

THE CONSTITUTIONAL STRUGGLE FOR RELIGIOUS FREEDOM: A COMPARATIVE STUDY OF INDIA AND INDONESIA

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Abstract

Constitutions tend to regulate the relationship between religious and state authorities. Before the rise of the modern state, it was difficult to make proper distinctions between law, religion and morality. With the emergence of Western liberalism, the concept of democracy and secularism gained newfound attention, becoming ingrained and in tune with modern constitutional frameworks. Establishing the relationship between state and religion is a thorny issue for constitution-makers. Opponents of constitutional recognition of religion view religion as a private matter, relating to personal beliefs and conscience. This paper studies the comparative constitutional frameworks of India and Indonesia in relation to the right to religious freedom. As vibrant democracies comprised of ethnically diverse populations, both India and Indonesia grapple with issues concerning religious majorities and minorities. In India, Hindus are the majority, then Muslims, Christians, Sikhs and Buddhists; whereas in Indonesia, Muslims are the majority, then Christians, Hindus and Buddhists. Both India and Indonesia have ratified the International Covenant on Civil and Political Rights. The judgments of the constitutional courts in these countries have prompted constitutional law scholars to analyze the status of constitutionally recognized

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freedom of religion and its enforceability. This article first studies the relationship between state and religion in the contemporary sphere, thereby engaging in a comparative study of the formation of constitutional provisions in relation to religious freedom in India and Indonesia. Second, it aims to establish the importance of religious freedom within a constitutional framework. Third, it will discuss the issues surrounding recognition and enforcement of religious freedom in India and Indonesia, as well as providing an analysis from the perspective of majoritarianism and religious intolerance. Fourth, it will analyze landmark judgments of the constitutional courts of India and Indonesia in formulating and establishing the basic tenets of religious freedoms in the two nations. The role of the judiciary and governmental institutions in dealing with issues of religious freedom remains a central question in democratic countries such as India and Indonesia. Keeping in mind the need for a more holistic study and contributing to the literature in this area, the authors will present a comparative analysis of religious freedom in both these nations for nuanced understanding of religious rights and their interplay with the respective constitutions.

Keywords: Blasphemy, Essential Practice, Judiciary, Religion, Religious Rights.

I. INTRODUCTION

The relationship between religion and politics remains highly debated in the field of political philosophy as well as in contemporary constitution processes.¹ During the Middle Ages, specifically in Europe, religion was perceived as the ultimate power source, determining the legitimacy of religion and state; gradually, during the reformation and enlightenment era, the influence of religion declined. Today, democracy and rule of law are the fundamental pillars of a constitutional state.²

Respect for another person's beliefs is "one of the hallmarks of a civilized society".³ Religious liberty is commensurate as a triumph of liberal democracies.⁴ Regarded as the "ultimate freedom" and the "cornerstone of all human rights", religious freedom is deeply rooted in human dignity and enjoys a special status

¹ Aernout Nieuwenhuis, "State and Religion, a Multidimensional Relationship: Some Comparative Law Remarks," *International Journal of Constitutional Law* 10, no. 1 (2012): 153–174.

² Constantin Fasolt, "Separation of Church and State: The Past and Future of Sacred and Profane" (Fourth National Conference of the Historical Society, 2004).

³ *R v. Secretary of State for Education and Employment*, ex p Williamson (2005) UKHL 15 [15].

⁴ *Refah Partisi [the Welfare Party] v. Turkey* (2003) 37 EHRR 1, [90].

in the maintenance of social stability.⁵ Religious freedom and religious tolerance are equally important and have been center stage in the secularized modern state.⁶ With the secularization of the state and a revived interest in discourse surrounding religion toward the end of twentieth century, if we attempt to analyze the meaning of religion or importance of religious freedom in constitutional theory, then its foundational basis has to be seen from the prism of the right to equality.⁷

Religion, considered integral to existence in India and Indonesia, is often perceived as a mode of self-identification and establishing faith and belief in a value system, enforced through constitutional recognition.⁸ However, with the homogeneity of society and especially in a post-colonial world, the right to religion has emerged as a primary right, denial of which, historically as well as in the contemporary world, has caused major crises, often leading to human rights violations and subsequently used as justification for state actions.⁹

The discourse surrounding religious freedom is not relatively new; rather, it was a gradual process of incorporating and recognizing such a right within the domestic framework. In the light of the complex development of the state and its entities, today, the ongoing crisis over the right to religious freedom cannot be ignored. Unique cultural and political settings, as well as the complex inter-relationship between religion, state and society, have posed much greater challenges to the maintenance of the sanctity of religious freedom in a constitutional state. These crises often emerge in constitutional democratic states by way of exceptions created in the name of other rights with respect to the exercise of religious freedom. After all, religion is here to stay, it is

⁵ James Wood Jr., "Religious Human Rights and a Democratic State," *Journal of Church and State* 46, no. 4 (2004): 739-764. Also see, Rex Ahdar and Ian Leigh, *Religious Freedom in the Liberal State* Second edition (Oxford: Oxford University Press, 2013).

⁶ Jürgen Habermas, "Religion in the Public Sphere," *European Journal of Philosophy* 14, no.1 (2016): 15.

⁷ See, Yashomati Ghosh and Anirban Chakraborty, "Secularism, Multiculturalism and Legal Pluralism: A Comparative Analysis between the Indian and Western Constitutional Philosophy," *Asian Journal of Legal Education* 7, no.1 (2019): 73-81.

⁸ See generally, Mariam Rawan Abdulla, "Culture, Religion, and Freedom of Religion or Belief," *The Review of Faith & International Affairs* 16, no.4 (2018): 102-115.

⁹ Arcot Krishnaswami, "Study of Discrimination in the Matter of Religious Rights and Practices," (Special Rapporteur of the Sub-Commission on Prevention of Discrimination and Protection of Minorities, 1960).

not withering away in a secularized world, as advocated in the past.¹⁰ Being a global phenomenon, secularization raises important questions about the role of government in connection with individuals and religious organizations having religious affiliations.¹¹ In this light, constitutions are made to regulate and affirm the relationship between state and religious authorities. This relationship differs from one nation to another and different approaches appear in their constitutions.¹² In pluralistic societies, there is much debate over whether religion should be a private or public matter, whether state agencies should handle religion or whether a country should eschew having a state religion.¹³ It is therefore pertinent to dissect the dichotomy of the two and understand their interplay.

Asia's distinct post-colonial political, social, cultural and economic establishment requires analysis to bring about a holistic understanding of the relationship between state and religion.¹⁴ Unlike the Western experience of religious pluralism, where the relationship between state and religion was often simply based on diverse Christian creeds, the Asian experience poses a much larger question in the light of distinct religious creeds, with the pressing need to have their interests recognized and voices heard.¹⁵ Both India and Indonesia have seen various instances where the interpretation of religious freedom, being an indispensable constitutional feature, has been brought to question, which drives the inquiry of this article. Obviously, diverse religious organizations and their proponents and believers have their own demands, which raises important questions regarding religious freedom, such as: What encompasses religious freedom? Is religious freedom absolute? How should the state relationship with

¹⁰ W. Cole Durham Jr., "Religious Freedom in a Worldwide Setting: Comparative Reflections, Universal Rights in a World of Diversity," *The Case of Religious Freedom Pontifical Academy of Social Sciences* 17, (2012).

¹¹ Nieuwenhuis, "State and Religion," 153–174.

¹² Dawood Ahmed, *Religion–State Relations* (Sweden: *International IDEA Constitution-Building Primer*, 2017). Available at <https://www.idea.int/sites/default/files/publications/religion-state-relations-primer.pdf>.

¹³ Veit Bader, "Religious Pluralism: Secularism or Priority for Democracy?" *Political Theory* 27 no. 5 (1999): 597-633.

