Judicial Concept of Religion in India: An Analysis of the Relationship Between Religion and Culture in Indian Supreme Court Jurisprudence

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Abstract: Scholars and judges have disagreed on an appropriate judicial definition of religion. Notably, scholarship has argued that definitions of religion are either underinclusive or over-inclusive. While this line of scholarship has achieved a significant amount of attention, scholars are yet to question whether the judicial concept of religion is different in free exercise and non-establishment clauses. Due to the polytheistic nature of Hinduism and the wealth of case law which has emerged from the Indian Supreme Court on this question, this paper seeks to answer the proposed question in an Indian Context. Notably, this paper will argue that Indian judges have a broad concept of religion in free-exercise cases. Specifically, this paper will draw on sociological literature to argue that the concept of religion in free exercise cases is broad enough to cover theistic, polytheistic, non-theistic, and lived religions. Furthermore, I will argue that this broad and inclusive concept of religion is narrowed by judges in cases which concern the separation of church and state to privilege the majority religion of the country. I will argue that judges narrow the concept of religion through a process called judicial inculturation. Judicial inculturation is the process by which judges hold that religious symbols or practices are cultural as opposed to religious due to their links to the majority religion of the country. In this way, judges narrow the concept of religion to exclude the country's majority religion, such that prohibitions and restrictions on government action by non-establishment clauses do not operate.
Keywords: Secularism; Freedom of Religion; Indian Constitution

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A. Introduction

The Judicial Concept of religion has proved to be contentious.[1] The difficulty of outlining the necessary and sufficient features of religion is rooted in methodological dogma which has frustrated the scholarly endeavour of defining religion in law and the humanities.[2] Judges across the world, have acknowledged this difficulty and expressed reservations about the possibility of coherently outlining a judicial concept of religion through case law. Justice Ramaswamy of the Indian Supreme Court, for instance, observed that '[for] different persons professing the same religious faith some of the facets of religion may have varying significance. It may not be possible, therefore, to devise a precise definition of universal application as to what is religion and what are matters of religious belief or religious practice.'[3]

While judicially defining a concept of religion has been difficult, the judicial concept of religion defines the scope of freedom of religion and the separation of church and state. For instance, scholars have noted that the judicial concept of religion can undermine the religious freedom of citizens by being underinclusive.[4] Underinclusive definitions of the concept of religion result in a series of religious citizens being ignored in freedom of religion cases. Accordingly, scholars have argued that underinclusive definitions of religion violate the rights of minorities who fall outside the rubric of the Abrahamic faith.[5]

A second way in which freedom of religion and the separation of church and state can be undermined is through overinclusive definitions.[6] As argued by Ronald Dworkin and Brian Leiter, overinclusive definitions undermine the universality of the legal system.[7] This criticism is specifically leveled against legal systems that allow for conscientious exemptions from general and neutral laws. In such legal systems, an overinclusive definition would undermine the universal applicability of law by providing several citizens with exemptions from generally applicable laws and correspondingly result in a reduction in the efficacy of the law. Additionally, overinclusive definitions of religion result in people

1 See generally, *Ronald Dworkin*, Religion Without God, Cambridge MA 2013; *Brian Leiter*, Why Tolerate Religion?, Princeton 2013; *Cecile Laborde*, Liberalism's Religion, Cambridge MA 2017.

2 *Cole Durham / Elizabeth Sewell,* Defining Religion, in: James A. Serritella et al. (eds.), Religious Organisations in the United States: A Study of Legal Identity Religious Freedom and the Law, Durham 2005, pp. 3-83.

3 A.S. Narayana Deekshitulu v State of AP, (1996) 9 SCC 548, 593-594.

4 *Peter Edge*, Law and Religion: An Introduction, Oxfordshire 2006, pp. 89-91.

5 *Alex Deagon*, Towards a Constitutional Definition of Religion, in: Brett Scharffs et al. (eds.); Freedom of Religion or Belief: Creating a Space for other Fundamental Rights and Freedoms, Cheltenham 2020, p. 92.

6 *Rex Adhar / Ian Leigh*, Religious Freedom in a Liberal Age, Oxford 2011.

7 *Dieter Grimm*, Conflicts Between General Laws and Religious Norms, in: Susanna Mancini / Michel Rosenfeld (eds.), Constitutional Secularism in an Age of Religious Revival, Oxford 2014.

committing fraud against the government by claiming to be religious and garnering the benefits of being religious without being religious.[8]

While scholarship has engaged with the impact of a judicial concept of religion extensively, a significant amount of research emerges from the context of the US Constitution.[9] Additionally, there is limited literature on how the judicial concept of religion in cases which implicate the separation of church and state impacts the content and nature of constitutional secularism.[10] Using the case study of India, this paper will attempt to partially address this gap in the literature. This paper will use the jurisprudence of the Indian Supreme Court to study the concept of religion to determine how the concept varies in the context of free exercise and cases which implicate the separation of chruch and state. In doing so, this paper will demonstrate that while Indian judges have a broad concept of religion in free exercise cases, judges narrow their concept of religion in cases which implicate the separation of Church and State. Accordingly, this paper will show that the narrower concept of religion in cases that separate church and state is used by judges to privilege the majority religion of the country by removing it from the regulatory ambit of the Indian Constitution's secularism principle.

Through this paper, I will draw on sociological literature on the relationship between religion and culture to argue that judges in India narrow the concept of religion in cases involving the separation of church and state to privilege the majority religion of the country by conflating the concept of religion and culture in a process I call judicial inculturation. In Part B, I will demonstrate that judges adopt a broad concept of religion in free exercise cases, which extends to recognising theistic, non-theistic, and atheistic belief systems and practices. In Part C, I will show that Indian judges narrow the concept of religion in non-establishment cases. To make this argument, this paper will first demonstrate that the text of the Indian *Constitution* institutes a principle that separates church and state in certain constitutionally specified areas of governance: education, cultural rights, and elections. Once this paper has clarified the scope and content of the Indian separation of church and state, I will demonstrate how judges narrow the concept of religion in non-establishment cases and further highlight the definitional strategies used by judges to judicially enculturate the Hindu faith.

On a methodological note, this paper will focus on India due to the pluralism of religion within the country. Specifically, religion in India is a source of great communal conflict, and a study of theology in India clearly illustrates the intersubjective nature of

8 *Edge*, note 4, p. 91.

9 See for instance, *Kent Greenawalt*, Religion and the Constitution, Volume 1: Free Exercise and Fairness Princeton 2006; *Kent Greenawalt*, Religion and the Constitution, Volume 2: Non-establishment and Fairness, Princeton 2006; *Dworkin*, note 1; *Leiter*, note 1; *Durham / Sewell*, note 2; *Cole Durham / Brett Scharffs*, Law and Religion, Aspen 2010.

10 *Laurence H. Tribe*, American Constitutional Law § 14-6, Eagan 1988, p. 1186; See contra, *Carl H. Esbeck*, The Establishment Clause as a Structural Restraint on Government Power, Iowa Law Review 84 (1998), pp. 1, 6-7.

religion.[11] For instance, cultural practices can be sacralised and assume religious meaning through community acceptance or legal classification.[12] Certain epics (the Mahabharata and the Ramayana) have achieved religious status in India through widespread community acceptance.[13] Conversely, religious practices can be enculturated through a community.[14] Inculturation is a strategy through which a community or an institution attaches cultural meaning to a religious symbol or practice.[15] Therefore, it is clear that in the context of the Indian Constitution, the concept of religion is particularly significant.

From this context, we can infer that the diversity of beliefs in India, particularly within Hinduism, has resulted in a rich body of case law that concerns the legal definition of religion in India.[16] Unlike in the European jurisdictions or the United States, India does not have a body of case law which focuses heavily on monotheistic, Abrahamic religions.[17] Instead, Indian case law deals with a polytheistic Hindu faith.[18] Due to the complexity noted by scholarship around judges dealing with non-Abrahamic religions, the jurisdiction is fertile ground to assess the impacts of the judicial concept of religion.[19]

B. Concept of Religion in Free Exercise Cases

Articles 25 and 26 collectively form the free exercise clauses of the Indian *Constitution*. Article 25 guarantees the right to profess, practise, and propagate religion and permits the state to regulate economic, financial, political, or other secular activity associated with religious practice and provide for 'social welfare and reform' of religious institutions.[20] Article 26 gives religious groups and organisations the autonomy to manage their own affairs. Article 25, which governs individual religious liberties, states that '[s]ubject to public order, morality, and health and the other provisions of this Part, all persons are equally entitled to freedom of conscience and the right freely to profess, practice and

11 *Tarun Khaitan* / *Jane Norton*, The Right to Freedom of Religion and the Right against Religious Discrimination: Theoretical Distinctions, International Journal of Constitutional Law 17 (2019), pp. 1126–1128.

