https://www.worldwatchmonitor.org/2011/09-September/article\\_120331.html/](https://www.worldwatchmonitor.org/2011/09-September/article_120331.html/).

131. Yaroslav Trofimov, *In India, 'Untouchables' Convert to Christianity—and Face Extra Bias*, WALL STREET J. (Sept. 19, 2007, 11:59 PM), <http://www.wsj.com/articles/SB119014428899931394>.

132. *Frequently Asked Questions*, MINISTRY OF SOC. JUSTICE AND EMPOWERMENT, <http://socialjustice.nic.in/UserView/index?mid=28545#sc4> (last visited Nov. 24, 2017).

133. See Piyush Srivastava, *'We Will Free India of Muslims and Christians by 2021': DJS Leader Vows to Continue 'Ghar Waspi' Plans and Restore 'Hindu Glory'*, DAILY MAIL.COM INDIA (Dec. 18, 2014, 22:45 EST), <http://www.dailymail.co.uk/indiahome/indianews>

inward association concept is seriously undermined, particularly when political leaders put a heavy price on conversion. In a country of India's size, competing in the "open category" instead of the "reserved category" almost negates the chances of selection for admission in educational institutions and State jobs.<sup>134</sup> Moreover, the presidential order is in clear contravention of Article 15(1), which makes religion a prohibited ground for any State action. In the recent past, the Indian judiciary has unfortunately lent itself to the majoritarian agenda on this point. In the *K.P. Mannu* case,<sup>135</sup> the Court held that a Dalit Christian converting to Hinduism would be entitled to reservation benefits as long as it could be proved that his forefathers belonged to a caste categorized as a Scheduled Caste.<sup>136</sup> In the times of *Ghar Vapsi*,<sup>137</sup> the judgment seems to put a judicial seal on reconversion, thereby incentivizing it against the assurances given in 1950.<sup>138</sup> Affirmative action should not be denied to anyone

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[/article-2879597/We-free-India-Muslims-Christians-2021-DJS-leader-vows-continue-ghar-wapsi-plans-restore-Hindu-glory.html](#).

134. Open means general seats where everyone is eligible. Reserved means seats are reserved for the categories entitled to affirmative action. In a country of India's size, competition is quite tough and if affirmative action is not there, some groups will have no representation at all both in education as well as in jobs.

135. *K.P. Manu v. Chairman, Scrutiny Committee for Verification of Community Certificate*, Civ. App. No. 7065 of 2008 (India Feb. 26, 2015).

136. *Id.* This judgment extended the earlier position laid down in *Guntur Med. Coll. v. Rao*, 1976 SCR (3) 1046 (India), <https://indiankanoon.org/doc/1013438/> [hereinafter *Rao*], in which it was noted that a person did not need to be born a Hindu to get scheduled caste status.

137. Hindu rightists consider reconversion of Muslims and Christians as Hindus as *Ghar Vapsi*, (i.e., 'return home') as they consider all Indian Muslims and Indian Christians to have been originally Hindus and they are now returning to their original faith.

138. The idea of incentivization comes from the fact that there are constitutional provisions of affirmative action in India for certain scheduled castes. Ira N. Gang et. al., *Caste, Affirmative Action and Discrimination in India*, CHRONIC POVERTY RESEARCH CENTRE (2010), [http://www.chronicpoverty.org/uploads/publication\\_files/gang\\_sen\\_yun.pdf](http://www.chronicpoverty.org/uploads/publication_files/gang_sen_yun.pdf). Originally, an order by the President restricted the definition of "scheduled castes" only to those belonging to the Hindu faith. *The Constitution (Scheduled Castes) Order, 1950*, GAZETTE OF INDIA, EXTRAORDINARY, Part II, 148 (Aug. 10, 1950), [http://lawmin.nic.in/legislative/election/volume%201/rules%20&%20order%20under%20constitution/the%20constitution%20\(scheduled%20castes\)%20order,%201950.pdf](http://lawmin.nic.in/legislative/election/volume%201/rules%20&%20order%20under%20constitution/the%20constitution%20(scheduled%20castes)%20order,%201950.pdf). The umbrella has been extended to Sikhs and Buddhists over the years; but not the non-Indic religions. There is an entire narrative to be told on the point, but that must be for another day. By an amendment, Sikhs and Buddhists too have been given affirmative action. In fact, the definition of Hindus in Article 25 itself includes these groups within the definition of Hindu. Interestingly Sikhs are legally speaking Hindus at the national level but in the State of Punjab, where Sikhs are a majority, they are

on conversion from Hinduism as conversion does not change the financial or social status of converts.