¹⁴ J. Neo, A. Jamal, and D. Goh, *Regulating Religion in Asia: Norms, Modes, and Challenges* (Cambridge: Cambridge University Press 2019). "...in terms of demography, the Asia-Pacific region has the most religiously diverse profile in the world. The Index is based on the "percentage of each country's population that belongs to eight major religious groups, as of 2010", i.e. Buddhism, Christianity, Hinduism, Islam, Judaism, folk or traditional religions, adherents of other religions, as well as the religiously unaffiliated (including atheists and agnostics).

¹⁵ See, Veronica Louise B. Jereza, "Many Identities, Many Communities: Religious Freedom amidst Religious Diversity in Southeast Asia," *The Review of Faith & International Affairs* 14 no. 4 (2016): 89-97.

religion be governed? What protection does a constitution accord to religion and by what means? Should religious freedom be allowed to be curtailed by other prominent rights? In a pluralistic society, how can the needs of majority and minority stakeholders be balanced with respect to religious freedom? Does the essentiality of religious practice only need to be accorded protection within a constitutional framework? How can equality in treatment be maintained with respect to diverse religious institutions? What role and limitations can be attributed within a constitutional framework to state and its entities when it comes to religious freedom?

In this light, let us analyze the constitutional status of religious freedom in India and Indonesia, thereby seeking to delve into the contemporary issues relating to the relationship between state and religion, which remains a central question in the light of affirmation of constitutional values and ethos. First, while the relationship between state, religion and politics is often discussed, the issue remains fundamental in analyzing and understanding the constitutional status of religious freedom in a state. Second, with religious freedom being internationally recognized as a fundamental human right, the state's obligation to it cannot be neglected. Third, the constitutional recognition of religious freedom in a state can take various forms depending upon historical circumstances, while socio-economic, political and cultural factors can duly affect such recognition and implementation. Fourth, analyzing the constitutional provisions relating to religious freedom in India and Indonesia, looking into the originalist understanding and the subsequent developments has highlighted the role of governmental institutions and landmark judgments by constitutional courts in both these nations.

II. RELIGION, STATE, AND POLITICS: AN OVERVIEW

“In a free government, the security for civil rights must be the same as that for religious rights. It consists in the one case of the multiplicity of interests, and in the other in the multiplicity of sects. The degree of security in both cases will depend on the number of interests and sects.”¹⁶

¹⁶ See, Hamilton *et al.* *The Federalist Papers* (New York: Penguin Publications, 1961).

One of the essential features of democracy is separation of religion and state.¹⁷ The relationship between state and religion is a complex one. Durkheim argued that religion provides a social cohesion, as it is a source of solidarity in a society.¹⁸ Initially, John Locke believed religious tolerance would inevitably lead to conflict and disorder in a society with diverse religious beliefs; however, later he argued that suppression of religious practices provokes disruptive behavior, and maintained that religion and the state have distinct ends.¹⁹ John Rawls saw religion as illiberal and having a destabilizing potential, thereby he advocated for excluding religion from politics.²⁰

Plato and Aristotle saw the state as a vehicle for human fulfilment. Augustine, on the other hand, believed that political instability is closely related to the development of theological and philosophical reasons. He used this reasoning to analyze the relationship between the individual and society.²¹ Traditionally, religion and state were interdependent. Religious institutions used to accord validity and legality to the laws passed by the government, thereby establishing the supremacy of those governing the state. In turn, the state should financially assist these religious institutions. Gradually, with the need to limit the power of the state amid the rising prominence of the individual's right to conscience, there arose a need to establish separation between religion and state, considering religion a matter of the private realm.²²

In the post-Cold War era, religion has emerged as a significant political actor. Ignoring religion can have a negative political impact, nationally as well as globally.²³ The change in the dynamics of society due to industrialization, globalization and modernization, brought about a need for secularization,

¹⁷ Michael D.P. Driessen, "Religion, State and Democracy: Analysing Two Dimensions of Church-State Arrangement," *Politics and Religion* 3, no. 1 (2010). Also see, L Carl Brown, "Religion and State," *The Muslim Approach to Politics* (Columbia: Columbia University Press, 2000).

¹⁸ Wilson Dallam Wallis, "Durkheim's View of Religion," *Journal of Religious Psychology, including its Anthropological and Sociological Aspects* 7, no.2 (1914): 252-267.

¹⁹ See, Phillip Abrams, *John Locke: The Two Tracts on Government* (Cambridge: Cambridge University Press, 1967), 16-17.

²⁰ Tom Bailey and Valentina Gentile (eds.), *Rawls and Religion* (Columbia: Columbia University Press, 2014).

²¹ See, Raymond Plant, *Politics, Theology and History* (Cambridge: Cambridge University Press, 2001). Also see, John M. Rist, *Augustine: Ancient Thought Baptised* (Cambridge: Cambridge University Press, 1994), 205.

²² Michael Walzer, "Liberalism and the Art of Separation," *Political Theory* 12, no.3 (1984), 315-330.

²³ Eric O. Hanson, *Religion and Politics in the International System Today* (Cambridge: Cambridge University Press, 2006).

based on considerations of structural and social differentiation, individualism, socialization, social and cultural diversity, privatization, and the rise of liberal democracies and rationality.²⁴ Secularization changed the political structure of the state. In a pre-modern society, the individual was placed on the social ladder depending upon his or her religious affiliation, whereas in the modernized world, the individual's religious belief is a private matter, thereby creating a constitutional structure wherein individual liberties cannot be denied solely on the ground of one's religious belief.²⁵ However, in reality, secularism remains contentious, depending upon the cultural, social and economic conditions prevailing in a state. The only one thing which remains common is respect toward human rights, accepting that each individual has the right to maintain their own religious belief, faith and worship. Secularization has in no way marginalized religion; rather, it has brought to the forefront complex questions regarding the functionality of religious institutions and their relevance to politics.²⁶

2.1 Private-Public Discourse

“Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief, and freedom, either alone or in community with others and in public or private, to manifest his religion or belief in teaching, practice, worship and observance.”²⁷

According to Bader, the institutional separation of the state should be based on three guiding principles: a libertarian principle (the state must permit the practice of any religion), an equalitarian principle (the state must not give preference to one religion over another), and a neutrality principle (states should not favor or disfavor religion).²⁸ Paul Weithman believes religion has the capacity to destabilize democracy because religious segregation makes social cooperation

²⁴ Steve Bruce, “Secularisation and Politics,” in *Routledge Handbook of Religion and Politics*, Jeffrey Haynes (ed.), (London: Routledge 2009).

²⁵ Mark Chaves, “Secularization as Declining Religious Authority,” *Social Forces* 72, no.3 (1994), 749-774. Secularization has to be understood not as reducing religion, but as reducing the scope of religious authority.

²⁶ George Moyser (ed.), *Politics and Religion in the Modern World* (London: Routledge, 1991).

²⁷ Universal Declaration of Human Rights/Article 18, available at <https://www.un.org/en/about-us/universal-declaration-of-human-rights> (accessed on 28.08.2021).

²⁸ Vieit Bader, “Religious Pluralism: Secularism or Priority for Democracy?” *Political Theory* 27, no.5 (1999): 597-633.

more difficult.²⁹ Even Bruce Ackerman advocates for the separation of religion and state, arguing for religious convictions to be private, thereby suggesting that religion should not have an appropriate place in the public realm.³⁰

Hollenbach on other hand, conceives the private realm as being outside the purview of society and the public realm as consistent with society, and accordingly he believes that privatization of religion would hinder the exercising of religious freedom as a means of social freedom and that freedom of religion includes within itself right to seek to influence the policies and laws under which people are governed.³¹ In this light, religion cannot be denied as being part of society and in turn influencing society; thus, privatizing religion would undermine the vibrancy of civil society, in turn affecting democracy.³²

Now, the questions regarding the limitations on manifestations of religion or beliefs only arise in cases where religion is manifested in the public sphere, like carrying out street processions or the use of loudspeakers for religious purposes. In such cases, it comes in contrast or conflict with other aspects of societal harmony and other people's ways of living. It must be noted here that denial or restraint of freedom of religion, thought, belief or conscience can also stem from deeper social factors rather than governmental actions, which we shall inquire into in subsequent sections, as there are illustrations of social ostracism and other social pressures hampering the recognition and enforcement of freedom of religion.³³

III. UNDERSTANDING RELIGIOUS FREEDOM: A CONSTITUTIONAL PERSPECTIVE

“When we speak of religious liberty, specifically, we mean freedom of worship according to conscience and to bring up children in the faith of their parents; freedom for the individual to change his religion; freedom to

²⁹ Paul J. Weithman, *Religion and the Obligations of Citizenship* (New York: Cambridge University Press, 2002).

