

A Global Perspective of Law Relating to Freedom of Religion in India, UK and USA: A Comparative Study



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*“India has a great heritage and it is a model for religious harmony where people of different religions live peacefully and in harmony.”*

-Dalai Lama

**Abstract**

Religion is an indispensable part of human existence. Freedom of religion is considered as the third most important civil liberty after the right to life and personal liberty and the freedom of speech and expression. The Indian Constitution guarantees freedom of religion and acknowledges the individual's autonomy in his or her relationship with God. However, the Supreme Court of India, through the creation and continued use of the essentiality test, has tried to reform religion by restricting the scope of this freedom. The judiciary has taken over the role of clergy in determining what essential and non-essential religious practices are. Moreover, the Court has applied the test in an inconsistent manner, repeatedly changing the method of determining essentiality, seriously undermining religious liberty. This Article examines these judgments to demonstrate the adverse impact of the essentiality test on religious freedom. The constitution provides for freedom of conscience and the right of all individuals to freely profess, practice, and propagate religion; mandates a secular state; requires the state to treat all religions impartially; and prohibits discrimination based on religion. It also states that citizens must practice their faith in a way that does not adversely affect public order, morality, or health. Nine of the 28 states have laws restricting religious conversions. In August the central government revoked the semi-autonomous status of the Muslim-majority state of Jammu and Kashmir and split it into two Union Territories: Jammu and Kashmir, and Ladakh. The revocation sparked protests, criticism from Muslim leaders, and challenges filed in the Supreme Court from opposition politicians, human rights activists, and others. The government sent thousands of additional security forces to the region, shut down many internet and phone lines, and had not restored full service by year's end. The government also closed most mosques in the area until mid-December. Seventeen civilians and three security personnel were killed during the protests. In December parliament passed the Citizenship Amendment Act (CAA), which accelerates citizenship for Hindu, Sikh, Buddhist, Jain, Parsi, and Christian migrants from Afghanistan, Bangladesh, and Pakistan who entered the country on or before December 31, 2014, but not for similarly-situated migrants who are Muslims, Jews, atheists, or members of other faiths.

**Introduction**

When left undefined, the concept of religious freedom is little more than a platitude. Although a majority of modern nations have constitutional provisions for religious freedom, the substance and meaning of this term is constantly being negotiated.<sup>1</sup> It is certainly easier to champion religious freedom than to define, quantify, and evaluate it. Nevertheless, any meaningful discussion of this elusive concept is incomplete without a thorough consideration of the

more difficult questions that it invokes. Such questions include:

- What specific rights should be protected by religious freedom? What restrictions on these rights, if any, are permissible?
- Who has the authority to determine the scope of religion?
- How should the government handle cases where the religious freedom of one group conflicts with that of another?

where the rights protected by religious freedom conflict with other basic rights? In order to translate a promising yet vague concept into sound public policy, these complicated questions must be addressed.

India is an exemplary setting to explore the complex unfolding of religion and state relationships. The nation's unique religious, social, and political circumstances are ideal for examining the heated negotiations surrounding religious freedom and another highly contested term, secularism. This study will focus on the Supreme Court of India, the site where some of the most difficult legal issues involving religion are worked out. There are several factors that make India an important locus for understanding these themes. First, India's diverse religious landscape brings the issue of plurality to the fore. As home to significant populations of Hindus, Muslims, Christians, Jains, Sikhs, Buddhists, and an array of other religious sects and movements, the Indian state has to consider a variety of diverse religious commitments in its governance. Second, the provisions for religious freedom in the Constitution of India contain some notable ambiguities. Although largely similar to the constitutions of other democratic nations, the anomalies in the Indian Constitution make it a unique document as far as religious freedom is concerned. Finally, the rich debates surrounding secularism in India provide a theoretical backdrop to help us understand the potential implications of religion and state relations.

This study will show how the Supreme Court of India has employed two jurisprudential tests to circumscribe religious freedom and interpret the interventionist impulses contained in the Constitution. These two innovations, the religious denomination test and the essential practices test, give the Court the authority to determine which groups qualify for legal protection, and which practices are protected. The rights of religious denominations and individuals are contingent upon these two tests, among other factors. I argue that the

Court's domineering approach to religion as well as the language of the Constitution encourages litigants to present their legal arguments in several particular ways. Groups are encouraged to identify as religious denominations, so as to qualify for protection under Article 26. Furthermore, religious adherents are encouraged to claim that their impugned practices are integral to their respective faiths. I also suggest that the Court's pattern of ruling on religion demonstrates a characteristic feature of Indian secularism: the state's propensity to intervene in religious affairs. As the administrator of the religious denomination and essential practices tests, the Indian judiciary plays a central role in balancing the right to religious freedom with other state and public interests.