### C. The Cow Slaughter Ban

Another matter that deserves some attention is the question of the cow slaughter ban. There is some evidence that in ancient India, Hindus ate beef.<sup>139</sup> Today, a new version of Hinduism is being imposed not only on Hindus but on others as well. Individual autonomy even to eat certain foods is under threat due to the politics of cow slaughter. Hindu reverence of the cow is being imposed on followers of other religions, which has an adverse effect on butchers' right to their occupation.<sup>140</sup>

The Hindutva rhetoric has built up over time. It started with the needless dicta by a judge from the Punjab & Haryana High Court in 1996.<sup>141</sup> While hearing a bail application under the Prohibition of Cow Slaughter Act, the judge stated that five-year imprisonment for the offense of cow slaughter was too lenient.<sup>142</sup> This issue has simmered for years and was picked up by the Bharatiya Janata Party (BJP) just before the 2014 general elections. Narendra Modi, the current Prime Minister of India, called out the government as

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considered a minority and enjoy the rights of minorities to establish and administer educational institutions of their choice.

139. Mahadev Chakravarti, Note, *Beef-Eating in Ancient India*, 7 SOC. SCIENTIST 51, 51 (1979). Even the first author has been intimidated to write that Hindus, too, were beef eaters in ancient India. Four notices of defamation of one million rupees were sent to the author after recent draconian cattle rules notifications by the federal government. Faizan Mustafa, *The Modi Government's Cattle Rules May Not Pass the Legal Test*, HINDUSTAN TIMES (July 5, 2017, 13:15 IST), <http://www.hindustantimes.com/analysis/the-modi-govt-s-new-cattle-trade-ban-may-not-pass-legal-test/story-W2TWCVUuFCGFihHZDhcb8L.html>.

140. Shashank Bengali & Parth M.N., *Conservative Hindus Push Bans on Cattle Slaughter in India*, LOS ANGELES TIMES (Mar. 25, 2015, 11:29 AM), <http://www.latimes.com/world/asia/la-fg-india-hindus-cattle-20150325-story.html>.

141. This is an unreported case; I read it in a newspaper in 1996. Such orders are not reported. But now we have laws which even impose life imprisonment. In March 2017, Gujarat State, through an amendment in the Animal Protection Act, began to impose life imprisonment without bail and a fine of half a million rupees on those involved in cow slaughter. For possession of beef, punishment can range from seven to ten years in prison.

142. Asghar Ali Engineer, *Communalism and Communal Violence, 1996*, 32 ECON. & POL. WKLY., 323, 323–24 (1997).



supporting a “pink revolution”<sup>143</sup> that caused division among communities leading up to the election.<sup>144</sup> After coming to power, the Modi government has kept the issue on a back-burner as revenue from beef exports has risen by nineteen percent in just one year.<sup>145</sup>

In 2015, the same rhetoric was used in the run-up to the Haryana and Maharashtra state elections.<sup>146</sup> While the BJP government has made amendments providing harsher punishment for possession of beef, twenty-six out of twenty-nine Indian states have had such laws for decades, and slaughter has been banned since 1976. Therefore, discussion of stricter bans is largely regarded as political rhetoric aimed at persuading voters who are unaware of current law. However, after the Maharashtra election, the BJP government made amendments to the Maharashtra Animal Preservation (Amendment) Act, prohibiting the slaughter of bulls and bullocks and the possession and consumption of their meat as well.<sup>147</sup> The amendment was challenged in the Bombay High Court,

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143. *E.g.*, K. Balchand, *Modi Fears a ‘Pink Revolution,’* HINDU (Apr. 3, 2014, 12:55 IST), <http://www.thehindu.com/news/national/other-states/modi-fears-a-pink-revolution/article5864109.ece>.