³⁰ Bruce Ackerman, *Social Justice in the Liberal State* (California: Yale University Press 1980).

³¹ David Hollenbach, *The Global Face of Public Faith* (Washington, DC: Georgetown University Press, 2003), 259. See also, Hollenbach, “Public Reason/Private Religion? A Response to Paul J. Weithman,” *The Journal of Religious Ethics* 22, no. 1 (1994): 39–46.

³² Barbara Ann Rieffer, “Religion, Politics and Human Rights: Understanding the Role of Christianity in the Promotion of Human Rights,” *Human Rights and Human Welfare* 6 (2006): 31-42.

³³ Krishnaswami, “Study of Discrimination,” 11-12.

preach, educate, publish, and carry-on missionary activities; and freedom to organize with others, and to acquire and hold property for these purposes.”³⁴

The original understanding established by Protestantism and then furthered by enlightenment liberalism, was to protect mutual tolerance of Christians in their distinct profession of religion.³⁵ This original approach was based on the fundamental duty man owed to God. To this end, religious freedom was a political freedom to achieve a stated objective. With the advent of globalization, this original paradigm has been subjected to change, leading to the need to expand the scope of religious freedom as originally understood, to include even non-religious believers and creeds.³⁶ This expansion was gradually encompassed by the Universal Declaration of Human Rights (UDHR), International Covenant on Civil and Political Rights (ICCPR), and Declaration on the Elimination of All Forms of Intolerance and of Discrimination based on Religion or Belief, 1981.³⁷ In view of this expansion, the foundation of religious freedom has been correlated with the inherent dignity of an individual, rather than being connected with the existence of God, as was the case originally.³⁸

Now, here the question which arises is, why and how did religious freedom get accorded constitutional recognition and protection within the array of other freedoms? According to Steven D. Smith, there is a religious justification behind this. He presents two claims to elaborate this point: the priority claim and the voluntariness claim. The priority claim asserts that religious goods are more valuable than other goods and that religious duties take precedence over other duties. The voluntariness claim asserts that religious goods or duties involves

³⁴ The original citation is attributed to G. Bromley Oxnam, “Liberty: Roman or Protestant,” *Churchman* (1947), cited in Anthony Gill, *The Political Origins of Religious Liberty* (Cambridge University Press, 2008), 28.

³⁵ John Locke, “A Letter Concerning Toleration,” in *Selected Political Writings of John Locke* (2005), 126.

³⁶ See, Rafael Domingo, “A Right to Religious and Moral Freedom?,” *I•CON* 12, no.1 (2014): 226–247.

³⁷ “Universal Declaration of Human Rights,” G.A. res. 217A (III), UN Doc A/810 at 71 (1948); “International Covenant on Civil and Political Rights,” G.A. res. 2200A (XXI), 21U.N. GAOR Supp. (No. 16) at 52, “UN Doc. A/6316,” (1966), UNTS Vol. 999, 171, entered into force Mar. 23, 197. Also see, “Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief, G.A. res. 36/55, 36 UN GAOR Supp., (No. 51) at 171, “UN Doc. A/36/684,” (1981).

³⁸ “A Letter Concerning Toleration” in *The Selected Political Writings of John Locke*, Paul E. Sigmund (New York: W.W. Norton & Company, 2005), 126.

freedom of choice.³⁹ Accordingly, it is these claims that support constitutional recognition and justify constitutional enforcement of religious freedom.⁴⁰

Thomas Jefferson stated “*the constitutional freedom of religion is the most inalienable and sacred of all human rights.*”⁴¹ In “Why Tolerate Religion?” Brian Leiter argues that religion as such does not warrant any special treatment and that when it comes to accommodating practices, it will not be practicable to accommodate all claims based on conscience and that it will be unfair, arbitrary and unreasonable to single out claims grounded in religious beliefs.⁴²

IV. RIGHT TO RELIGIOUS FREEDOM: CONSTITUTIONAL FRAMEWORKS OF INDIA AND INDONESIA

Friction between religion-state relationships has dominated contemporary discourse surrounding constitution-making process around the world. With the advent of secularization, religion remained pivotal in shaping a concrete liberal democratic framework in its own form in different jurisdictions. Even though the prominence of religion in a modernized state has been deduced as a private matter, it still poses some important constitutional questions. The issue surrounding religious freedom, the mode and extent of imposing restrictions and limitations, remain central to the constitutionally guaranteed protection of religious freedom.

India and Indonesia have had a checkered history of colonialism. Upon independence, these nations undertook the task of formulating a constitution for themselves. Being culturally, socially and religiously diverse, they conducted the constitution-making process by trying to avoid a repetition of history and instead sought to establish a robust national structure. With the aspiration of maintenance of unity at the core, constitutional recognition of religious freedom

³⁹ Steven D. Smith, “The Rise and Fall of Religious Freedom in Constitutional Discourse,” *University of Pennsylvania Law Review* 140 (1991): 149-210.

⁴⁰ *Ibid.*

⁴¹ “Minutes of University of Virginia Board of Visitors, 29 March 1819,” *Founders Online*, National Archives. See, “Thomas Jefferson: Virginia Board of Visitors Minutes,” (1819). Also see, Philip B. Kurland, “The Origins of the Religion Clauses of the Constitution,” *William and Mary Law Review* 27, (1986): 839.

⁴² Brian Leiter, “Why Tolerate Religion?” (Princeton, New Jersey: Princeton University Press, 2012). Also see, Michael W. McConnell, “Why Protect Religious Freedom?” *The Yale Law Journal* 123, no.3 (2013): 530-861.

as an integral aspect of fundamental human rights remained an important task to be undertaken as a part of constitutional design.

India proclaimed itself constitutionally to be a secular state, whereas the Constitution of Indonesia is based on the belief of “the one and only God”. India has a majority Hindu population with the presence of other religions like Islam, Christianity, Sikhism, Jainism, Buddhism and with secularism as the basic structure. The Constitution of India therefore guarantees every individual religious freedom subject to constitutionally imposed restrictions. Indonesia, on other hand, has a majority Muslim population with the presence of other religions. The Constitution of Indonesia refers to the term “religion” in various provisions but nowhere proclaims Islam as the state religion. In accordance with laws of Indonesia, there are six officially recognized religions; however, there are indigenous minority groups which fall outside the purview of the six officially recognized religions. Although there is freedom to choose and practice one’s own religion, in accordance with the Constitution of Indonesia, the official recognition of selected religions restricts the implementation and recognition of religious freedom.

4.1 Right to Religious Freedom in India

Religion, as claimed, has long been an indispensable part of society.⁴³ It is no exaggeration to say that religion has played a central role in the existence of humanity. Today, in liberal democracies, religious liberty has assumed a great significance, often referred to as third most important civil liberty after right to life and freedom of speech and expression.⁴⁴ Constitutions too, across the globe have recognized the inseparable interplay of religion and the individual. It is interesting to note that while the word ‘God’ finds a place in a significant number of constitutions in the world, freedom of religion forms an essential

⁴³ Scott Arran, *In God We Trust: The Evolutionary landscape of Religion* (Oxford: Oxford University Press, 2005).