12 *Winnifred F. Sullivan*, The Impossibility of Religious Freedom, Princeton 2005, p. 167.

13 The Ramayana and Mahabharat are both in the category of sham religions which emerge from fictional stories. For a detailed assessment of sham religions. See generally, *Tom Cheung*, Jedism as a Religious Order, Oxford Journal of Law and Religion 8 (2018), p. 377.

14 *Oliver Roy*, Holy Ignorance: When Religion and Culture Part Ways, Oxford 2010, p. 65.

15 Ibid.

16 *Ronojoy Sen*, Articles of Faith, Oxford 2010.

17 *Rehan Abeyratne*, Privileging the Powerful: Religion and Constitutional Law in India, Asian Journal of Comparative Law 13 (2018), p. 370.

18 Ibid.

19 Ibid.

20 *Sen,* note 16.

propagate religion.'[21] Article 26, which governs group religious rights, states that '[s]ubject to public order, morality and health, every religious denomination or any section thereof shall have the right- (a) to establish and maintain institutions for religious and charitable purposes; (b) to manage its own affairs in matters of religion…; (c) to own and acquire movable and immovable property; and (d) to administer such property in accordance with law.'[22] The Articles collectively protect free exercise of religion, in a manner which is similar to other constitutions and human rights treaties. The protection afforded to Indian citizens is analogous to both the *ECHR* and the US.[23] In the discussion that follows, I will argue that the Indian judges have a broad concept of religion in free exercise cases.

Before assessing the concept of religion in Article 25 and 26 cases, it is important to take a step back and briefly assess the nuances in the doctrine of Indian free exercise cases. In Article 25 and 26 cases, Indian judges typically follow a three-stage inquiry before holding that a religious belief, practice or symbol should be protected under the *Constitution*.[24] First, judges consider whether a religious belief, practice, or symbol fits within their concept of religion.[25] Second, judges evaluate whether the case concerns an expression of the religion in question which should be protected.[26] Finally, judges assess whether this religious practice, belief, or symbol must be limited based on public health, morals or the rights of others.

The aspect of Indian free exercise jurisprudence which has received the most scholarly attention is the second stage of inquiry executed through the essential practice test.[27] Specifically, we must engage with the scholarly perspective which contends that this test institutes a narrow theistic definition of religion.[28] For instance, Jaclyn Neo, writing on the use of the essential practice test in the jurisprudence of Singapore and Malaysia, argues that the essential practice test creates a narrow theistic definition of religion.[29]

21 Article 25 of the Indian Constitution.

22 Article 26 of the Indian Constitution.

23 Ibid.

24 *Rajeev Dhavan / Fali Nariman*, The Supreme Court and Group Life: Religious Freedom, Minority Groups, and Disadvantaged Communities, in: Kirpal et al. (eds.), Supreme but not Infallible: Essays in Honour of the Supreme Court of India, Oxford 2000, pp. 256-287

25 Ibid.

26 Ibid.

27 *Sen*, note 16; *Jaclyn Neo*, A Critique of the Definition of Religion and the Essential Practice Test in Religious Freedom Adjudication, International Journal of Constitutional Law 574 (2018), pp. 576-577; *Marc Galanter,* Hinduism, Secularism, and the Indian Judiciary, Symposium on Law and Morality, Philosophy East and West 4 (1971), p. 467; *Khagesh Gautham*, Protecting free exercise of religion under the Indian and the United States constitutions: the doctrine of essential practices and the centrality test, Vienna Journal on International Constitutional Law 305 (2014); *Matthew John*, India's Communal Constitution, Oxford 2023.

28 *Neo*, note 27.

29 Ibid., pp. 534-536.

Through this section, I will show that the Indian Supreme Court (the Court) does not use the essential practice test to narrow the definition of religion. Instead, it uses the essential practice test to determine what practices, rituals, or symbols constitute an essential part of a religion for free exercise protection.[30] Accordingly, the Court only protects essential religious practices and does not afford non-essential or peripheral practices any protection.[31]

A useful starting point to demonstrate the breadth, scope, and nature of the essential practice test is through an analysis of the *Anand Margis* case.[32] In this case, the Supreme Court clarified that the essential practice test limited the scope of protection afforded to religious communities. The Court specifically clarified that freedom of religion in India only protected religious practices which are essential to the religion.[33] The Court clarified that an 'essential part of a religion means the core belief upon which a religion is founded and those practices that are fundamental to follow a religious belief.'[34]

The Court follows a series of strategies to determine what a core belief is. The Court can first investigate what the religious community agrees upon as a core religious practice. In the case of *Yagnapurushadji*, the Court observed that:

> *"In cases where conflicting evidence is produced in respect of rival contentions as to competing for religious practices the Court may not be able to resolve the dispute by a blind application of the formula that the community decides which practice is an integral part of its religion, because the community may speak with more than one voice and the formula would, therefore, break down. The question will always have to be decided by the Court, and in doing so, the Court may have to inquire whether the practice in question is religious in character and, if it is, whether it can be regarded as integral or essential part of religion."*[35]

The second strategy that the Court follows is a theological reading of religious doctrine to determine when a practice is an essential part of a religion. This is clearly seen in the case

30 Ibid., p. 576.

31 Ibid., p. 577; See also *Gautam Bhatia*, Freedom from Community: Individual rights, group life, state authority and religious freedom under the Indian Constitution, Global Constitutionalism 351 (2016).

32 The Commissioner of Police v Acharya Jagishwarananda Avadhuta 2004 (12) SCC 782. See also Jagadishwaranand v Police Commissioner of Calcutta AIR 1990 Cal 336. This case is specifically significant as it arose out of an appeal by a previous decision rendered by the Calcutta High Court in which the High Court rejected the essential practice test by holding that 'if courts start enquiring and deciding the rationality of a particular religious practice then there might be confusion and the religious practice would become what the courts wish the practice to be.'

33 The Commissioner of Polive v Acharya Jagishwarananda Ayadhuta, Ibid.

34 Ibid., p. 783.

35 Shastri Yagnapurushadji v Muldas Bhundardas Vaishya AIR 1966 SC 1119, p 1410.

of *Shariya Banoo,*[36] which constitutionally challenged the validity the 'triple talaq' as a legitimate form of divorce under Muslim law. The majority of judges used a reading of the *Quran* to determine that triple talaq was not an essential part of the Muslim faith. To make this decision, the Court held that '[in order to determine] what constitutes an essential part of a religion or religious practice has to be decided by the courts concerning the doctrine of a particular religion.'[37]

A third strategy adopted to assess an essential religious practice is when the Court determines whether a religious practice amounts to a secular or religious function of the denomination. In the case of the *Durgah Committee, Ajmer vs Syed Hussain Ali and Others*,[38] the Court held that:

> *"[In order for] the practices in question [to] be treated as a part of religion they must be regarded by the said religion as its essential and integral part; otherwise even purely secular practices which are not an essential or an integral part of religion are apt to be clothed with a religious form… Similarly, even practices though religious may have sprung from merely superstitious beliefs and may in that sense be extraneous and unessential accretions to religion itself."*[39]

One visible way in which the Court uses the essential practice test is to differentiate between beliefs that are central to a religion and beliefs which are merely superstitious beliefs.[40] Such a classification has resulted in some scholars incorrectly arguing that the Supreme Court's use of the essential practice test creates a narrow essentialist concept of religion in free-exercise cases.[41] However, as I have demonstrated previously, the essential practice test is not an evaluative filter which defines a concept of religion. The essential practice test determines when a religious belief is protected and does not determine when a belief, practice, or symbol is religious.

The Supreme Court is conscious of the difference between a definitional filter and a filter based on the scope of protection given to religious beliefs, practices, or symbols. In the case of *A.S Narayana*, the Court observed that it was difficult to define religion. However, the Court argued that limiting the protection given to religions through the essential practice test was possible. The Court observed that:

> *"Even to different persons professing the same religious faith, some of the facets of religion may have varying significance. It may not be possible, therefore, to devise a precise definition of universal application as to what religion is and what are matters*

36 Shariya Banoo v Union of India (2017) 9 SCC 1.

37 Ibid., para. 105.

38 The Durgah Committee, Ajmer vs Syed Hussain Ali and Others 1962 SCR (1) 383.

39 Ibid., para. 13.

40 S.P. Mittal v Union of India 1983 1 SCC 1.

41 *Neo*, note 27.