### **India and Religious Differentially:**

Differentially in India is not merely a descriptive fact. For some, it is a virtue that exemplifies an ancient tradition of acceptance and religious harmony, defining India's identity as a diverse civilization. For others, it is a threat to the nation's identity, and a source of hostility and conflict. That tensions exist between religious communities in India is unsurprising given the historical circumstances under which different groups have come into contact. The Indian subcontinent is the birthplace of several major religions: Hinduism, Buddhism, Jainism, and Sikhism. Islam arrived around the 8th century CE, and was expanded by conquests between the 13th and 17th centuries as well as the efforts of Sufi missionaries. The story of Islam in India is, among other things, deeply connected to political power. Many Muslim rulers during the Delhi Sultanate and Mughal Empire stand accused of religious intolerance, persecution, and bigotry. For many Indians today, the image of Islam is irrevocably tainted with ideas of invasion, persecution, and violent conquest. Christianity also has a long history in India, going back at least to the 8th century CE. Protestantism was introduced to India by the efforts of foreign missionaries, mostly between the 17th and 18th centuries. Just as history colors the perception of Islam, Christianity in India too is often associated with proselytization and imperialism. Most historians agree that the British colonial government exacerbated tensions between religious communities.<sup>2</sup> Yet this does not tell the whole story: many Jewish and Parsi communities in India settled

there precisely to escape religious persecution elsewhere. While some praise India for its tradition of religious tolerance, others see it as the textbook example of inter-religious strife amid rising Hindu majoritarianism.<sup>3</sup> A term was even coined to describe the ideology of division along ethnic or religious lines witnessed in South Asia—communalism.

### Constitutional Provisions relating to Right of Religion

- Article 25: Freedom of conscience and free profession, practice and propagation of religion.
- Article 26: Freedom to manage religious affairs.
- Article 27: Freedom as to payment of taxes for promotion of any particular religion.
- Article 28: Freedom as to attendance at religious instruction or religious worship in certain educational institutions.

### Freedom of Religion in India (Art. 25)

- Article 25 of the Constitution guarantees freedom of religion to all persons in India. It provides that all persons in India, subject to public order, morality, health, and other provisions:
- Are equally entitled to freedom of conscience, and
- Have the right to freely profess, practice and propagate religion.
- It further provides that this article shall not affect any existing law and shall not prevent the state from making any law relating to:
- Regulation or restriction of any economic, financial, political, or any secular activity associated with religious practice. Providing social welfare and reform.
- Opening of Hindu religious institutions of public character for all the classes and sections of the Hindus.
- The Supreme Court in Tilkayat Shri Govindlalji Maharaj V. State of Rajasthan held that the test to determine the question in deciding what is an integral part of a religion is whether it is regarded as integral by the community

following that religion or not.

### Doctrine or Belief?

In Hasan Ali v. Mansoor Ali the Bombay High Court held that Articles 25 and Article 26 not only prevents doctrines or beliefs of religion but also the acts done in pursuance of religion. It thus guarantees ceremonies, modes of worship, rituals, observances, etc which are an integral part of religion. What is the essential or integral part of a religion has to be determined in the light of the doctrines and practices that are regarded by the community as a part of their religion and also must be included in them.

The Supreme Court in Commissioner, Hindu Religious Endowments, Madras v. Sri Lakshmindra Thirtha Swamiar of Sri Shirur Mutt ruled that there is no doubt that religion finds its basis in the system of doctrines regarded by those who profess that religion, but it will not be correct to say religion is nothing but a doctrine or belief.

In the case of SP Mittal v. Union of India, the court held that Religion need not be theistic. It is not merely an opinion, doctrine or belief but has an outward expression in the act as well.

### What is religion?

The German philosopher Immanuel Kant defines religion as “Religion is the recognition of all our duties as divine commands”.

Milton Yinger, American sociologist defines religion as “a system of beliefs and practices by means of which a group of people struggles with the ultimate problems of human life”.

The constitution does not define the term ‘religion’ and ‘matters of religion’. Hence, It is left to the Supreme Court to determine the judicial meaning of these terms.