⁴⁴ Faizan Mustafa and Jagteshwar Singh Sohi, “Freedom of Religion in India: Current Issues and Supreme Court Acting as Clergy,” *Bringham Young University Law Review* 9 (2017); Also see, Wood Jr., “Religious Human Rights and a Democratic State,” 739-764.

facet of most constitutions.⁴⁵ Religious freedom in modern constitutions is, therefore, a ubiquitous concept.⁴⁶ Constitution-making is always faced with the perennial question of religion's intersection with law, quintessentially because globally, a state's "identity" is reflected through its constitution.⁴⁷ The challenge with it is not limited to accommodating religious freedom as a right but also to reconciling the fabrics of individual and group rights with religious practices.⁴⁸ The elusive concept also raises a multitude of questions on whether religion can be quantified or defined and what would be the scope of such freedom, etc.⁴⁹ This becomes extremely difficult in countries with complex social and religious structures, such as India.

India, with its fair share of major religious tensions, has been considered a land of 'religious harmony' and culture. Many of the major religions are said to have originated from there. It is therefore impossible to appreciate the way religious freedom is engineered in India's Constitution unless it is contextualized with the historic task of its framers. With its multiple religions, India has some inherent individual practices which contribute to bewildering diversity.⁵⁰ Perhaps, Sir Harcourt Butler's comment that, "The Indians are essentially religious as Europeans are essentially secular. Religion is still the alpha, and the omega of Indian life," would be the best representation of the impact of religion in India.⁵¹ With tremendous religious influence on the everyday lives of people, it is quite remarkable how India has managed to constitutionally guarantee religious rights and establish a secular state, a task which involved a perpetual debate on values,

⁴⁵ A comparative study reveals that the word "god" appears in 109 out of 192 constitutions documented on the Constitute Project. Version of the term "freedom of religion" appears in 186 constitutions. See: "Constitute, the World Constitutions to Read, Search, and Compare," available at <https://www.constituteproject.org/>."

⁴⁶ Asli Bali and Hanna Lerner, "Religion and Constitution Making in Comparative Perspective," in *Handbook on Comparative Constitution Making*, David Landau and Hanna Lerner (eds.), (Cheltenham: Edward Elgar, 2019).

⁴⁷ Tom Ginsburg and Rosalind Dixon, *Research Handbook on Comparative Constitutional Law* (Cheltenham: Edward Elgar Publishing, 2011), 141; Garry Jeffery Jacobson, "Constitutional Identity," *The Review of Politics* 68, no. 3 (2006).

⁴⁸ Rajeev Dhavan, "Religious Freedom in India," *American Journal of Comparative Law* 35, no.1 (1987): 209-254.

⁴⁹ Coleman D. Williams, *Freedom of Religion and the Indian Supreme Court: The Religious Denomination and Essential Practices Tests* (Thesis, University of Hawai'i at Manoa, 2019).

⁵⁰ Ibid.

⁵¹ Rajendra K. Sharma, *Indian Society, Institutions and Change* (New Delhi: Atlantic Publishers and Distributors, 2004): 186.

culture, religion and practices in the Constituent Assembly while drafting the constitution.⁵²

India does not only guarantee fundamental rights to individuals against the state under its Constitution but also guarantees certain 'group rights' to practice religion, in addition to minority rights.⁵³ With these two sets of rights, it also gives the state the power to regulate these rights. The Constitution of India provides to every person freedom to practice, profess, and propagate religion⁵⁴ and to establish and manage their religious affairs.⁵⁵ Like every fundamental right, these are also not absolute, and the state can intervene in the religious freedom if it affects public order, morality and health, in addition to a general restriction under the Indian Constitution's Part III on Fundamental Rights. The nature of religious freedom is such that many have written that these articles (25 and 26) very well constitute a code in itself.⁵⁶ These rights therefore are the embodiment of not only the deliberations which took place in the Constituent Assembly but also reflect the inspiration from various constitutions around the world and the Universal Declaration of Human Rights.⁵⁷

4.1.1 Secularism in India

The essence of religious freedom is rooted in the idea of individual liberty and 'secular' identity. However, all of these are subject to the basic principles of dignity, equality and liberty of the individual, indispensable values of the Indian Constitution.⁵⁸ Religious freedom therefore is that the individual is free to choose and practice, profess and propagate a religion or reject it altogether.⁵⁹ Religious freedom in India is a value inherent from time immemorial.⁶⁰ It is testament to

⁵² Constitution of India, Article 25-28.

⁵³ Constitution of India, Part III.

⁵⁴ Constitution of India, Article 25.

⁵⁵ Constitution of India, Article 26.

⁵⁶ R. Dhavan and F.S. Nariman, "The Supreme Court and Group Life," in *Supreme but Not Infallible: Essays in Honour of the Supreme Court of India*, B.N Kripal et al. (eds) (New Delhi: Oxford University Press 2000), 256–87; M Galanter, "Hinduism, Secularism, and the Indian Judiciary," *Philosophy East and West* 1, no.4 (1971): 467.

⁵⁷ J. Patrocínio de Souza, "The Freedom of Religion Under the Indian Constitution," *The Indian Journal of Political Science* 13, no. 3/4 (1952).

⁵⁸ Indian Young Lawyers Association v State of Kerala 2018 SCC Online SC 1690 [231] (Chandrachud, J).

⁵⁹ Donald Eugene Smith, *India as a Secular State* (Bombay: Oxford University Press, 1963); Also see John Milton, *Areopagitica* (Cheltenham: AMG Press, 1966), 1644.

⁶⁰ See, Aijaz Ahmad, *Lineages of The Present: Political Essays* (New Delhi: Tulika Publishers, 1996), 313.

its unique 'secular' attribute which differs from the Western conceptualization of secularism in many ways, such as retaining personal laws or maintaining religious institutions while ensuring a distance from intervening in religion.⁶¹ This idea of secular structure is guaranteed in form of constitutional right to religious freedom envisaged under Articles 25 and 26 of the Constitution.⁶²

Secularism in India in its own way has become one of the essential attributes of the Indian Constitution, having assumed constitutional identity, as the framers wanted, while basing the country on the idea of "inward association" with a "spiritual connection to higher power".⁶³ The word "secular" might have been added years later⁶⁴ to the Constitution, but its sentiment⁶⁴ was dominant while deliberations were undertaken in the Constituent Assembly.⁶⁵ It was the central character of the 'secular state' which led to defeat of a motion by H.V. Kamath, who moved an amendment to begin the Preamble with the phrase, "In the name of god".⁶⁶ Secularism in India is the separation of state from religion and not the 'non-existence of religion'. In simpler terms, it can be described as the absence of 'state-sponsored religion' but it is not departure from religion. On the other hand, to secure basic rights of equality and dignity, in certain circumstances the state can intervene to regulate. The Constituent Assembly did not want to indulge in intellectual exercise around religion or prevent the state from engaging with religious groups because the right was premised on religion being a "personal choice", as believed by Gandhi himself.⁶⁷

⁶¹ Asli U. Bali and Hanna Lerner, "Constitutional Design without a Constitutional Moment: Lessons from Religiously Divided Societies," *Cornell International Law Journal* 49, no.2 (2016): 49(2), 227–308; Gary Jeffrey Jacobson, *The Wheel of Law: India's Secularism in Comparative Constitutional Context* (New Jersey: Princeton University Press, 2003), 286; Also see, Rajeev Bhargava, "The Distinctiveness of Indian Secularism," in *The Future of Secularism*, ed. T.N. Srinivasan (Delhi: Oxford University Press, 2006), 2; Also see, Partha Chatterjee, "Secularism and Toleration," *Economic and Political Weekly* 29, no. 28 (1994), 772; Also see Donald Eugene Smith, "India as a Secular State," 159.

⁶² Ranbir Singh and Karamvir Singh, "Secularism in India: Challenges and Its Future," *the Indian Journal of Political Science* 69 (2008): 597-603.

⁶³ Ananya Mukherjee Reed, "Religious Freedom Versus Gender Equity in Contemporary India: What Constitutions Can and Cannot Do," *Atlantis* 25, no. 2 (2001): 42

⁶⁴ Constitution of India, Preamble, the Constitution (Forty-Second Amendment) Act, 1976.

⁶⁵ Adrija Roy Chowdhury, "Secularism: Why Nehru dropped, and Indira inserted the S-word in the Constitution," *The Indian Express* (2017).