> *of religious belief or religious practice. That is far from saying that it is not possible to state with reasonable certainty the limits within which the Constitution conferred a right to profess religion. Therefore, the right to religion guaranteed under Article 25 or 26 is not an absolute or unfettered right to propagating religion, which is subject to legislation by the State limiting or regulating any activity – economic, financial, political, or secular which are associated with religious belief, faith, practice, or custom. They are subject to reform on social welfare by appropriate legislation by the State. Though religious practices and performances of acts in pursuance of religious belief are as much a part of religion as faith or belief in a particular doctrine, that by itself is not conclusive or decisive."*[42]

In this case, the Court held that the essential practice test amounted to a limitation on the scope of protection and not a definitional test. The Court held that the essential practice test allowed the government to regulate economic, financial, political, or secular activities of religion as they did not form a part of the essential parts of a religion. Therefore, the Court is more comfortable limiting the scope of religion through the essential practice test and refraining from using a narrow evaluative filter through a definitional test.

The Court has been clear in numerous decisions that the concept of religion in India is broad. In the case of *Indian Young Lawyers Association v State of Kerala*,[43] the Court held that '[religion] does not need to be theistic. It can also include persons who are agnostic or atheistic.'[44] The Court further clarified that the *Constitution* is 'meant as much for the agnostic as it is for the worshiper – it values and protects the atheist.'[45] Similarly, in the case of *Sharaya Bano*, Justice Nariman observed that: "'[r]eligion' has been given the widest possible meaning by this Court...,'[46] such that, "in this country... atheism would also form part of 'religion'."[47]

I. Broad Concept of Religion Based on Self-Identification, Including Theistic, Non-Theistic, and Atheistic Beliefs

One way the Court has expanded upon the features of the broad concept of religion in Article 25 and 26 cases is by emphasising an individual or group's self-identification to determine whether they are religious. Judicial deference to an applicant's self-identification

42 A.S. Narayana Deekshitulu v State of AP (1996) 9 SCC 548, pp. 593-594.

43 (2017) 10 SCC 689.

44 Ibid., para. 176.

45 Ibid., para .176.

46 Shayara Bano v Union of India, para. 24.

47 Ibid., para 24 The Court however continued to hold that the scope of protection, but one important caveat has been entered by this Court, namely, that only what is an essential religious practice is protected under Article 25.

towards a religion has been called the self-deferential approach.[48] The central insight of the self-deferential approach is that a group's self-identification as being religious should be the deciding factor in a court's decision as to whether a group is religious.[49] Durham and Scharff demonstrate how this approach is implemented through an example. They observe that '[t]he fact that Scientology regards itself as a religion should count heavily in favour of its being regarded as such by others, whereas the fact that Marxism would be distressed by being labelled as a religion should count against its being so treated.'[50]

The self-deferential approach uses religious adherent's self-identification as the single most determinative factor in assessing whether a belief is religious or not. However, this does not mean that the self-deferential approach does not impose any limitations on the concept of religion. Durham and Sewell argue that the self-identification approach should be subject to inherent limitations of the free exercise clause, which are the test of sincerity and protection against fraud.[51] Durham and Scharffs clarify that:

> *"Under the [self-identification] approach, the person making a religious claim must show not only that she sincerely believes what she claims to believe but that she sincerely considers this belief to be religious. Just as there is no reason to grant free exercise protection based on beliefs the claimant does not actually hold, there is no reason to give deference to a believer's definition of her beliefs as religious if she herself does not consider them religious. The second limitation inherent to religious freedom is the reverse side of the first, namely that claims of religiosity made for fraudulent or strategic reasons deserve no deference or protection."*[52]

Durham and Scharffs designed the self-deferential approach as a normative suggestion for courts to consider when deciding whether a belief was religious or not. The self-identification concept of religion best explains the Indian Supreme Court's concept of religious denominations, as the Court defers to the self-identification of adherents.

Evidence that the Indian Supreme Court has a broad concept of religion based on self-deference in Article 25 cases can be seen in the case of *SP Mittal.* In this case, the Court considered whether the belief in the teachings of the saint Shri Aurobindo were religious. In holding that the tenets of Shri Aurobindo's teachings were not a religious belief, the Supreme Court observed that '[e]veryone has a religion, or at least, a view or a window on religion, be he a bigot or simple believer, philosopher or pedestrian, atheist or agnostic. Religion, like "democracy" and "equality", is an elusive expression, which everyone understands according to his pre-conceptions.'[53] Additionally, the Court clarified

48 *Durham / Schraffs*, note 9.
49 Ibid.
50 *Durham / Sewell*, note 2, p. 38.
51 *Neo*, note 27.
52 *Durham / Scharffs,* note 9.
53 S.P. Mittal, note 39, para. 51.

that 'a religion undoubtedly has its basis in a system of beliefs and doctrine which are regarded by those who profess religion to be conducive to their spiritual well-being.'[54] Furthermore, the Court held that:

> *"A religion is not merely an opinion, doctrine, or belief. It has outward expression in acts as well… Religion, therefore, cannot be construed in the context of Articles 25 and 26 in its strict and etymological sense. Every religion must believe in a conscience and ethical and moral precepts. Therefore, whatever binds a man to his own conscience and whatever moral or ethical principles regulate the lives of men believing in that theistic, conscience, or religious belief that alone can constitute religion as understood in the Constitution."*[55]

From this series of judicial observations, it is clear that the Supreme Court considers any moral or ethical belief that a citizen considers part of their 'own' conscience or belief to be religious. Additionally, the Court considers any belief an applicant subjectively considers part of their spiritual welfare to be religious. As such, it is clear that the Court considers the subjective opinion of an individual as being determinative when considering whether a moral, ethical, or spiritual belief is religious for Article 25.

The terminological difference between Articles 25 and 26 resulted in the Court interpreting the phrase 'religious denomination' in Article 26 cases and not the word 'religion', as in Article 25 cases. The Court demonstrated that it is conscious that the words 'religion' in Article 25 and 'religious denomination' referred to in Article 26 are similar. The Court observed that: '[t]he words "religious denomination" in Article 26 of the *Constitution* must take their colour from the word religion.'[56] In the case of *S.P. Mittal*, the Court held that the term religious denomination is defined as 'a religious sect or body having a common faith, organisation, and is designated by a distinctive name.'[57]

Referencing the test to determine whether a religion amounts to a separate religious denomination, the Court later clarified that:

> *"There is no formula of general application [to test whether a belief is religious] ... [Religion is] primarily ... a question of the consciousness of the community, how does the fraternity or sodality (if it is permissible to use the word without confining it to Roman Catholic Groups) regard itself, how do others regard the fraternity or sodality. A host of other circumstances may have to be considered, such as the origin and the history of the community, the rituals observed by the community, what the founder, if any, taught, what the founder was understood by his followers to have taught, etc. In origin, the founder may not have intended to found any religion at all.*

54 Ibid., para. 51.

55 Commissioner, Hindu Religious Endowments, Madras v Sri Lakshimindra Thirtha Swamiar of Sri Shirur Mutt [1954] AIR 282 cited in SP Mittal, Ibid., para. 15.

56 S.P. Mittal v Union of India, note 39.

57 Ibid., para. 65.

> *He may have merely protested against some rituals and observances; he may have disagreed with the interpretation of some earlier religious tenets. What he said, what he preached and what he taught, his protest, his distant, his disagreement might have developed into a religion in the course of time, even during his lifetime. He may be against religion itself, yet history and the perception of the community may make a religion out of what was not intended to be a religion, and he may be hailed as the founder of a new religion."*[58]

The Court's concept of a religious denomination also reflects concept of religion based on the self-identification of an adherent. The three-part test is based on a group's self-identification as different from other organised religions, emphasising the group's organisational structure and distinctive name. The requirements that a group have a distinctive name and an independent organisational structure indicates that the Court defers to the self-identification of an applicant in Article 26 cases to determine whether they are religious or not. Accordingly, the Court's concept of religious denominations or groups draws colour from the self-identification of a group in a manner similar to individual instances of free exercise in Article 25 cases.