### A.S. Narayan v. State of Andhra Pradesh, AIR 1996 SC 1765

In this case, Justice Hansaria observed that “our constitution makers had used the word “religion” in these two articles (Articles 25 and 26) in the sense conveyed by the word ‘dharma.’” He further explained the difference between religion and dharma as “religion is enriched by visionary methodology and theology, whereas dharma blooms in the realm of direct experience. Religion contributes to the changing phases of a culture; dharma enhances the beauty of spirituality. Religion may inspire one to

build a fragile, mortal home for God; dharma helps one to recognize the immortal shrine in the heart.”

### The National Anthem Case

Bijoe Emmanuel v. State of Kerala, (Popularly known as the national anthem case.)

The facts of this case were that three children belonging to a sect (Jehovah's witness) worshipped only Jehovah (the creator) and refused to sing the national anthem “Jana Gana Mana”. According to these, children singing Jana Gana Mana was against the tenets of their religious faith which did not allow them to sing the national anthem. These children stood up respectfully in silence daily for the national anthem but refused to sing because of their honest belief. A Commission was appointed to enquire about the matter. In the report, the Commission stated that these children were ‘law-abiding’ and did not show any disrespect. However, the headmistress under the instruction of the Dy. Inspector of Schools expelled the students.

The Supreme Court held that the action of the headmistress of expelling the children from school for not singing the national anthem was violative of their freedom of religion. The fundamental rights guaranteed under Article 19(1)(a) and Article 25(1) has been infringed. It further held that there is no provision of law which compels or obligates anyone to sing the national anthem, it is also not disrespectful if a person respectfully stands but does not sing the national anthem.

In another case of the Supreme Court, Shyam Narayan Chouksey v. Union of India It was averred in the petition filed before the Supreme Court that every person must show respect to the national anthem. The Supreme Court held that every citizen or persons are bound to show respect to the National Anthem of India, whenever played or sung on specific occasions the only exemption is granted to disabled people. It further held that playing of the national anthem in cinema halls is not mandatory but optional and directory.

Article 51A also recognizes the duty of every citizen to show respect to our national anthem. It states that every citizen of India is duty-bound to respect its ideals, institutions, National flag, National anthem, etc.

### Triple Talaq: Shayara Bano v. Union of India

Talaq-e-biddat known as triple talaq, a kind of

divorce through which a Muslim man could divorce his wife by uttering the words talaq talaq talaq. A 5 judges bench of the Supreme Court heard the controversial Triple Talaq case. The main issue, in this case, was whether the practice of Talaq-e-biddat (triple talaq) is a matter of faith to the Muslims and whether it is constituent to their personal law. By a 3:2 majority, the court ruled that the practice of Talaq-e-biddat is illegal and unconstitutional. The court also held that, an injunction would continue to bar the Muslim male from practicing triple talaq till a legislation is enacted for that purpose.

To which the government formulated the Muslim Women (Protection of Rights on Marriage) Bill, 2017. Later, Muslim Women (Protection of Rights on Marriage) Ordinance, 2018 was passed. As the 2018 ordinance was about to expire, the government formulated a fresh bill in 2019 and an ordinance was passed for the same in 2019 which was approved by the President and finally the Muslim Women (Protection of Rights on Marriage) Act, 2019 came into force on July 31st, 2019 with an objective “to protect the rights of the married Muslim women and prohibit the Muslim male to divorce the wife by pronouncing talaq”.

### Noise Pollution in the name of Religion

The Supreme Court in Church of God (Full Gospel) v. K.K.R. Majestic Colony Welfare Association held that nowhere in any religion, it is mentioned that prayers should be performed through the beating of drums or through voice amplifiers which disturbs the peace and tranquility of others. If there is any such practice, it should be done without adversely affecting the rights of others as well as that of not being disturbed in their activities.

In the case of Maulana Mufti v. State of West Bengal restrictions were placed on the use of microphones before 7am. It was held by the Calcutta High Court that Azan is an integral and necessary part of the religion but certainly not the use of microphones. It violates the basic human and fundamental right of the citizens to sleep and leisure.

### Restrictions on Freedom of Religion

The Supreme Court in In re, Noise Pollution case, has given certain directions to be followed to control noise pollution in the name of religion:

**Firecrackers:** A complete ban on sound-emitting firecrackers from 10 pm to 6 am.

**Loudspeakers:** Restriction on the beating of drums, tom-tom, blowing of trumpets, or any use of any sound amplifier between 10 pm to 6 am except in public emergencies.