144. See Puja Mehra, *Meat Production Doubled in Gujarat in 10 Years*, HINDU (Apr. 5, 2014, 3:21 IST), <http://www.thehindu.com/news/national/other-states/meat-production-doubled-in-gujarat-in-10-years/article5872923.ece?ref=relatedNews> (noting the fact that meat production doubled under Modi’s leadership over a ten-year period but that it may have been trying to create strife among communities by playing up the issue before the elections). The BJP manifesto promised a ban on cow slaughter, and during April 2014, ran the slogan “Modi ko matdan, gai ko jeevadan” [Vote for Modi, give life to the cow]. Elizabeth Soumya, *Sacred Cows and Politics of Beef in India*, ALJAZEERA (Apr. 20, 2014), <http://www.aljazeera.com/indepth/features/2014/04/india-bjp-piggybacks-cow-milk-votes-2014417142154567121.html>.

145. Cithara Paul, *Red Meat Export Surge Gives Beef Ban a Red Face*, NEW INDIAN EXPRESS (Mar. 8, 2015, 6:00 AM), <http://www.newindianexpress.com/thesundaystandard/Red-Meat-Export-Surge-Gives-Beef-Ban-a-Red-Face/2015/03/08/article2702789.ece> (“As per the statistics [of] the Agricultural and Processed Food Products Export Development Authority (APEDA)—the government’s gatekeeper for exports—the production and export of red meat have registered a steady jump during the BJP Government.”).

146. Ajaz Ashraf, *Bihar Polls: Will Voters Ignore Hindutva Effect and Trust BJP’s Development Plank?*, FIRSTPOST (Oct. 20, 2015, 07:12 IST), <http://www.firstpost.com/politics/bihar-election-will-voters-ignore-the-hindutva-effect-and-trust-bjps-development-plan-k-2474412.html>.

147. *HC Decriminalises Possession of Beef with a Caveat*, DECCAN HERALD (May 6, 2016, 14:36 IST), <http://www.deccanherald.com/content/544749/hc-decriminalises-possession-beef-caveat.html>.

which upheld the slaughter ban.<sup>148</sup> The BJP government has now filed an appeal in the Supreme Court. Since a nine-judge bench of the Supreme Court in its August 24, 2017 judgment upheld the right to privacy as a fundamental right, there is hope the Court will consider eating habits as part of privacy.

Moreover, the Hindutva rhetoric has caused great instability. In 2015, a Muslim individual named Akhlaq was beaten by a mob in Dadri based on a rumor that his family was eating beef.<sup>149</sup> All of the accused have been now released on bail.<sup>150</sup> The police, apart from looking into the murder of Akhlaq, also sent the meat in question for forensic tests<sup>151</sup>—initial tests indicated the meat was mutton or goat meat. Different forensic labs have issued contradictory reports about whether the meat was beef or goat.<sup>152</sup> No law permits killing of a human being, and, therefore, the question whether it was beef or mutton is irrelevant. Further, in Dadri, possession of beef was not an offense.

In 2017, Pehlu Khan, a Muslim, was similarly killed in a mob lynching for carrying dairy cows with proper purchase documents. The video of people beating him is in the public domain. But all the six accused named by him in dying declarations too have been let off by the BJP government of Rajasthan as the police report says they

148. See Ashraf, *supra* note 146; Mukhtar v. State of Maharashtra, Writ Pet. No. 5731 of 2015, § 221 (Bombay HC May 6, 2016), <https://indiankanoon.org/doc/153513175/?type=print> [hereinafter *Mukhtar*].

149. Aditi Vatsa, *Dadri: Mob Kills Man, Injures Son over 'Rumours' that They Ate Beef*, INDIAN EXPRESS (Dec. 25, 2015, 11:59 PM), <http://indianexpress.com/article/india/india-others/next-door-to-delhi-mob-kills-50-year-old-injures-son-over-rumours-they-ate-beef/>.

150. Staff Reporter, *Key Accused in Dadri Lynching Case Gets Bail*, HINDU (Aug. 1, 2017, 20:36 IST), <http://www.thehindu.com/news/national/other-states/key-accused-in-dadri-lynching-case-gets-bail/article19402152.ece/>.