II. Broad Concept of Religion Based on Acceptance of Practice, Rituals as Religion

The second way the Supreme Court broadens its concept of religion is through an express recognition that rituals and practices are religious.[59] In the case of *Shirur Mutt*, the Court held that:

> *"Religion is certainly a matter of faith with individuals or communities and it is not necessarily theistic. There are well-known religions in India like Buddhism and Jainism which do not believe in God or in any Intelligent First Cause. A religion undoubtedly has its basis in a system of beliefs or doctrines… but it would not be correct to say that religion is nothing else but a doctrine or belief. A religion may not only lay down a code of ethical rules for its followers to accept, it might prescribe rituals and observances, ceremonies and modes of worship which are regarded as integral parts of religion."*[60]

Accordingly, it is clear that the Court has a broad concept of religion, including religious practices and rituals that may not be part of the text of the religion.

A clear instance of the application of this broad concept of religion can be seen in cases which consider whether practices are Hindu. The Supreme Court demonstrates an extensive understanding of what is Hindu. The Court has held that Hinduism is the:

58 Ibid., para. 20.

59 *Gilles Tarabout*, Ruling on Rituals: Courts of Law and Religious Practices in Contemporary India, South Asia Multidisciplinary Journal 17 (2018), p. 1.

60 Sri Shirur Mutt, note 55, para. 17.

> *"Acceptance of the Vedas with reverence; recognition of the fact that the means or ways to salvation are diverse, and realisation of the truth that the number of gods to be worshipped is large, that indeed is the distinguishing feature of Hindu religion. This definition succinctly brings out the broad distinctive features of the Hindu religion. Therefore, it would be inappropriate to apply the traditional tests in determining the extent of the jurisdiction of the Hindu religion. It can be safely described as a way of life based on certain basic concepts referred to above It is the release and freedom from the unceasing cycle of births and rebirths; Moksha or Nirvana, which is the ultimate aim of Hindu religion and philosophy, represents the state of absolute absorption and assimilation of the individual soul with the infinite The Constitution-makers were fully conscious of this broad and comprehensive character of Hindu religion; and so, while guaranteeing the fundamental right to freedom of religion, Explanation II to Art. 25 has made it clear that in sub-clause (b) of cl. (2), the reference to Hindus shall be construed as including a reference to persons professing the Sikh, Jaina or Buddhist religion, and the reference to Hindu religious institutions shall be construed accordingly."*[61]

For instance, in the *Satyasangi case*,[62] the Court had to consider whether Satyasangi, the followers of the religious leader Swaminarayan, were exempted from *the Bombay Harijan Temple Entry Act 1948* (*BHTEA*). The *BHTEA 1948* was passed to ensure that citizens from marginalised castes were given access to Hindu Temples as part of a sustained effort to purge independent India of caste-based discrimination.[63] The Satyasangi's claimed that the *Act* did not apply to them because they were a religious denomination separate from Hinduism. Independent of the central legal issue, the Court interpreted Articles 25 and 26. In his interpretation of Article 26, Justice Gagendragadkar held that the Swaminarayan sect was a separate religious sect connected with the Hindus and Hindu religion. Justice Gajendragatkar observed that:

> *"The development of Hindu religion and philosophy shows that from time to time saints and religious reformers attempted to remove from the Hindu thought elements of corruption and superstition and that led to the formation of different sects. Buddha started Buddhism; Mahavir founder Jainism; Basava became the founder of Lingayat religion, Dhyaneshwar and Tukaram initiated the Varakari cult; Guru Nanak inspired Sikhism; Dayananda founded Arya Samaj, and Chaitanya began Bhakti cult; and as a result of Ramakrishna and Vivekananda, Hindu religion flowered into its most attractive, progressive and dynamic forms. If we study the teachings of these saints and religious reformers, we would notice an amount of divergence in their respective views: but underneath that divergence, there is a kind of subtle*

61 Yagnapurushadji v Union of India, note 34, p. 1130.

62 Ibid., p. 1121.

63 *Sen*, note 16, pp. 6-7.

> *indescribable unity which keeps them within the sweep of the broad and progressive Hindu religion."*[64]

From this, we can observe that the Court considered religions such as Buddhism and Jainism as a part of a broader concept of Hinduism.[65] While the Court was conscious of the significant differences between Hinduism and the other religions, the Court noted that there was a unity between the religions and Hinduism. In *obiter*, Justice Gagendragadkar further observed that:

> *"When we think of the Hindu religion, we find it difficult, if not impossible, to define the Hindu religion or even adequately describe it. Unlike other religions in the world, the Hindu religion does not claim anyone God; it does not subscribe to any one dogma; it does not believe in one philosophic concept; it does not follow anyone set of religious rites … [Hinduism] does not appear to satisfy the narrow traditional features of any religion or creed. It may broadly be described as a way of life and nothing more."*[66]

Even though the Court found Hinduism was a way of life, it has consistently referred to Hinduism as the 'Hindu religion.'[67] This indicates that, even though the Court observed that Hinduism is a way of life, it continued to consider Hinduism as a religion.[68] Accordingly, the Court has decided that cultural practices could form a part of Hinduism for the purpose of Article 25 and Article 26 protection.[69]

Further evidence of the Court's broad concept of Hinduism which includes cultural practice, can be seen in the *obiter* of the case of *Adi Saiva Sivachariyargal Nala Sangam vs Government of Tamil Nadu.*[70] In this case, the Court clarified that:

> *"Hinduism, as a religion, incorporates all forms of belief without mandating the selection or elimination of any one single belief. It is a religion that has no single founder; no single scripture, and no single set of teachings. It has been described*

64 *Yagnapurushadji*, note 34, p. 1130.

65 Ibid., p. 1127.

66 Ibid., p. 1128; *Sen*, note 16.

67 *Ratna Kapur / Brenda Cossman*, Secularism's Last Sigh? The Hindu Right, The Courts, and India's Struggle for Democracy, Harvard International Law Journal 38 (1997); See also Shuganchand v Prakash Chand, AIR 1967 SC 506; Guramma v Mallappa, AIR 1964 SC 520. Prakash Chand and Mallappa, both demonstrate how the Court has also expanded the concept of the Jain faith to include a series of practices which do not form a part of the foundational beliefs of the religion.

68 Ibid.

69 *Sen*, note 16.

70 (2016) 2 SCC 725.

> *as [Sarvara] Dharma, namely, eternal faith, as it is the collective wisdom and inspiration of the centuries that Hinduism seeks to preach and propagate."*[71]

This further demonstrates that even though Hinduism lacks a text, the collective wisdom passed down through rituals and practices form a part of the Hindu religion. Further evidence can be found in the case of *Ganpat v Returning Officer*[72]. The Court held that:

> *"It is necessary to remember that Hinduism is a very broad-based religion. Some people take the view that it is not a religion at all on the ground that there is no founder and no one sacred book for the Hindus. This, of course, is a very narrow view merely based on the comparison between Hinduism on the one side and Islam and Christianity on the other. But one knows that Hinduism, through the ages, has absorbed or accommodated many different practices, religious as well as secular, and also different faiths."*[73]

In the *Ramakrishna Mission* case,[74] the Court further demonstrates how it uses a broad, capacious definition of Hinduism to include many different faiths under Article 25. This case emerged from an appeal of the Calcutta High Court's decision. The High Court held that the Rama Krishna Mission was a religious organisation separate from the Hindu Faith. The High Court observed that:

> *"The cult or religion of Shri Ramakrishna Paramahansadeb is that all beings are the manifestations of God and all religions are but different paths of reaching God… There is no necessity of one surrendering his own religion, be he a Hindu or a Christian or Muslim or Jew in order to be a follower of the cult or religion of Shri Ramakrishna… Thus in fact, Thakur Shri Ramakrishna preached a World Religion which is quite different from all other religions."*[75]

On appeal, the Supreme Court overturned the Calcutta High Court's decision and held that the Ramakrishna Mission formed a part of a broad concept of Hinduism. The Supreme Court rejected the characterisation of the Calcutta High Court and clarified that the Ramakrishna mission was a 'religious denomination [of the] Hindu religion.'[76] Drawing on the written work of Swami Vivekananda, the Supreme Court observed that 'the glory of Ramakrishna is that he preached and made his principal disciple Swami Vivekananda to preach the religion of the Vedanta which is the religion of the Hindus.'[77] From this

71 Ibid., 800 sic.

72 (1975) 1 SCC 589, para. 25.

73 Ibid., para. 11.

74 2 Calcutta L.J. (1983); AIR 1995 SC 2099. The initial case was before the Calcutta High Court. The case was later appealed to and heard by the Supreme Court of India.