⁶⁶ Shefali Jha, "Secularism in the Constituent Assembly Debates," *Economics & Political Weekly* 37, (2002): 3175.

⁶⁷ Charles Freer Andrews, *Mahatma Gandhi's ideas: including selections from his writings*, (London: Pierides Press, 1949).

Secularism is also affirmed as a constitutional principle which encompasses India's basic structure and it accounts for more than being a merely passive attitude towards religious tolerance. It is based on the concept of equal treatment of all religions and is described as neutrality towards religion.⁶⁸ Secularism, premised in the concept of equality, neutrality and liberty, enables an individual to make a personal choice and guarantees equal treatment of religion by state and its non-interference.⁶⁹ It is also important to note here that a greater degree of religious freedom does not only ensure manifestation of liberal constitutional values but also promotes social harmony, which if not granted may lead to imbalance in society and consequently result in violence.⁷⁰

It is also true that religion could be a threatening weapon to polarize and destabilize society. There have been numerous instances in India, not only pre-independence but also post-independence, when violence was sparked by cases of inter-religious disputes, one of which the Supreme Court settled in 2019.⁷¹ A complex country like India, with its plethora of religions and religious practices, coupled with a constitutional guarantee to maintain a secular fabric, has often faced multiple religious disputes going up to the Supreme Court to adjudicate. Since religion is a contested term and cannot be defined it always leaves a scope of interpretation with respect to its extent and this becomes pertinent when the state in a certain situation is allowed to regulate religious affairs. In this context, historically the role of the courts has been important but 'controversial' for their determination of the 'essentiality' of religion.

4.1.2 Essential Religious Practice and the Supreme Court

Constitutional scholar Gautam Bhatia argues that the religious rights guaranteed in the Indian Constitution are reconciliation between competing

⁶⁸ S R Bommai v. Union of India (1994) 3 SCC 1 [Reddy J.].

⁶⁹ Reed, "Religious Freedom versus Gender Equity," 42. See also, S.P. Sathe, *Secularism, Law and The Constitution of India* (Pune: Indian Secular Society, 1991).

⁷⁰ Amartya Sen, *Identity and Violence: The Illusion of Destiny* (New Delhi: W.W. Norton Company, 2006); Also see, Brian J. Grim and Roger Finke, *The Price of Freedom Denied: Religious Persecution and Conflict in The Twenty-First Century* (Cambridge: Cambridge University Press, 2011), 212-13; Also see, Patrick F. Fagan, "Why Religion Matters Even More: The Impact of Religious Practice on Social Stability," *Backgrounders* 1992, no. 1 (2006).

⁷¹ The controversial religious dispute of Ram Mandir-Babri Masjid in Ajudhya was decided in 2019; M Siddiqui v. Mahant Suresh Das.

claims of individuals and groups over their right to practice, profess and propagate religion.⁷² These claims and their extent are, however, not objectively defined and are blurred, thus making Supreme Court the central figure in determining religious claims and questions to manifest the scientific temper.⁷³ Over the years, the court has stepped in to decide such questions in many instances, which has developed a constitutional understanding of religious freedom, apparently different and narrower from what was envisaged in the Constitution.⁷⁴ Articles 25 and 26 provide for the constitutional right of religious freedom but the language is far from conviction. In this context, it is important to understand that while Article 25(1), in tune with liberal constitutional values, guarantees religious freedom, it is subjected to restrictions on the grounds of public order, morality, health, and restrictions under Part III. Moreover, Article 25(2) allows the state to intervene in managing religious affairs in order to ensure social welfare. Deliberating upon the scope of Article 25, Bhatia relies upon B.P. Rao and argues that Article 25 creates a difference between religion and secular practices that might be associated with religion.⁷⁵ Plainly read, it appears that Articles 25 and 26 protect a person's individual and group rights but in practice they fail to give a concrete answer on competing or conflicting rights in Part III.⁷⁶ They also clearly highlight two reoccurring questions before the courts: the first, on what constitutes essential practice for an individual to practice religion; and the second, on the extent of state intervention in temples, gurudwara, mosques, and other religious institutes. It is also clear from textual reading that the Constitution has left the question of determining the extent of intervention and the difference up to the courts completely.

To answer questions regarding whether religious practices are essential or non-essential, and therefore whether or not they merit constitutional protection,

⁷² See generally, Gautam Bhatia, "Freedom from Community: Individual Rights, Group Life, State Authority and Religious Freedom under the Indian Constitution," *Global Constitutionalism* 2, no.3 (2016): 351–382.

⁷³ *Gandhi v. State of Bombay*, 1954 SCR 1035, 1062 (India).

⁷⁴ Mustafa and Sohi, "Freedom of Religion in India," 931.

⁷⁵ Bhatia, "Freedom from Community," 356. See Also, B.P. Rao, "Matters of Religion," *Journal of the Indian Law Institute* 509, no. 5 (1963).

⁷⁶ Suvrith Parthasarathy, "Secularism and the Freedom of Religion Reconsidered – Old Wine in New Bottles?" *Indian Constitutional Law and Philosophy* (2015); Shrutanjaya Bhardwaj, "Individual Religious Freedom is Subject to Other Fundamental Rights," *SCC 7, Part-4 J-29* (2019).

the Indian Supreme Court devised a test of “essentiality” in the *Shirur Mutt* case.⁷⁷ In determining where a line must be drawn and what constitutes part of religion, the Court held that only essential practices to a religion shall be protected under Article 25. The Supreme Court did not adopt a definite standard for essentiality, but it can be reduced to three steps. First, the Court would differentiate between matters of religion and secular practice. Second, there should be a religious community for a practice to be considered essential. Third, even if a practice is considered essential it will not merit constitutional protection if it is based on ‘superstitious’ belief.⁷⁸ It is the third part of the test which has led to the criticism of the apex court.

On rejecting the American “assertion test” – whereby a plaintiff can assert that a particular practice is a religious practice – the seven-judge bench in *Shirur Mutt*, cultivated the Doctrine of Essential Religious Practice.⁷⁹ It is important to note here that in doing so, the Supreme Court not only moved beyond its scope of competence, but by entering into objective examination of religious practices, it also narrowed the scope of religious freedom guaranteed by the Constitution.⁸⁰ The essentiality test is moreover against the foundation of constitutionally-mandated religious freedom, which is premised on the “inward association to god”.⁸¹ It has also placed the matter of one’s religious determination in the hands of judges who rely on an ambiguous test, which is devoid of any ‘scientific evidence’, to decide the essentiality of religious practice.

A shift was seen in the case of *Dargah Committee*,⁸² when the Supreme Court started to determine if a practice was superstitious in nature. In this case, while hearing the validity of the Durgah Khwaja Saheb Act of 1955, the Supreme Court observed that when religious practices arise from superstitious belief, they

⁷⁷ Comm’r, Hindu Religious Endowments, Madras v. Sri Lakshmindra Thirtha Swamiar of Sri Shirur Mutt, 1954 SCR 1005, 1021.

⁷⁸ Rao, “Matters of Religion,” 509.

⁷⁹ Soumalya Ghosh, “Supreme Court on Women’s Right to Religious Freedom in India: From Shirur Mutt to Sabarimala,” *Indian Journal of Law and Justice* 10, no. 1 (2019): 162-168; Dhavan, “Religious Freedom in India,” 209-254.

⁸⁰ Faizan Mustafa, “The Unfreedom of Religion,” *The Indian Express* (2015).

⁸¹ Mustafa and Sohi, “Freedom of Religion in India,” 915.