151. Suhasini Raj, *Goat Meat, Not Beef, Found in Home of Indian Killed over Cow-Slaughter Rumors*, N.Y. TIMES (Dec. 29, 2015), [http://www.nytimes.com/2015/12/30/world/asia/uttar-pradesh-india-cow-slaughter.html?\\_r=0](http://www.nytimes.com/2015/12/30/world/asia/uttar-pradesh-india-cow-slaughter.html?_r=0). There was no ban on beef consumption in Dadri in the state of Uttar Pradesh, but such is the frenzy created by the BJP: that police went down an abhorrent path in the wake of a horrifying incident. The meat turned out to be goat; we still await a second analysis. *Id.*

152. Mohammad Ali, *Dadri Meat Was Beef, Claims Fresh Forensic Report*, HINDU (May 31, 2016, 18:57 IST), <http://www.thehindu.com/news/national/other-states/dadri-meat-was-beef-claims-fresh-forensic-report/article8673383.ece>.

are not guilty.<sup>153</sup> Indira Jaisingh a former Additional Solicitor General, Supreme Court Lawyers: Prashant Bhushan and Colin Gonsalves, Human Rights Defender: Teesta Setalved, and many others, conducted an independent probe and have reported that the police are protecting the murderers of Pehlu Khan.<sup>154</sup> Similar incidents took place in the eastern state of Jharkand.<sup>155</sup> It is heartening that the Prime Minister at least has, on three different occasions, condemned cow vigilante groups and termed them criminals.<sup>156</sup> But his words have had no impact on the ground. Thus we see that the Hindutva forces have created anti-Muslim sentiment related to cow slaughter, though the majority of Indians are non-vegetarians, and poorer populations do consume beef derived from water buffalos. The English language has just one word for both, but only cows are considered sacred by Hindu, not water buffalo. In fact, water buffalo meat is the only cheap source of protein for the poor, as goat meat is three times more costly.

It is worth noting the Constituent Assembly debates regarding the inclusion of the cow slaughter ban in the Constitution of India. Some members wanted a complete constitutional ban, while others favored only a partial prohibition.<sup>157</sup> The case for a complete ban was

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153. Rohit Parihar, *Alwar Lynching Case: Cops Drop Charges Against 6 Accused Named by Pehlu Khan*, *INDIATODAY*, (Sept. 15, 2017), <http://indiatoday.intoday.in/story/pehlu-khan-lynching-case-alwar-rajasthan-police-cid-cattle-cow-vigilantes/1/1048327.html/>.

154. Shreya Sinha, *Police Are Protecting the Murderers of Pehlu Khan: Fact-finding Committee Report*, *ONEINDIA* (Oct. 27, 2017, 18:19 IST), <https://www.oneindia.com/india/police-are-protecting-the-murderers-of-pehlu-khan-fact-finding-committee-report-2570763.html/>.

155. Prashant Pandey, *Meat Trader Lynched Near Ranchi, Van Set On Fire*, *INDIAN EXPRESS* (June 30, 2017, 8:22 AM), <http://indianexpress.com/article/india/jharkhand-lynching-meanwhile-a-meat-trader-is-lynched-near-ranchi-4728597/>.

156. Special Correspondent, *Cow Vigilantes 'Anti-Social': Modi Breaks His Silence*, *HINDU* (Aug 6, 2016, 23:54 IST), <http://www.thehindu.com/news/national/Cow-vigilantes-%E2%80%98anti-social%E2%80%99-Modi-breaks-his-silence/article14556739.ece>; see also Special Correspondent, *Modi Warns Cow Vigilantes, Says Killing People in the Name of 'Gau Bhakti' Cannot Be Accepted*, *HINDU* (June 29, 2017, 13:41 IST) <http://www.thehindu.com/news/national/killing-people-in-the-name-of-gau-bhakti-is-not-acceptable-modi-at-sabarmati-ashram/article19172520.ece/>; Vikas Pathak, *Crack Down on Cow Vigilantes, PM Tells States*, *HINDU* (July 16, 2017, 14:25 IST), <http://www.thehindu.com/news/national/crack-down-on-cow-vigilantes-pm-tells-states/article19289158.ece>.

157. 7 CONSTITUENT ASSEMBLY DEBATES (Nov. 24, 1948), <http://parliamentofindia.nic.in/ls/debates/vol7p12.htm>. In the end, the prohibition on cow slaughter was only described in Part IV of the Constitution, as a directive principle. See INDIA CONST. art. 48. As such, it is merely supposed to be a guideline for State policy. Other directive principles which

initiated by certain Hindu members.<sup>158</sup> Muslim leaders Z.H. Lari and Syed Muhammad Saadulla also made a forceful case for the inclusion of the cow slaughter ban in the fundamental rights chapter of the Constitution so that the prohibition could become absolute.<sup>159</sup> To avoid confusion in the law, they called for the inclusion of the ban on cow slaughter in fundamental rights and opposed its inclusion in the less equally enforced directive principles.<sup>160</sup> Historically as well, “many prominent Muslims” actively participated in the cow protection movement of 1880 to 1894.<sup>161</sup>