75 Ibid., p. 348.

76 AIR 1995 SC 2099, p. 2107.

77 Ibid., p. 2103.

we can determine that the Supreme Court has a capacious concept of Hinduism, which emerges from Vedanta, that includes a series of rituals, practices, and beliefs. As we have seen throughout this paper, in certain instances, this inclusive understanding of Hinduism attributes religious significance to cultural practices which do not find any place in the foundational texts of Hinduism.

The expansion of the concept of religion to include practices and rituals means that spiritual organisations are included in the Court's concept of Hinduism and, accordingly, the Supreme Court's concept of religion. In light of this expanded concept of religion, I contend that the judicial concept of religion in Article 25 cases is broad enough to include 'lived religion'[78] as theorised by Winnifred Sullivan.[79] Relying on anthropological literature and situating herself in the US legal system, Sullivan argues that '[l]ived' religion shifts the focus to the local, a local that is increasingly transient. Integration happens temporarily and at the instigation of individuals and families, and even occasionally local congregations, but is spectacularly resistant to hierarchical control.'[80] A lived religion is 'religion that takes place beneath the radar of religious officials and institutions.'[81]

Through this study, anthropologists argue that the practice of religion, at a grassroot level, is very different from the doctrines of religions. Robert Orsi argues that communities, in some instances, attach religious symbolism to otherwise innocuous secular symbols.[82] For example, through a study of a Roman Catholic community in Brooklyn, Orsi discovered that community members had started to worship a 'grotto' in Brooklyn.[83] As described by Orsi, the 'grotto' did not have any features of a traditional grotto and was merely New York water flowing down rocks due to a broken pipe. However, Orsi determined that the community's worship of the 'grotto' was sincere, and the community truly believed it to be religious. From this study, Orsi concludes that a lived practice of religion involves the attachment of religious significance to otherwise secular cultural practices. Therefore, on some occasions, what from the outside looking in is a cultural practice is religious to the people who practise it.

Sullivan's description of a lived religion reflects a broad concept of religion that encompasses religious beliefs localised to a small set of individuals outside a religious organisation.[84] A concept of lived religion reflects the understanding that ordinary rituals can assume religious significance for people even without an organisational recognition of

78 *Sullivan*, note 12.

79 Ibid.

80 Ibid, p. 140.

81 Ibid, p. 19.

82 *Robert Orsi*, The Madonna of 115th St.: Faith and Community in Italian Harlem 1880–1950, New Haven 1995, pp. 4-5.

83 Ibid., p. 5.

84 *Sullivan*, note 12, p. 167.

the beliefs. Therefore, this concept of religion would include localised cultural practices and rituals within its ambit.

In light of this expanded concept of religion, I contend that the judicial concept of religion in Article 25 and 26 jurisprudence is founded on a lived concept of religion.[85] By holding that the practice of religion, through rituals and practices, is a central component of the judicial concept of religion, the Court has made it possible for cultural practices which are in furtherance of spiritual well-being to be considered religious. The Court has further indicated that they have a lived concept of religion by characterising Hinduism as a 'way of life', which reflects the culture of the Indian subcontinent. Even though the Court has described Hinduism as a way of life, they continue to protect Hindu practices and rituals under Articles 25 and 26. This demonstrates that the judicial concept of religion is broad enough to include cultural practices.

As a consequence of the judicial concept of religion encompassing a lived religion, the Supreme Court has recognised numerous subsects of Hinduism as being religious. Even when the Court has described Hinduism as a way of life, it continues to protect Hindu practices, rituals, and beliefs under Articles 25 and 26. This demonstrates that the judicial concept of religion is broad enough to include cultural practices.

C. The Judicial Concept of Religion in Non-Establishment Cases

I. Content of the Non-Establishment Principle in the Indian Constitution

To determine the definition of religion in non-establishment cases, we must first determine whether and to what extent the content of the Indian constitution supports the separation of church and state. Non-establishment is a specific form of the separation of church and state which ensures that government cannot establish a state church or endorse, through explicit or implicit policy, the doctrines of a specific religion. Judicial accounts of the concept of secularism in India are contested. The Supreme Court (the Court) has referenced a series of related concepts to explain the meaning of secularism. The Court has referenced equality and the equal treatment of all religions,[86] fraternity and the unity and diversity of the country,[87] and positive neutrality.[88] For instance, in the case of *S.R Bommai v Union of India*,[89] which was a case that considered the meaning of secularism under the Indian *Constitution*, the majority in the Indian Supreme Court could not agree on the content of the principle of secularism. In *Bommai,* Justice Pandian observed that '[Indian secularism means that] the state does not extend patronage to any particular religion, [the] [s]tate is neither pro [a] particular religion nor anti [a] particular religion. It stands aloof, in other

85 Ibid.

86 Aruna Roy v Union of India AIR 2002 SC 3176.

87 M Siddique v Mahant Suresh Das & Ors Civil Appeal Nos 10866-10867 of 2010.

88 SR Bommai v Union of India (1994) 3 SCC 1.

89 Ibid.

words, maintains neutrality in matters of religion and provides equal protection to all religions subject to regulation and actively acts on the secular part.'[90] Additionally, the Court stated that 'secularism in the Indian context bears positive and affirmative emphasis…. Positive secularism believes in the basic values of freedom, equality and fellowship.'[91]

In other cases, the Court has held that secularism is the equal treatment of all religions. In the case of *M. Siddiq v Mahant Suresh Das and Ors,*[92] a bench comprising of eleven judges reaffirmed that '[t]he value of a secular constitution lies in a tradition of equal deference.'[93] The Court has clarified that the 'tradition of equal deference' differs from Western understandings of separation of church and state or *laicite*. In the case of *S.R. Bommai*,[94] Justice Jeevan Reddy held that:

> *"Secularism [in India] is more than a passive attitude of religious tolerance. It is a positive concept of equal treatment of all religions. This attitude is described by some as one of neutrality towards religion or as one of benevolent neutrality. This may be a concept evolved by western liberal thought, or it may be, as some say, an abiding faith with the Indian people at all points of time."*[95]

The Court further explained the tradition of equal deference by holding that 'the *Constitution* postulates [that] the equality of all faiths, [t]olerance and mutual co-existence nourish[es] the secular commitment of our nation and its people.'[96] However, once again, the judges cast their definition of 'Indian secularism' in abstract terms. The Court has not consistently clarified what it means by tolerance, mutual co-existence, and equal deference.

Finally, the Court has also held that secularism is the preservation of the unity and diversity of the country. In the case of *St. Xaviers v State of Gujrat*, Justice Ray observed that Article 30 was part of the *Constitution* because it preserved the unity and integrity of the nation-state. He held that:

> *"The [religious] minorities are given this protection under Article 30 in order to preserve and strengthen the integrity and unity of the country. The sphere of general secular education is intended to develop the commonness of boys and girls of our country … General secular education will open doors of perception and act as the natural light of mind for our countrymen to live in the whole."*[97]

90 Ibid., para. 182.

91 Ibid., para. 182.

92 Siddique, note 87; Bommai, Ibid.

93 Siddique, Ibid. para. 555; *Rajeev Bhargava*, Reimagining Secularism: Respect, Domination and Principled Distance, Economic and Political Weekly 48 (2013), pp. 79-92.

94 Ibid.

95 Bommai, note 88, para. 818.

96 Siddique, note 87, para. 800.

97 St Xaviers College v State of Gujarat 1975 SCR (1) 173, 673.

While each of these accounts posits a theory of Indian secularism, the Court has yet to develop a coherent framework which explains the concept thoroughly. In light of the significant judicial and scholarly disagreement on the concept of Indian secularism, we must look to the text of the Indian *Constitution* to determine the nature of Indian secularism. The Indian *Constitution* has some non-establishment tendencies in certain narrowly enumerated fields.[98]

The Indian *Constitution* did not originally reference non-establishment, secularism, separation of church and state, or *laicite*. However, in 1976, the 42nd Amendment to the Indian *Constitution* inserted the word 'secular' in the Preamble.[99] The Indian Supreme Court, which serves as India's final court of appeals, in *S.R. Bommai*,[100] noted that the *Constitution* had features that made it secular long before the 42nd Amendment.[101] In *obiter*, the Court observed that '[n]otwithstanding the fact that the words "[s]ocialist", and "[s]ecular" were added in the Preamble … in 1976 by the 42nd Amendment, the concept of secularism was very much embedded in our constitutional philosophy … By this Amendment what was implicit was made explicit.'[102] The Court further observed that independent of the insertion of the word secularism in the preamble, the Indian *Constitution* has a principle of secularism which emerges from the text and structure of the *Constitution*.[103]

Apart from the 42nd Amendment, the Indian *Constitution* clarifies the government's relationship with religion in several Articles.[104] As noted by Bhargava, a series of Articles can be seen as supporting the separation of church and state in certain narrow aspects of the Indian *Constitution*.[105] A harmonious reading of the *Constitution* allows us to determine its features. Four categories of Articles deal with India's state-church relationships. The first category includes Articles that give special rights to religious minorities and allow the state to promote religious practices and activities.[106] The second includes Articles that peripherally regulate religious conduct, predominantly through regulating the caste system.[107]The

98 Ibid.; Bhargava, note 93; See also, *Deepa Das Acevedo*, Secularism in the Indian Context, Law and Social Enquiry 38 (2013), p. 138.