⁸² *Durgah Committee, Ajmer v. Syed Hussain Ali*, (1962) 1 SCR 383 (India), 33.

cannot claim protection under Article 26 as they are not “essential” to religion. In *Tilkayat Shri Govindlalji Maharaj*,⁸³ the Court went on to categorically state that the power to determine the essentiality of a religion remains with the courts only, virtually elevating itself, as Prof. Faizan Mustafa and Prof. Jagteshwar Singh Sohi said, to the status of clergy. A similar trend was observed in *Mohd. Hanif Qureshi v. State of Bihar*.⁸⁴

The criticism of essential religious practice is premised in the Supreme Court allowing itself to sit on deciding theological questions on religious practices, imposing an external opinion on whether a practice is religious or not.⁸⁵ It is true that common law countries have imposed certain limitation on religious freedom, but the Indian courts have attracted criticism as they have curbed the individual freedom to choose religious practice, thus hurting liberal constitutional values. The Indian judiciary also failed to take into account that the competing rights under Articles 25 and 26 would be balanced by the text of the Constitution and Part III, whether or not explicitly provided for.⁸⁶

4.1.3 Anti-Exclusion Test

In the recent *Sabarimala* case,⁸⁷ the Indian Supreme Court in a 4-1 decision held that the exclusion of women of a specific age range from entering Sabarimala temple in Kerala state was not valid. In doing so, the Court struck down Rule 3b of Kerala Hindu Places of Public Worship (authorities of entry) Rules, 1965, stating that it was an “exclusionary practice”.⁸⁸

It is interesting to note that Justice D.Y. Chandrachud hinted of the need to abjure the ‘essential religious practice test’ as he observed that “the religious committees must be allowed to determine for themselves what constitutes essential aspect of religion, and such practice must enjoy protection as a matter of autonomy”. He advocated an ‘anti-exclusion test’ to manifest liberal

⁸³ *Tilkayat Shri Govindlalji Maharaj v. State of Rajasthan and Ors.*, AIR 1963 SC 1638 (India), 57.

⁸⁴ *Mohd. Hanif Qureshi v. State of Bihar*, AIR 1958 SC 731.

⁸⁵ Suhrith Parthasarathy, “An Equal Right to Freedom of Religion: A Reading of the Supreme Court’s Judgment in the Sabarimala Case,” *University of Oxford Human Rights Hub Journal* 3, no.2 (2020).

⁸⁶ H.M. Seervai, *Constitutional Law of India* (Universal Law Publishing, 1993), 1269.

⁸⁷ *Indian Young Lawyers Association v. The State of Kerala*, AIR 2018, SC.

⁸⁸ *Ibid.*

constitutional values and to minimize the Court's intervention in determining essential practice. He observed that "the anti-exclusion principle allows for due-deference to the ability of a religion to determine its own religious tenets and doctrines... [but if] "a religious practice causes the exclusion of individuals in a manner which impairs their dignity or hampers their access to basic goods, the freedom of religion must give way to the over-arching values of a liberal constitution".⁸⁹ In holding so, Justice Chandrachud also held that the religious freedom clauses under Articles 25 and 26 are not standalone but are part of "seamless web" of fundamental rights.

Deliberation of the anti-exclusion principle considers the extent of interference with the freedom to participate in normal economic and social life, and if it hampers such freedom, that practice cannot be permissible. However, the autonomy to decide a religious practice shall be with the people. This conclusion is reached by taking a cue from anti-discrimination laws, which state that an individual's access to basic guarantees cannot be taken away.⁹⁰ The Sabarimala was an example of exclusionary practice, as females of reproductive age had not been permitted to worship there. Similarly, women at Haji Ali Shrine petitioned Bombay High Court against an exclusionary practice. Based on such cases, it can be said the major religious disputes are in some way or other rooted in discrimination or exclusion rather than determining essentiality. It is, however, interesting to note that scholars have relied upon a dissenting opinion of former Supreme Court chief justice B.P. Sinha in *Syedna Tahir Saifuddin v. State of Bombay*,⁹¹ which dealt with excommunication in the Bombay Prevention of Excommunication Act, 1949. The Dawoodi Bohra community, through their head priest, argued that his constitutional right of religious freedom would be violated by taking away his power to excommunicate. The Court struck down the act, stating the power of excommunication to be 'essential religious practice'. Justice Sinha in his dissent voiced that the excommunication *per se* does not only take

⁸⁹ *Ibid.*, 112.

⁹⁰ Tarunabh Khaitan, *A Theory of Discrimination Law* (Oxford University Press, 2015).

⁹¹ *Syedna Tahir Saifuddin v. State of Bombay* 1962 SCR Supl. (2) 496.

away a person's religious right but also their civil right,⁹² and that Articles 25 and 26 are not standalone rights but are subject to the basic idea of constitution, as are Articles 17 and 15(2), which forms the premise for Bhatia's argument on the exclusion test. The anti-exclusion test, endorsed by Justice Chandrachud, manifests liberal constitutional principles by minimizing the court's role in religious determination. It can therefore be the test to determine the competing rights, after deciding on the extent of intervention on the fact in question.

This mechanism as argued will enable the courts to determine the balance between competing rights, respect religious autonomy and shall make way for striking down legislation if any 'practice' would be against human rights or discriminatory in nature. It will also ensure that the courts stick to their role of securing the religious rights of the individual, which in these troubled times has become a contentious issue both in and out of courts due to majoritarian tendencies, rather than inquiring into facets of the individual. It could also be a redemption of constitutional courts in India as champions of individual rights.

4.2 Right to Religious Freedom in Indonesia.

One of the most controversial human rights issues in Indonesia is that of religious freedom. Being a member of the United Nations, Indonesia, has an obligation to conform to the principles of international human rights. Also, efforts have been undertaken in the past to ensure effective recognition and implementation of human rights in the country.⁹³

The Preamble of the Constitution of Indonesia proclaims: "...the independence of Indonesia is formulated into a constitution of the Republic of Indonesia which is built into a sovereign state based on a belief in the One and Only God, just and civilized humanity, the unity of Indonesia, and democratic life led by wisdom of thoughts in deliberation amongst representatives of the people, and achieving social justice for all the people of Indonesia."⁹⁴ Chapter XI, Article

⁹² Bhatia, "Freedom from Community," 353.

⁹³ For Indonesia's ratification status, see, https://tbinternet.ohchr.org/_layouts/15/TreatyBodyExternal/Treaty.aspx?CountryID=80&Lang=EN. Last accessed on 30.08.2021.

⁹⁴ See, Constitution of Indonesia, 1945, reinstated in 1959, available at https://www.constituteproject.org/constitution/Indonesia_2002.pdf?lang=en. Last accessed on 28.08.2021.

29, of the Indonesian Constitution, echoing the sentiments provided in the Preamble, declares that the state is based upon the belief in the One and Only God. Further, it goes on to provide that everyone will be guaranteed freedom of worship according to religion or belief.⁹⁵ Article 9 provides for the swearing of an oath by the President and Vice-President in accordance with their respective religions.⁹⁶ Article 28 E provides for freedom to choose and practice religion and that every person has freedom of belief, and to express their thoughts and tenets, in accordance with their conscience.⁹⁷ Article 28 I recognizes religious freedom as a human right and accords protection under any circumstances.⁹⁸ However, it seems that Indonesia recognizes the monotheistic concept, although there is no specific mention or imposition of the meaning of the phrase “One and Only God”. Undoubtedly, the belief in a single deity is based on the premises of devotion and faith in accordance with a person’s own religious belief.⁹⁹ In addition to constitutional provisions, Article 22 (1) of Law No. 39/1999 on Human Rights states that “every person is free to choose their religion and worship in accordance with their religion and beliefs”. Article 22 (2) further provides that the state guarantees each person’s freedom to choose and practice religion and worship according to their religious beliefs.¹⁰⁰

4.2.1 Understanding Religion in Indonesia

In the wake of the central role played by Muslim organizations during the struggle for the independence of Indonesia, achieved in 1945, there were strong calls for Indonesia to become an Islamic state.¹⁰¹ However, the nationalists, which comprised homogenous representations, demanded a unitary and neutral state that separated state and religion.¹⁰² It was believed that establishment of a state

⁹⁵ Constitution of Indonesia, Chapter XI, Article 29.

⁹⁶ Constitution of Indonesia, Article 9.

⁹⁷ Constitution of Indonesia, Article 28E.

⁹⁸ Constitution of Indonesia, Article 28I.

⁹⁹ See, Alexius Andang L. Binawan, “Declarations and The Indonesian Constitution on Religious Freedom,” *Journal of Islamic Studies* 49, no.2 (2011).