In the case challenging the Maharashtra Animal Preservation (Amendment) Act, the Bombay High Court had to address legal questions regarding cow slaughter, freedom of religion, and the economic justification of a slaughter ban on bulls and bullocks. The Bombay High Court, in its order of May 6, 2016, struck down provisions of the newly enacted Maharashtra law as unconstitutional and permitted consumption of beef slaughtered outside the state.<sup>162</sup> It also read the provision to punish the possession of beef by holding

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are far more important, such as reducing income inequalities, right to work, distribution of national resources to serve the common good, etc., are given no prominence.

158. 10 CONSTITUENT ASSEMBLY DEBATES, *supra* note 23.

159. Z.H. Lari stated,

My own submission to this House is that it is[ ]better to come forward and incorporate a clause in[ ]Fundamental Rights that cow slaughter is henceforth[ ]prohibited, rather than it being left vague in the Directive[ ]Principles, leaving it open to Provincial Governments to[ ]adopt it one way or the other . . . In the interests of good-will in the[ ]country and of cordial relations between the different[ ]communities I submit that this is the proper occasion when[ ]the majority should express itself clearly and definitely.

7 CONSTITUENT ASSEMBLY DEBATES, *supra* note 157.

160. *See supra* text accompanying note 159. Syed Muhammad Sa’adulla stated,

In my religious book, the Holy Qoran, there[ ]is an injunction to the Muslims saying – “La Ikraba fid Din”[ ]or . . . there ought to be no compulsion in the name of religion.[ ]I therefore do not like to use my veto when my Hindu[ ]brethren want to place this matter in our Constitution from[ ]the religious point of view.

*Id.* He did go on to state that if one were to give economic reasons for the complete ban then he would rebut the same. *Id.* However, ultimately the cow slaughter prohibition was not included within the Constitution’s fundamental rights because the whole leather industry would have collapsed. Thus the slaughter ban was made part of the non-binding directive principles.

161. HEIKO KRETSCHMER, SANSKRIT READER I: A READER IN SANSKRIT LITERATURE 48 (2d ed. 2015).

162. *Mukhtar*, *supra* note 148, §§ 176, 221.

that it should be by “conscious possession” only.<sup>163</sup> But it did uphold the prohibition against consuming cow meat slaughtered in the state of Maharashtra.<sup>164</sup>

Decades ago, the Supreme Court held in *Quareshi v. Bihar* that cow slaughter during *Bakr-id*, a Muslim holiday of feasting, was not an essential practice of the Muslim petitioner.<sup>165</sup> First, the Supreme Court referred to *Quranic* verses, which provided for prayer and sacrifice and also made references, in this regard, to authentic *Hanafi* school text of *Heydeya*, which discusses the sacrifice of a cow, camel, or goat.<sup>166</sup> It used the texts to conclude that sacrificing a cow on *Bakr-id* was not an essential Islamic practice because a goat could be substituted for a cow.<sup>167</sup> One might be tempted to ask why the Supreme Court looked at scriptures here, when in *Fasi v. Superintendent of Police*, the Court did not.<sup>168</sup>

Second, the Court said there was no affidavit on record to show that a *Maulvi* (a Muslim scholar, also known as Maulana) had stated that cow slaughter was an essential religious practice.<sup>169</sup> If this were the tipping argument, how would the judiciary explain rejecting the same argument in *Hyde* in which Christian clergy demonstrated that conversion is explicitly provided in the scriptures?<sup>170</sup> There, the Orissa High Court had accepted conversion to be an essential Christian practice but was overturned by the Indian Supreme Court.<sup>171</sup>

The Supreme Court needs to look at the constitutional conundrum between the directive principle of prohibition on cow

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163. *Id.* § 222.

164. *Id.* §§ 4, 221.

165. *Quareshi v. State of Bihar*, 1959 SCR 629, 635 (India).

166. *Id.* at 650.