99 *Abhinav Chandrachud* Republic of Religion: The Rise and Fall of Colonial Secularism, New York 2020.

100 *Abhinav Chandrachud* Secularism and the Citizenship Amendment Act, Indian Law Review 4 (2020), pp. 138, 139 -162.

101 Ibid.

102 Bommai, note 88, p. 1951.

103 In the case of Bommai*,* Ibid.

104 *Sen*, note 16.

105 *Rajeev Bargava*, Secularism, and its Critics, Oxford 2005, p. 25.

106 *Sen*, note 16, pp. 6-7.

107 *Rajeev Dhavan,* Religious Freedom in India, The American Journal of Comparative Law 35 (1987), pp. 209, 220-254; *Rajeev Dhavan*, The Road to Xanadu: India's Quest for Secularism, in: G.J. Larson (eds), Religion and Personal Law in Secular India: A Call to Judgment, Bloomington 2001, pp. 301-329.

third category deals with non-justiciable aspirational norms that aim to influence policy around law and religion.[108]

The second category of Articles deviates substantially from traditional non-establishment states. Articles 27- 30 give religious and cultural minorities a series of cultural rights in education and taxation.[109] The rights themselves do not impose a non-establishment obligation on the state. However, the limitation clauses do. Article 27, for instance, states that '[n]o person shall be compelled to pay any taxes, the proceeds of which are specifically appropriated in payment of expenses for the promotion or maintenance of any particular religion or religious denomination.'[110] Article 28 states that '[n]o religious instruction shall be provided in any educational institution wholly maintained out of State funds.' Article 29 states that: '(1) Any section of the citizens residing in the territory of India or any part thereof having a distinct language, script or culture of its own shall have the right to conserve the same (2) No citizen shall be denied admission into any educational institution maintained by the State or receiving aid out of State funds on grounds only of religion, race, caste, language...'[111]

This set of Articles prevents the government from endorsing a particular religion when granting aid and from providing religious instruction in state-funded educational institutions. Articles 27-29 clarify that the government is constitutionally prevented from establishing or endorsing any religion in the microcosm of educational rights. Therefore, it imposes a non-establishment obligation on the government, similar to countries like the US and France.

The third category of Articles peripherally regulates the relationship between the church and state. Article 17 claims to abolish the caste practice of 'Untouchability,' and Articles 14, 15, and 16 protect against religious discrimination by the government.[112] Articles 14-17 are a set of Articles that protect the right to equality in India. Collectively, the Articles attempt to eliminate intra and inter-religious discrimination in India. Critically, the Articles protect against one religion being discriminated against by other faiths and protect members of a religious community from facing caste-based discrimination from within the religious denomination.[113]

Finally, the fourth category of cases deals with the directive principles of state policy and fundamental duties in Part IV and V of the *Constitution*. Notably, Article 44 instructs the Indian 'state [to] endeavour to secure for the citizens a uniform civil code throughout the territory of India.'[114] Furthermore, Article 51A—part of a section of the *Constitution*

108 *Dhavan / Nariman*, note 24, pp. 256-387.
109 Articles 27-30 of the Indian Constitution.
110 Article 27 of the Indian Constitution.
111 Article 28 of the Indian Constitution.
112 Article 30 of the Indian Constitution.
113 *Bhargava*, note 93.
114 Article 44 of the Indian Constitution.

concerning citizens' fundamental duties—mandates that every Indian citizen 'promote harmony and the spirit of common brotherhood amongst all the people of India transcending religious... diversities.'[115]

On an initial reading, the text of the Indian *Constitution* paints a picture of India as having some elements of a non-establishment state, which gives private religious institutions some special rights.[116] The Indian *Constitution* separates church and state in education, cultural rights, and elections. One major objection to this assertion is that India is a multi-establishment state because it gives minority religions special privileges by allowing for the differential treatment of religious citizens.[117] However, providing religious minorities with additional rights is not uncommon in non-establishment constitutions. For instance, even in the US, certain religious citizens can opt out of a generally applicable law, where it conflicts with their sincerely held beliefs. Additionally, the text of the Indian *Constitution* makes it clear that the Indian government cannot discriminate against religions, nor can it provide special benefits for one religion unless expressly allowed by the *Constitution*.[118] This indicates that the text of the Indian *Constitution* is non-establishment in nature as it cannot discriminate against non-adherents when endorsing a religion through differential treatment.[119]

In addition to the constitutional provisions that create a non-establishment principle, the Supreme Court has interpreted certain statutes to give them constitutional significance in Indian non-establishment cases. In the case concerning the *Ayodhya Temple,*[120] where the Court had to consider whether the demolition of a mosque to construct a temple in the name of Lord Ram was constitutionally valid, the Supreme Court clarified that statutes could act in extension to the *Constitution* to enforce India's commitment to secularism. Speaking about the *Places of Worship Act 1991*, the Court held that the statute:

> *"[I]mposes a non-derogable obligation towards enforcing our commitment to secularism under the Indian Constitution. Hence, the law is a legislative instrument designed to protect the secular features of the Indian polity, which is one of the Constitution's basic features. Non-retrogression is a foundational feature of the fundamental constitutional principles of secularism as a core component. The Places of Worship Act is thus a legislative intervention which preserves non-retrogression as an essential feature of our secular values."*[121]

115 Article 51A of the Indian Constitution.

116 *Bhargava*, note 93.

117 Ibid.

118 Ibid.

119 Ibid.

120 M Siddiq (D) Thr Lrs v Mahant Suresh Das & Ors., note 87.

121 Ibid., para. 82. (SIC)

The Court further observed that:

> *"The Places of Worship Act was enacted in 1991 by Parliament [to] protect and secure the fundamental values of the Constitution. The Preamble underlines the need to protect the liberty of thought, expression, belief, faith, and worship. It emphasises human dignity and fraternity. Tolerance, respect for and acceptance of the equality of all religious faiths is a fundamental precept of fraternity."*[122]

The Supreme Court uses the term non-derogable to suggest that constitutional secularism creates a duty for the government to enforce such statutes. Accordingly, they form an important part of the legal framework that clarifies the state's secular commitment. A statute with similar constitutional significance is the *Representation of Peoples Act 1951.* The *Representation of Peoples Act 1951* was enacted to prevent religious vote bank politics.[123] This obligation emerges from section 123 of the *Representation of Peoples Act 1951*, which states that:

> *[No candidate in an election can promote], or attempt to promote, feelings of enmity or hatred between different classes of the citizens of India on grounds of religion, race, caste, community, or language, by a candidate or his agent or any other person with the consent of a candidate or his election agent for the furtherance of the prospects of the election of that candidate or for prejudicially affecting the election of any candidate (...)*[124]

Therefore, Section 123 of the *Representation of Peoples Act 1951* attempts to prevent certain divisive rhetoric from being used in electoral campaigns. Accordingly, the *Act* prohibits electoral candidates, at a state and federal level, from promoting communal tension through an appeal to religion. In light of this, the Courts have held that any appeal to religion during an electoral campaign falls foul of the regulation created by the *Representation of Peoples Act 1951.* The Supreme Court has held that the broader purpose of the *Representation of Peoples Act 1951* is to ensure that Indian democracy is protected from candidates who campaign against the 'spirit of secular democracy.'[125] The Court held that the spirit of secular democracy is that 'candidates at elections have to try to persuade electors by showing them the light of reason and not by inflaming their blind and disruptive passions [based on religion].'[126]

Accordingly, the *Representation of Peoples Act 1951* separates church and state in the microcosm of electoral campaigns. Facially, it seems as though the *Constitution* and

122 Ibid., para. 82.

123 *Sen*, note 16.