¹⁰⁰ Law Number 39 of 1999 on Human Rights, available at <https://peraturan.go.id/common/dokumen/terjemah/2019/UU%2039%201999%20English.pdf>.

¹⁰¹ See, R. E. Elson, “Another Look at the Jakarta Charter Controversy of 1945,” *Indonesia* 88, no. 105 (2009).

¹⁰² For further discussion see, Dian A.H. Shah, “Constitutions, Religion and Politics in Asia, Indonesia, Malaysia and Sri Lanka” (Cambridge University Press 2017).

religion would intensify political disputes and complicate the integration of non-Muslims. On 1 June 1945, nationalist leader Soekarno introduced Pancasila as the philosophical basis of the state. Pancasila, the Indonesian state ideology, formulated by Soekarno, consists of five principles, which can be summed up as: belief in one God, internationalism or humanitarianism, nationalism, consensus through consultation and deliberation, and social justice for all.¹⁰³ These principles were formulated to represent the constitutional aspirations of the people of Indonesia. For Soekarno, achieving national unity was the ultimate goal, which necessitated rejection of specific reference to Islam in the Constitution.¹⁰⁴

There was a clarification issued by the Indonesian Ministry of Religious Affairs, specifying the criteria for recognizing “religion”: acknowledgment of a prophet, study of a canonical scripture or holy book, a standardized corpus of ritual practices and beliefs, knowledge and performance of which are incumbent on all believers, and a clear distinction of local custom from religion. Later, an additional criterion was included: the tradition in question must enjoy a significant measure of international recognition rather than being simply regional or local.¹⁰⁵ Indonesia has a predominantly Muslim population; however, based on the clarification issued by the Ministry of Religious Affairs, apart from Islam, official recognition has been given to five other religions: Hinduism, Protestantism, Catholicism, Buddhism, and Confucianism.¹⁰⁶ According to Indonesian law, other religions such as Judaism, Zoroastrianism, Shintoism, and Taoism are not prohibited to be practiced, although the six officially recognized religions are treated differently.¹⁰⁷ Other religions, apart from those officially recognized, need to register with the Ministry of Home Affairs as Civil Society Organizations, which are required by law to uphold all principles of Pancasila. All officially

¹⁰³ Michael Morfit, “Pancasila: The Indonesian State Ideology According to the New Order Government,” *Asian Survey* 21, no.8 (1981): 838-851.

¹⁰⁴ See, Nadirsyah Hosen, “Religion and the Indonesian Constitution: A Recent Debate,” *Journal of Southeast Asian Studies* 36, no.3 (2005): 419-40.

¹⁰⁵ Robert Hefner, “Islam and Institutional Religious Freedom in Indonesia,” *Religions* 415, no. 12 (2021).

¹⁰⁶ See, Indonesia 2020 International Religious Freedom Report, available at <https://www.state.gov/wp-content/uploads/2021/05/240282-INDONESIA-2020-INTERNATIONAL-RELIGIOUS-FREEDOM-REPORT.pdf>. Accessed on 30.08.2021.

¹⁰⁷ Alexius Andang L. Binawan, “Declarations and the Indonesian Constitution on Religious Freedom,” *Journal of Islamic Studies* 49, no. 2 (2011).

registered religious groups must comply with the directives of the Ministry of Religious Affairs.¹⁰⁸

Indonesian adult citizens are required to hold a National Identity Card (KTP), which identifies the religion of the holder. Members of non-recognized minority religious groups have difficulty in obtaining these identity cards denoting their actual religion, so they are forced to inadequately and incorrectly identify themselves with recognized religious groups.¹⁰⁹ Law No. 23 of 2006 on Population Administration, allowed people from other religions to leave their religion blank on their KTPs.¹¹⁰ In 2017, the Constitutional Court of Indonesia, in a landmark ruling, allowed citizens to put their indigenous faith on their national identity card.¹¹¹

According to Arskal Salim, there has been a misinterpretation of Presidential Decree No. 1/PNPS/1965 (later made into law by Law No. 5/1969) on the Prevention of Abuse and Disrespect of Religion, which listed six religions as official. Salim maintains the decree was never meant to imply that only those six religions were officially acknowledged, but they came to be regarded as the only official religions after a 1974 law made religion a prerequisite for validating marriage.¹¹² Of the six religions regarded as official, Confucianism was dropped from the list by President Soeharto because of its alleged relationship with communism. However, in 2001, President Abdurrahman Wahid allowed Confucianism to be a recognized religion.¹¹³

¹⁰⁸ Morfit, "Pancasila," 838-851.

¹⁰⁹ "The Tandem Project, United Nations, Human Rights & Freedom of Religion or Belief," UN NGO in Special Consultative Status with the Economic and Social Council of the United Nations, 2020.

¹¹⁰ Indonesia: Law No. 23 of 2006 on Population Administration, 29 December 2006. Also see, Hefner, "Islam and Institutional," 415.

¹¹¹ "Indonesia: Constitutional Court Opens Way to Recognition of Native Faiths," Library of Congress, published November 17, 2017. Also see, Judicial Review of Constitutional Court of Indonesia, Decision 97/PUU-XIV/2016 (The Constitutional Court of the Republic of Indonesia, 2016).

¹¹² Arskal Salim, "Muslim Politics in Indonesia's Democratization: The Religious Majority and the Rights of Minorities in the Post-New Order Era," in Ross H. McLeod and Andrew MacIntyre (eds.), *Indonesia: Democracy and the Promise of Good Governance* (Singapore: ISEAS, 2007), 116.

¹¹³ Bani Syarif Maula, "Religious Freedom in Indonesia, between Upholding Constitutional Provisions and Complying with Social Considerations," *Journal of Indonesian Islam* 7, no. 2 (2013): 383-403. Also see, Hyung-Jun Kim, "The Changing Interpretation of Religious Freedom in Indonesia," *Journal of Southeast Asian Studies* 29, no. 2 (1998): 357-373.

Indonesia falls in such a category of a Muslim-majority country which has not made any specific declaration in its constitution concerning an Islamic nature of state.¹¹⁴ Despite having constitutional and legal protection of the right to religious freedom, Indonesia has not seen full realization of religious freedom. According to one report, there have been instances of religious discrimination, which saw no active steps being taken by the government to punish or condemn such actions.¹¹⁵

The Constitutional Court of Indonesia has been called upon to decide on important issues in relation to the constitutional right to religion, such as considering the constitutionality of restricting polygamy and prohibiting courts from applying Islamic criminal and constitutional law.¹¹⁶ In both these cases, the Constitutional Court highlighted that Islamic law does not have independent recognition in Indonesia.¹¹⁷

The Court has also held that “irreconcilable difference” is constitutionally valid as a ground for divorce, even though Islamic law doesn’t provide for it.¹¹⁸ In another decision, the Court held that a biological father should have a legal relationship with a child born out of wedlock.¹¹⁹

4.2.2 Blasphemy Law and the Right to Religious Freedom

As discussed above, each of the six recognized religions in Indonesia has its own National Council, which lays down what is considered orthodox beliefs and practices. Any deviation from these set standards attracts Article 156 (a) of the Penal Code, which is complemented by Presidential Decree No. 1/PNPS/1965. The Blasphemy Law covers two types of acts: deviation and defamation, provided

¹¹⁴ For discussion on categories of countries having majority Muslim populations, see, Tad Stahnke and Robert C. Blitt, “The Religion-State Relationship and the Right to Freedom of Religion or Belief: A Comparative Textual Analysis of the Constitution of Predominantly Muslim Countries,” *Georgetown Journal of International Law* 36 (2005): 947-1078.

¹¹⁵ Also see, US Department of State, Bureau of Democracy, Human Rights and Labour, Annual Report on International Religious Freedom: Indonesia (2020), available at <https://www.state.gov/reports/2020-report-on-international-religious-freedom/>, last accessed on 31.08.2021.