167. *Id.*

168. *Fasi*, *supra* note 88. The Kerala High Court said, “Counsel for the petitioner was not able to point out anything said in the holy Quran requiring the followers of Islam to grow a beard.” *Id.* § 4. However, the Quran alone is not sufficient to determine essential practices of Islam, as the Quran itself says to follow the Prophet Muhammad, and his sayings and doings compiled as Sunna are equally important to the Quran.

169. *Quareshi*, 1959 SCT at 651 (“We have, however, no material on the record before us which will enable us to say, in the face of the foregoing facts, that the sacrifice of a cow on that day is an obligatory overt act for a [Muslim] to exhibit his religious belief and idea.”).

170. *Hyde*, *supra* note 122, § 4.

171. *Rev. Stainislaus v. State of Madhya Pradesh*, 1977 SCR (2) 611 (India).

slaughter and the fundamental right to religion. It is the latter that is more important and thus ought to prevail—the framers did not place the ban on cow slaughter under Part III of the Constitution that outlines fundamental rights. The blame cannot be put at the doorstep of the minority community, as minority members of the Constituent Assembly made a strong case for including a provision in the fundamental rights chapter in the interest of “good-will” and “cordial relations” and to ensure consistent treatment.<sup>172</sup> The nation has not had any trouble with limiting the ban to the slaughter of cows of a certain age.<sup>173</sup> Why, then, has the judiciary changed its position to completely prohibit cow slaughter?<sup>174</sup> This shift affects the leather industry, in terms of lost revenue at the corporate level and lost revenue for those employed.<sup>175</sup> Additionally, this affects the Dalits, Adivasis, Muslims, and Christians—together a sizable portion of the Indian population—who rely on beef as their chief source of nutrition,<sup>176</sup> rather than pulses or vegetables, which are relatively more expensive.<sup>177</sup> Is this not pure majoritarianism? Does it not adversely affect the personal choices of citizens regarding their food habits?

This judicial support of majoritarianism with respect to religion may be seen in the 2004 decision in *Om Prakash and Ors. vs. State of U.P. and Ors.*<sup>178</sup> In that case, the Court upheld the prohibition on the sale of eggs in the municipal region of Rishikesh, a Hindu pilgrim city, on the grounds that the inhabitants and pilgrims would

172. The exact words used by Z.H. Lari during the Constituent Assembly debate. 7 CONSTITUENT ASSEMBLY DEBATES, *supra* note 157.

173. *Quareshi*, 1959 SCT at 676–78.

174. *State of Gujarat v. Jamat*, Civ. App. No. 4937–40 of 1998 (India Oct. 26, 2005).

175. Tommy Wilkes & Mayank Bhardwaj, *Cattle Slaughter Crackdown Ripples Through India's Leather Industry*, REUTERS (June 14, 2017, 6:53 AM), <https://in.reuters.com/article/uk-india-politics-religion-insight/cattle-slaughter-crackdown-ripples-through-indias-leather-industry-idINKBN1951QQ/>.

176. “In India, cattle have always been relished and their meat is a critical source of nutrition for various communities—including Adivasis, Dalits, Christians, Muslims and several other castes . . . .” Sagari Ramdas, *Bovine Politics*, 677 SEMINAR 41, 44 (2016).

177. Shoaib Daniyal, *Between Banned Beef and Expensive Dal, How Are Poor Indians Supposed to Get Enough Protein?*, SCROLL.IN (Oct. 31, 2015, 9:15 AM), <http://scroll.in/article/765001/between-banned-beef-and-expensive-dal-how-are-poor-indians-supposed-to-get-enough-protein>.

178. *Om Prakash and Ors. vs. State of U.P. and Ors.*, AIR 2004 SC 202 (India).

prefer a “clean” vegetarian atmosphere in the city.<sup>179</sup> This ruling does nothing but impose majoritarian views on the other communities living within the city.

On August 24, 2017, in a big blow to federal government, a nine-judge bench of the Supreme Court held the right to privacy as a fundamental right and said that what one eats is a matter of personal autonomy and what religion one follows is a question of choice. Justice Chamleswara made the following observation in the judgment: “I do not think that anybody would like to be told by the State as to what they should eat or how they should dress or whom they should be associated with either in their personal, social or political life.” The judgment will have a far reaching impact on the beef ban laws.<sup>180</sup>

Freedom of religion impacts social stability. The *Om Prakash* case and recent controversies demonstrate that all is not well with the freedom of religion in India. There is an urgent need for the new government to assure religious minorities that the constitutional guarantees and promises made during the drafting of the Indian Constitution will be fully honored. Moreover, the innovation of the doctrine of *essentiality* restricts the freedom of religion of the majority and gives a role to the judiciary that it is ill-equipped to undertake. India has frequently had communal rights, and the best way to create an environment of trust between diverse religious communities is to ensure the fullest protection of their freedom of religion.