124 *Ratna Kapur*, Gender and the 'Faith' in Law: Equality, *Secularism*, and the Rise of the Hindu Nation, Journal of Law and Religion 35 (2020), p. 35; *Kapur / Cossman*, note 67, p. 113.

125 Ziyauddin Burhanuddin Bukhari v Brijmohan Ramdass Mehra & Ors (1976) 2 SCC 17, p. 31.

126 Ibid., p. 31.

statutes related to secularism institute a non-establishment principle in India.[127] The *Constitution* separates religion from core governmental functions such as education, taxation, elections, and public funds. Considering this, it is clear that the text of the Indian *Constitution* has a non-establishment principle in certain enumerated fields.

II. The Judicial Concept of Religion in Non-establishment Cases.

Unlike in free-exercise cases where the Indian Supreme Court protects rituals and practices as being religious even if they have some cultural significance, the Indian Supreme Court narrows its concept of religion in non-establishment cases to exclude Hindu practices which it decides are cultural. To fully understand why this is the case, it is important to note that political developments in India influence judicial inculturation. Therefore, while it is empirically observable that Indian judges judicially enculturate the Hindu faith, the process of judicial inculturation in India is linked to the political landscape.

Thomas Blom Hansen notes that the politics around Indian secularism is increasingly creating a civic culture based on Hinduism.[128] Hansen notes that:

> *"The growth of the Hindu nationalist Bhartiya Janata Party and affiliated organisations in the 1990s, the seminal conflicts around the Babri Masjid, and the ensuing decade of pogroms and attacks on Muslims, in particular, changed the political landscape in India and its political common sense. Open Hindu majoritarianism and public abuse of minorities became more common and acceptable. There was no longer a tacit consensus around what public speech should look like, for instance. Still, however much the BJP attacked official secularism as hypocritical "pseudo-secularism" ... The force of the BJP's criticism was not that secularism was worthless as a public virtue but that the Congress and others were not secular enough in the Indian sense, in that they did not practice proper balance between communities and were accused of pandering to the minorities."*[129]

The BJP advocated for a strict separation of church and state with the primary agenda of stopping any benefits which minority religions were entitled to accrue through differential treatment and state aid.[130] A Hindu majoritarian agenda underpins their advocacy for separationism. The BJP rooted the criticism of Indian secularism in a Hindu nationalist ideology. Hansen observes that: '[T]he Hindu nationalist movement itself is structured

127 *Kapur / Cossman,* note 67; *Bhargava*, note 93.

128 *Thomas Blom Hansen*, Secular Speech and Popular Passions, in: Winnifred Sullivan (ed.), After Secular Law, Princeton 2011. For a more general account, see, *Mancini Susanna / Rosenfeld Michel*, Nationalism, Populism, Religion, and the Quest to Reframe Fundamental Rights, Cardozo Research Studies Research Paper, p. 617.

129 Ibid., p. 268.

130 *Shylashri Shankar*, Indian Secularism in a Comparative Perspective, India Review 2 (2010), pp. 43-58.

around a structurally homologous divide between those wedded to cultural activism as a means to consolidate the Hindu nation, and those favouring political and electoral mass mobilisation to the same end.'[131] At the heart of the Hindu Right's ideology is the belief that Hinduism is not a religion but a cultural way of life in the subcontinent.[132] Golwalkar, a thinker at the heart of the Hindu majoritarian ideology, wrote that:

> *"This great Hindu Race professes its illustrious Hindu Religion, the only religion in the world worthy of being so denominated; which in its variety is still an organic whole .... Guided by this Religion in all walks of life, individual, social, political, the Race evolved a culture which despite the degenerating contact with the debased "civilisations" of the·Mussalmans and the Europeans, for the last ten centuries, is still the noblest in the world."*[133]

Central to Golwarkar's idea is the assertion that Hinduism is a religion that has now formed a unique culture for a race of people.[134] More generally, the Hindu Right does not think of Hinduism as solely a religion.[135] Instead, many associated with the Hindu Right has consistently asserted that Hinduism is a culture that emerges from religion to unite an entire race of people.[136]

For this reason, the Hindu majoritarian agenda does not engage in a frontal attack on the non-establishment parts of the Indian *Constitution*.[137] Instead, it uses non-establishment to achieve its end of creating a Hindu majoritarian state.[138] By advocating for a separationist regime, the Hindu Right can privilege Hinduism while at the same time disadvantaging other religions. Because Hinduism is not considered religious, a separationist regime would not bar the privileging of Hinduism. The political movement started by the Hindu Right has resulted in an increased spate of litigation in front of the Supreme Court. Unfortunately, the Court has not been clear on the boundaries and meaning of Indian non-establishment and has enculturated the Hindu faith.

In this section, I show that Indian judges are enculturating the Hindu faith in non-establishment cases. Judicial inculturation is the process by which judges hold that religious symbols or practices are cultural as opposed to religious due to their links to the majority religion of the country.[139] In this way, the judges narrow the concept of religion to exclude

131 *Hansen*, note 128, p. 268.
132 Ibid.
133 *M.S. Golwakar*, We or Our Nation Defined, Nagpur 1939, p. 40.
134 Ibid.
135 *Kapur*, note 67.
136 Ibid.
137 *Hansen*, note 128.
138 Ibid.
139 Ibid.

the country's majority religion, such that prohibitions and restrictions on government action by non-establishment clauses do not operate.

One of the reasons judicial inculturation occurs in non-establishment regimes is that non-establishment clauses and principles aim to create a secular culture where the political sphere is religiously neutral. Religious neutrality is an obligation placed on the government by non-establishment clauses to entrench a form of political secularism.[140] When faced with non-establishment clauses, religious advocacy groups claim that a particular religion has unique ties to secular culture.[141]

This claim attempts to enculturate a religion into an otherwise secular culture. The process of inculturation has been noted outside judicial settings by Olivier Roy,[142] who states that dominant religions have been 'powerful machines for manufacturing culture.'[143] Roy concludes, 'even if societies become secularised, they still bear the cultural imprint of the founding religion.'[144] This argument is cognisant of the possibility that the majority religion of a country could be considered religious.[145] Accordingly, the recognition of the cultural meaning of religion 'with a view to calling attention to the ways in which majority religions shape social institutions and cultural patterns'[146] is central to the process of inculturation. Inculturation is a strategy that suggests that the majority religion is integral to forming culture within a particular territorial boundary.

In non-establishment cases, Indian judges enculturate the Hindu faith in two ways. First, the Court increasingly enculturates Hinduism into the concept of non-establishment. The Court indicates that Hinduism is the genesis of non-establishment and religious tolerance in India. In *Ismail Fauroque*[147], the Court held that the value underpinning secularism was tolerance. Building on this assertion, the Court praised Hinduism for its 'tolerant' doctrines. The Court observed that 'Hinduism is a tolerant faith.'[148] In several cases, the Court has held that the true meaning of Indian secularism is *Sarvara Dharma.* As noted in *Ismail Fauroque*, the term itself is derived from Hindu texts.[149] To justify this conclusion, the Court noted that: '[Hinduisms' tolerance] had enabled Islam, Christianity, Zoroastrianism, Judaism, Buddhism, Jainism and Sikhism to find a shelter and support [in India].'[150]Accordingly, the Court cited the Vedas, a Hindu text, to emphasise a long

140 *Cecile Laborde*, Liberalism's Religion, Cambridge MA 2017.
141 *Roy*, note 14.
142 Ibid., p. 28.
143 Ibid., p. 65.
144 Ibid., p. 67.
145 Ibid., pp. 67-75.
146 Ibid.
147 AIR 1995 SC 605.
148 Ibid., para. 159.
149 Ibid., para. 34.
150 Ibid.

historical relationship between Hinduism and Indian secularism.[151] In light of this form of reasoning, it is clear that the Court has enculturated the Hindu faith by holding that constitutional secularism and Indian secularism are based on Hinduism.

In *Ismail Faruqui*, judges hold that Hindu values, notably tolerance, are the genesis of secularism and the equal treatment of all religions. Accordingly, the Court has treated a series of Hindu texts as the source of a constitutional provision. It has thereby enculturated the texts into the constitutional culture of India, giving the Hindu faith a cultural meaning by uniquely tying it to the history of Indian non-establishment and the text of the *Constitution*.