¹¹⁶ Constitutional Court Decision 12/PUU-V/2007, decided October 3, 2007, 35 Constitutional Court Decision 19/PUU-VI/2008, decided August 12, 2008.

¹¹⁷ See, Simon Butt, “Constitutional Recognition of ‘Belief’ in Indonesia”, *Journal of Law and Religion* 35, no.3 (2020).

¹¹⁸ Constitutional Court Decision 38/PUU-IX/2011, decided March 12, 2012.

¹¹⁹ Constitutional Court Decision 46/PUU-VIII/2010, decided February 13, 2012.

under Articles 1 and 4 respectively. For these two acts, different mode of procedure have been provided. Article 1 states that before a person can be prosecuted for a blasphemous act, there needs to be an administrative warning under Article 2 (1). In addition, Article 2 (1) provides that the Minister of Religious Affairs, the Attorney General and the Minister of Home Affairs can issue a joint decree to warn a person who has violated Article 1 by promoting deviant teachings. If the violation is committed by a religious organization, the President has the power to ban the group on the recommendation of the aforementioned authorities. If there has been a warning or ban and the person or persons in the organization continues to act in breach of Article 1, then Article 3 provides that they can be prosecuted and, upon conviction, can be imprisoned for a maximum of five years.¹²⁰

Further, Article 4 states that a person shall be punished with imprisonment for five years if they intentionally publicly express feelings or commit an act that is hostile, abusive or blasphemous against a religion adhered to in Indonesia, or with the intention that people do not adhere to any religion, which is based on the belief in God Almighty.¹²¹ In 1966, this provision was incorporated as Article 156(a) of the Indonesian Criminal Code in Section V on Crimes Against Public Order, and unlike Article 1, no administrative warning is required under this provision.¹²²

Indonesia's Blasphemy Law has attracted global attention and scrutiny, and there have been demands in the recent past to repeal the law as it is seen as threat to religious minorities. In this light, Article 28J of the Indonesian Constitution states that in exercising their rights and freedoms, every person shall be subject to any restrictions established by law for the purpose of ensuring the recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, religious values, security, and public order in a democratic society.¹²³

¹²⁰ Melissa A. Crouch, "Law and Religion in Indonesia: The Constitutional Court and the Blasphemy Law," *Asian Journal of Comparative Law* 7 (2001): 3-5.

¹²¹ See, Zainal Abidin Bagir, "Defamation of Religion Law in Post-Reformasi Indonesia: Is Revision Possible?" *Australian Journal of Asian Law* 13, no. 2 (2013): 153-168.

¹²² See, Penal Code of Indonesia, Article 156 (a).

¹²³ Constitution of Indonesia, Article 28J.

The Government of Indonesia has maintained the right to define what constitutes religion in the country, so in practice the constitutional guarantee of freedom of religion has long been subjected to scrutiny and interpretations.¹²⁴ Following a history of repressive authoritarian rule, which ended in 1998, Indonesia ushered in a period of reform and democracy, which raised hopes of the promotion of religious freedom. However, conservative Islamist groups rose in power and used various modes of suppression against religious minorities.¹²⁵ This is where the Blasphemy Law came in handy.

One of the cases which highlights the complexities of the Blasphemy Law involves former Jakarta governor, Basuki “Ahok” Tjahaja Purnama, an ethnic Chinese Christian, who was initially charged with hate speech and was subsequently charged under the Blasphemy Law for desecrating religion¹²⁶ North Jakarta District Court reasoned that although one of the charges of blasphemy was dropped, Ahok had nevertheless “legitimately and convincingly conducted a criminal act of blasphemy”, felt no remorse for what he did and his action caused unrest, hurt Islam and divided Muslims and groups.¹²⁷

Indonesia’s Constitutional Court has upheld the validity of the Blasphemy Law on the grounds of “public order” and “religious values”, stating that non-regulation of blasphemous action can lead to “horizontal conflict, social unrest, social disunity and hostility within society”.¹²⁸ However, the Court did caution against the misinterpretation of the Blasphemy Law and emphasized the need to revisit the framing of its provisions. The Court in this decision also highlighted the limitation of human rights on the grounds of religious values, stating: “the

¹²⁴ Nikolas K. Gvosdev, “Constitutional Doublethink, Managed Pluralism and Freedom of Religion,” *Religion, State & Society* 29, no. 2: 81-90.

¹²⁵ Nur Amali Ibrahim, “The Law and Religious Intolerance in Indonesia,” Baker Institute Blog, 2019.

¹²⁶ Decision of North Jakarta District Court No. 1537/Pid.B/2016/PN. Jkt.Utr for Defendant Basuki Tjahaja Purnama alias Ahok. See, Amnesty International at <https://www.amnesty.org/en/latest/press-release/2017/05/indonesia-ahok-conviction-for-blasphemy-is-an-injustice/>. Also see, Osman, Mohamed Nawab Mohamed, and Prashant Waikar, “Fear and Loathing: Uncivil Islamism and Indonesia’s Anti-Ahok Movement”, *Indonesia* 106, (2018), 89-109.

¹²⁷ See, <https://globalfreedomofexpression.columbia.edu/cases/public-prosecutor-v-basuki-tjahaja-purnama-aka-ahok/>. Also see, “Islam, Blasphemy, and Human Rights in Indonesia: The Trial of Ahok” (Routledge 2020). Also see, Adam Tyson, “Blasphemy and Judicial Legitimacy in Indonesia, Religion and Politics Section of the American Political Science Association”, *Politics and Religion* 1 (2020): 24.

¹²⁸ See, Decision of the Constitutional Court No. 140/PUU-VII/2009. The validity of the Blasphemy Law has been subsequently upheld even in 2013. See, Decision of the Constitutional Court No. 84/PUU-X/2012, 116-117 and 142-143.

limitation of human rights on the grounds of 'religious values' as stipulated in Article 28J (2) of the 1945 Constitution is one of the considerations to limit implementation of human rights. This is different from Article 18 of the ICCPR, which does not include religious values as a limitation of individual freedom."¹²⁹

The Blasphemy Law and its subsequent implementation has raised several human rights concerns over recent years amid an increasing number of cases and restrictions of religious freedom. The blasphemy provisions have often faced a backlash as being against the constitutional aspirations of the framers, as well as in violation of Indonesia's international obligations.

V. CONCLUSION

This comparative study of Indonesia and India presents a tale of dwindling constitutional status accorded to religious freedom in both the countries. In light of the absence of any clear definition of the term "religion", religious freedom has been subjected to exacting judicial scrutiny by courts in India and Indonesia. The Indian Supreme Court has devised the "Essential Religious Practices Test" to determine the essentiality of religious practices as integral to a particular religion to attract constitutional protection, which in turn strengthens the constitutional recognition of religious freedom. In Indonesia, the Blasphemy Law and its exercise has been subject to judicial scrutiny and has also received huge flack for being in violation of human rights standards. Even though the Constitutional Court of Indonesia has upheld the validity of the Blasphemy Law on various instances, this law and its usage place a large question mark over the constitutional recognition of religious freedom.

The status of religious freedom, especially with respect to religious minorities, is highly questionable with various instances of suppression of religious freedom and violations having been noted officially. The dominance of a majority threatens the existence of religious freedom and maintenance of liberal democracy in a state. This duly calls for the establishment of a robust mechanism for balancing

¹²⁹ Decision of the Constitutional Court No. 140/PUU-VII/2009, 276. Also see, Crouch, "Law and Religion," 1-46.

the interests and needs of religious minorities. Indeed, the judiciary, though faced with opposition and challenges, and accused of corrupt practices, has played a central role in adjudicating important constitutional questions arising on the individual's right to religious freedom. India and Indonesia, even though having different constitutional designs, on various fronts share common experiences and values, also furthered by the vision of their respective founders to establish unity and respect for the human dignity of every individual. The challenges and extremities posed in the name of religious freedom can be well tackled by ensuring institutional strengthening of state machinery, and furthering and fostering the need to respect constitutional values and ethos by keeping in view international obligations, as well as mutual respect and tolerance for the maintenance of harmony and peace.

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