#### IV. CONCLUSION

Religion and spirituality have been central to Indian society, but religion has been—and ought to be—an inward association.<sup>181</sup> The Indian Constitution was framed with this in mind; the State was not to interfere, but the scope for reform was left within the text itself.<sup>182</sup> The doctrine of *essentiality* propounded by the Indian Supreme Court impinges on individual freedom and gives too much power to

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179. *Id.* at 9.

180. Justice KS Puttuswami v. Union of India, 2017 SCALE 1, 181 (India).

181. See Raju, *supra* note 14, at 1, 31–32; GANDHI, THE COLLECTED WORKS, *supra* note 24, at 74–75.

182. See INDIA CONST. art. 25; JACOBSON, *supra* note 21, at 286.

the courts in matters of religion. In effect, it elevates the judiciary to the status of clergy. Moreover, politicians have also curtailed individual choice in several ways, the latest instance being causing the national identity card (Aadhar) to be linked with income tax payment<sup>183</sup> The original idea was to shape a society of peace and harmony, with religion's role well recognized by the framers of the Indian Constitution.<sup>184</sup> However, in India, religion can and has been used to create fragmentation.<sup>185</sup>

In India, the constitutional position on secularism was adopted to assure minorities that their culture, religion, and identity would be protected and that majoritarian views would not be imposed on them.<sup>186</sup> This was done to manage tension between religious groups,<sup>187</sup> by placing them on equal footing vis-à-vis the State<sup>188</sup> and by distancing the State from any specific religious affiliation.<sup>189</sup> Alongside balancing diversity, the Indian Constitution also sought to create a progressive society based on "scientific temper."<sup>190</sup> The Supreme Court has said that the State could intervene under specific circumstances to regulate secular activities associated with religious practice, but not the regulation of "religious practices as such."<sup>191</sup>

The idea of limited intervention brought the judiciary into the equation. Over the years, the judiciary has styled itself as the messiah (messenger or reformer) by taking upon itself responsibility to cleanse superstition from religion and reform it to suit ideas of modern rationality.<sup>192</sup> The Court's insistence on following the *essentiality* test (instead of following the American approach of taking asserted religious beliefs at face value) has struck at the very

183. See Faizan Mustafa, *Supreme Court as Clergy*, TRIBUNE, (May 20, 2017, 12:28 IST) <http://www.tribuneindia.com/news/comment/supreme-court-as-clergy/409651.html>.

184. See *supra* text accompanying note 50; KÜNG, *supra* note 27, at xxiii; Gopin, *supra* note 35, at 1; Joshi & Kumari, *supra* note 43, at 40–50.

185. See U.S. COMM'N ON INT'L RELIGIOUS FREEDOM, *supra* note 46, at 149–53.

186. See INDIA CONST. arts. 29, 30; Chandhoke, *supra* note 55, at 296–97; *supra* text accompanying note 66.

187. See Chandhoke, *supra* note 55, at 291–95.

188. See *id.*

189. See Taylor, *supra* note 58, at 31–53.

190. See INDIA CONST. art. 51A, cl. h.

191. See *Gandhi v. State of Bombay*, 1954 SCR 1035, 1063 (India); *supra* text accompanying note 71.

192. Mustafa, *supra* note 8.



foundation of religious freedom in India.<sup>193</sup> Practices of Hinduism and its denominations have been targeted by reformist judges who consider the practices to be based on superstition,<sup>194</sup> while practices central to Islam are targeted either because of the sentiments of the majority community or the misplaced understanding of Islamic practices.<sup>195</sup> The whole concept of providing constitutional protection only to those elements of a religion that the Court considers essential is problematic for three reasons.