Enculturating Hinduism through the universal value of tolerance can also be seen in the case of *Aruna Roy*.[152] In this case, the Court clarified that Indian non-establishment is based on a principle of *Sarva Dharma Samabhav*, which translates to an idea of equality amongst all religions.[153] For instance, the *Aruna Roy case,*[154] which challenged the government policy of mandatory academic courses on 'education for value development'[155] (added into the compulsory syllabus by the BJP led coalition in 2000), was examined.[156] The petitioners took objection to a particular part of the proposal which stated that '[a]lthough [religion] is not the only source of essential values, it certainly is a major source of value generation. What is required today is not religious education but education about religions, their basics, the values inherent therein and also a comparative study of the philosophy of all religions.'[157]

The Court went on to observe that 'education about religions must be handled with extreme care … All religions, therefore, have to be treated with equal respect (*Sarva Dharma Sam[a]bhav[a]*) and that there has to be no discrimination on the ground of any religion (panthanirapekshata).'[158] The petitioner challenged this on the grounds that the state-funded study of religions violated the *Constitution*. The Court held that 'the real meaning of secularism in the language of Gandhi is *Sarva Dharma Samabhav* meaning equal treatment and respect of all religions, but we have misunderstood the meaning of secularism as …[the] negation of all religions.'[159]

The second way the Court enculturates religion is by holding that the endorsement of Hindu symbols is constitutional due to Hinduism's links to the history and culture of India.

151 Ibid., para. 159.

152 Aruna Roy v Union of India, 2002 (7) SCC 389.

153 *Sen*, note 16.

154 *Roy*, note 152, pp. 402-408.

155 National Curriculum Framework for School Education, National Council of Educational Research and Training, New Delhi 2000, p. 18.

156 Ibid., p. 19.

157 *Roy*, note 152.

158 Ibid., p. 407.

159 Ibid., p. 407.

In contrast to being 'religious', Hinduism is interpreted by the Court as a belief system that has cultural meaning. The Supreme Court ties Hinduism to the culture and history of India in a similar way. The Court articulates an understanding of Hinduism as an essential part of the philosophy and culture of India.[160]

One example of the Court enculturating the state endorsement of the Hindu faith (understood as including Sikhism) is in publicly funded educational institutions.[161] In a case which concerns the constitutionality of a government-funded institution running a course on the teachings of Guru Nanak, a religious leader of the Sikh faith being taught as a compulsory subject, the petitioner argued that a law that mandated the teaching of Guru Nanak's philosophy infringed upon Article 28(1),[162] the Court distinguished between religious instruction and the study of religions. The Court held that 'to provide for the academic study of life and teaching or the philosophy and culture of any great saint of India in relation to or the impact on the Indian and world civilisations cannot be considered as making provision for religious instruction.'[163]

Furthermore, in a concurring judgment, Dharmadhikari, J held that 'the academic study of the teaching and the philosophy of any great saint such as Kabir, Guru Nanak and Mahavir were held to be not prohibited by Article 28(1) of the *Constitution.'*[164] Justice Dharmadhikari justifies this position by holding that the Indian concept of *dharma* does not reflect the concept of religion as understood in the West. According to him, the concept of *dharma* reflects the idea that 'different faiths, sects and schools of thought merely are different ways of knowing the truth.'[165] Therefore, Justice Dharmadhikari holds that *dharma* is a philosophy of different cultures. He observes that *dharma* is a way of 'approaching the many religions of the world with an attitude of understanding.'[166] He noted that this understanding of religion is essential to preserving shared identity in a religiously diverse country.[167] The Court's description of *dharma* reveals that it is not religious and is a philosophy. While it is apparent that Indian secularism allows for religious instruction, the Court has made it clear that it does not think that syllabuses based on some aspects of Hinduism are religious.

Another example of judicial inculturation is in election cases which emerge from the *Representation of People Act 1951*. Section 123 of the *Representation of People Act 1951* prohibits electoral candidates from making an appeal to citizens to vote on religious lines. Sub Section 3A. of the *Act* states that:

160 *Roy*, note 14.
161 *Roy*, note 152.
162 Ibid.
163 Ibid., para. 58.
164 Ibid., para. 80.
165 Ibid., para. 58.
166 Ibid., paras 58-59.
167 AIR 1996 SC 1130.

> *"[Causing] feelings of enmity or hatred between different classes of the citizens of India on grounds of religion, race, caste, community, or language, by a candidate or his agent or any other person with the consent of a candidate or his election agent for the furtherance of the prospects of the election of that candidate or for prejudicially affecting the election of any candidate."*[168]

The Supreme Court has held that this provision was enacted to preserve the integrity of Indian secularism.[169] Section 123 of the *Representation of People Act 1951* regulates religious speech by candidates in an election so that religion does not influence the outcome of an election. This is facially in line with Indian non-establishment. Interpreting this section of the *Representation of People Act 1951*, Justice Bheg observed that:

> *"Section 123, sub-sections (2), (3) and (3A) were enacted so as to eliminate from the electoral process appeals to those divisive factors which arouse irrational passions that run counter to the basic tenets of our Constitution, and, indeed, of any civilised political and social order … Under the guise of protecting your own religion, culture, or creed you cannot embark on personal attacks on those of others or whip up low hard instincts and animosities or irrational fears between groups to secure electoral victories."*[170]

The position adopted by Justice Bheg indicates that a candidate can, under no circumstances, make an appeal to voters based on religion. However, this position was revised by the Indian Supreme Court in the *Hindutva cases*.[171] In the case of *Prabhoo*, the petitioner challenged a ban on election rallies being conducted by Bal Thackeray, the leader of a right-wing political party in Maharashtra. The petitioner alleged that Bal Thackeray was incorrectly banned from campaigning by the Election Commission. The petitioner claimed that Mr Thackeray had not appealed to religion in his speeches. Instead, the petitioner claimed that he had referred to culture. Writing for the majority, Justice Verma held that:

> *"Considering the terms 'Hinduism' or 'Hindutva' per se as depicting hostility, enmity or intolerance towards other religious faiths or professions, proceeds from an improper appreciation and perception of the true meaning of these expressions emerging from the discussions in earlier authorities of this Court… It is indeed very unfortunate, if in spite of the liberal and tolerant features of Hinduism recognised in judicial decisions, these terms are misused by anyone during the elections to gain any unfair political advantage."*[172]

168 Ibid. Emphasis added.

169 The Court held that the RPA was one of the acts which was enacted in extension of Indian Secularism.

170 Kultar Singh v Union of India, AIR 1975 SC 1788, p. 1794.

171 Ramesh Yashwanth Prabhoo v Prabharkar Kashinath Kunte, 1995 S.C.A.L.E. 1.

172 Ibid., p. 16.

Justice Verma justified this position by downplaying the religious significance of Hinduism in Hindutva. He held that 'the word "Hindutva" is used and understood as a synonym for "Indianisation", i.e., development of uniform culture by obliterating the differences between all the cultures co-existing in the country.'[173] The Court held that the reason Hindutva was central to the uniform culture of India was because 'Hinduism, the religion of the majority of Indians, comes to reflect the way of life of all Indians'[174]

In this case, the Court articulates an understanding of Hinduism as an essential part of the philosophy and culture of India. By making this statement, the Court moves away from holding that Hinduism is a purely religious belief which, when invoked in an electoral campaign, can intimidate non-believers.[175] Instead, the Court conflated Hindutva with an inclusive understanding of Hinduism, which, in the Court's opinion, symbolised the culture of tolerance in India.

D. Conclusion

Given the recent rise of Hindu nationalism,[176] its sustained political appeal,[177] and its increasing legitimacy,[178] it is vital that we understand the different institutions that are complicit in its rise to prominence. Scholarship has given a lot of attention to the strategies adopted by the Indian executive to undermine secularism and promote the Hindu nationalist agenda. Additionally, scholarship has focused on how the Supreme Court has been complicit in allowing the executive to undermine secularism.

This paper attempts to flesh out a novel dimension of the role the Indian Judiciary has played in rise of Hindu nationalism. Notably, this paper focused on the role of the judicial concept of religion in the rise of the Hindu majoritarian project. This paper demonstrated that judges narrow the judicial concept of religion in establishment cases compared to the broad definition of religion in free-exercise cases to privilege the majority religion of the country. Judges narrow the concept of religion through a process called judicial inculturation. By inculturating the Hindu faith, judges allow for the state endorsement of Hinduism on a constitutional level by removing Hinduism from the regulatory ambit of Indian Secularism. As such, the Supreme Court rubber stamps policies designed to uniquely promote Hinduism over other religions.

173 *Singh*, note 170, p. 1131.
174 Ibid., p. 1131.
175 Ibid.
176 *Roy*, note 14.
177 Ibid.
178 Ibid.