First, it assumes that there can be objective criteria for deciding what is essential to a religion and what is not. This is a fundamentally wrong assumption, as the very idea of religion is subjective. As observed in 1943 by the Australian High Court in *Adelaide Co. of Jehovah Witnesses v. Commonwealth*: “What is religion to one is superstition to another.”<sup>196</sup> Secondly, such an approach assumes that one element or practice of religion is independent of the others. This approach assumes that some things are central to religion and others are merely incidental. This cannot be correct—it is the summation of various elements and practices that together constitute a religion. Finally, this approach assumes that religions are static and that what was central a few centuries ago must continue to hold true today. Religions, like all else, must be allowed to change and evolve with time.

“The essentiality test has proved to be the biggest deterrent to freedom of religion in India.”<sup>197</sup> It was invented by the Indian Supreme Court without any constitutional basis. The Indian

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193. See *Shirur Mutt*, *supra* note 72, at 1021–25 (discussing the meaning of management of “affairs in matters of religion” and the definition of religion); Dhavan, *supra* note 75 (discussing the Court’s implied rejection of the “assertion test” and adoption of a test that requires that a practice or set of beliefs must be essential to that religion in order to be afforded constitutional protection); Mustafa, *supra* note 8; *supra* text accompanying note 78; *supra* text accompanying note 74.

194. See *Gram Sabha*, *supra* note 84, at 17 (holding that the capture for worship and performance of cobras is not an essential part of the Hindu religion and therefore violates a statute that prohibits the capturing of Indian Cobras); *Quareshi v. State of Bihar*, 1959 SCR 629, 651 (India); *Ramesh Sharma*, *supra* note 87, § 30; *supra* text accompanying note 87; *supra* text accompanying note 90.

195. See *Faruqui*, *supra* note 95; *Fasi*, *supra* note 88, §4; *Anandan*, *supra* note 88; see also *Mustafa* *supra* note 183.

196. *Adelaide Co. of Jehovah’s Witnesses Inc. v. Commonwealth* (1943) 67 CLR 116, 123 (Austl.).

197. *Mustafa*, *supra* note 81.

Supreme Court should reconsider its reliance on this test. This is not to say that there should be no social reform; the State is not powerless in this regard.<sup>198</sup> The State has been given power to regulate religions in the name of public order, health, morality, and other fundamental rights. Thus, it can take up any secular, economic, or political activity associated with religion.<sup>199</sup> It has adequate powers under Article 25 to initiate social welfare and reforms without interpreting religions in terms of essential or non-essential features and practices.

In sum, the *essentiality* test has, by stifling the freedom of religion in India, created anxiety in minority communities. This, in turn, fosters instability in the larger Indian society. It is heartening to note that, in its latest pronouncement on August 22<sup>nd</sup>, 2017, a constitutional bench of the Supreme Court held that freedom of religion subject to restrictions is absolute. This judgment is indeed the high-water mark of freedom of religion in India.<sup>200</sup> The Chief Justice explicitly held that ‘personal law’ has constitutional protection. This protection is extended to ‘personal law’ through Article 25 of the Constitution. It needs to be kept in mind, that the stature of personal law is that of a fundamental right. Justice Kurian went a step ahead and said that subject to restrictions, the freedom of religion under the Constitution of India is absolute on this point.<sup>201</sup>

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198. INDIA CONST. art. 25, § 1, reads, “Subject to public order, morality and health and to the other provisions of this Part, all persons are equally entitled to freedom of conscience and the right freely to profess, practise and propagate religion.”

199. INDIA CONST. art. 25, § 2, cl. a, states, “Nothing in this article shall affect the operation of any existing law or prevent the State from making any law . . . regulating or restricting any economic, financial, political or other secular activity which may be associated with religious practice . . . .”

200. *Shayra Bano v. Union of India*, 2017 SCALE 1, 178 (India). Chief Justice Khehar said so explicitly on his own behalf and on behalf of Justice Nazeer. *Id.* at 311. Justice Joseph in his separate opinion agreed with him on this point. *Id.* at 360. Thus three out of five judges who constitute a majority have held freedom of religion as absolute. *See also* Faizan Mustafá, *3 Judgments, 3 Takeaways*, INDIAN EXPRESS (Aug. 23, 2017, 12:52 AM), <http://indianexpress.com/article/explained/3-judgments-3-takeaways-triple-talaq-4809039/>; Faizan Mustafá, *No Instant Solution Yet*, TRIBUNE (August 31, 2017, 2:22 IST), <http://www.tribuneindia.com/news/comment/no-instant-solution-yet/459700.html>.

201. *Shayra Bano*, 2017 SCALE at 297.