**Generally:** A provision shall be made by the State to confiscate and seize loudspeakers and such other sound amplifiers or equipment that create noise beyond the limit prescribed

Freedom from taxes for promotion of any particular religion (Art. 27)

Article 27 of the Constitution prevents a person from being compelled to pay any taxes which are meant for the payment of the costs incurred for the promotion or maintenance of any religion or religious denomination.

In the case of Commissioner, Hindu Religious Endowments, Madras v. Sri Lakshmindra Thirtha Swamiar of Sri Shirur Mutt, the Madras legislature enacted the Madras Hindu Religious and Charitable Endowment Act, 1951 and contributions were levied under the Act. It was contended by the petitioner that the contributions levied are taxes and not a fee and the state of madras is not competent to enact such a provision. It was held by the Supreme Court that though the contribution levied was tax but the object of it was for the proper administration of the religious institution

**Teaching of Guru-Nanak: D.A.V. College v. State of Punjab, (1971)**

In this case, Section 4 of the Guru Nanak University (Amritsar) Act, 1969 which provided that the state shall make provisions for the study of life and teachings of Guru Nanak Devji was questioned as being violative of Article 28 of the Constitution. The question that arose was that the Guru Nanak University is wholly maintained out of state funds and Section 4 infringes Article 28. The court rejecting this held that Section 4 provides for the academic study of the life and teachings of Guru Nanak and this cannot be considered as religious instruction.

**International Scenario towards Freedom of religion:** International human rights law provides a framework for the practical resolution of situations where freedom of religion or belief appears to conflict with other rights or there are competing claims for the protection of freedom of religion or belief. Several inter-related principles can be derived from the case law. These include the principles of:

**Non-discrimination**, meaning that there is no 'right

to discriminate'; in respect of claims for religiously-motivated refusals to provide goods or services to same-sex couples, courts have consistently held either that therequirement to provide goods and services to the public in a non-discriminatory way is not an interference with religious freedom, or that such interference is justified by the goal of combating discrimination

**Neutrality and Impartiality** of the state as between religions and as between religious and non-religious forms of belief; **respect for others** to believe and the duty of the state to create a level playing field between different groups of different religions or beliefs or no religion or belief, which may be summarised as respecting the believer rather than the belief;

**Pluralism and Tolerance**, which includes that there is no right not to be offended; institutional and personal autonomy;

**Proportionality** in determining whether an interference with the right to manifest one's religion is justified: the restriction must have a legitimate aim and the means used to achieve that aim must be proportionate and necessary. This means that a fair balance needs to be struck between the rights of the individual and the rights of others. The proportionality analysis – the balancing act - is highly contextual and fact-specific and precludes making abstract determinations about competing rights or the outcome of any specific case;

**no hierarchy of rights**, meaning that in each instance, an attempt is made to maximise each of the rights engaged and to ensure that none is inappropriately sacrificed; and,

**legality**, i.e. that restrictions on rights must be clear, publicly accessible, non-retrospective, and that people must be able to understand the circumstances in which restrictions might be imposed and foresee the consequences of their actions with a degree of certainty.

The human rights-based principles above should be used not only within courts and tribunals but also in the wider public sphere. Additionally, this paper suggests a number of ground rules for negotiating differences outside the courts, including:

**Good faith and Reciprocity:** mutual respect for the right of all to express views, whatever they might be; willingness to engage in mediation, negotiation and conciliation to resolve differences and an avoidance of litigation wherever possible; an

awareness of the need to avoid essentialising religions or beliefs or misattributing certain views or values to entire groups or communities, whether these are communities identified by their religion or belief, their sexual orientation or any other characteristic; and a commitment to invoking legal cases in public debate in a way which is accurate and socially-contextualised, since erroneous reporting of high-profile cases may make tensions between religion or belief and other interests appear more prevalent or intractable than they actually are.

### Religion: Freedom of Expression

Lord Pearson of Rannoch: Her Majesty's Government, further to the Written Answer by Lord Bourne of Aberystwyth on 3 July, whether UK citizens are free to criticise religions in private and in public. Lord Bourne of Aberystwyth | Department for Communities and Local Government: Citizens of the United Kingdom are of course, free to criticise religions in private and public. However, it is not acceptable to stir up or promote hatred and violence against people because of their faith. Freedom of speech is one of the values that underpin our society but there are limits – it is not acceptable for people to abuse freedom of speech to incite hatred and division. 26 Jul 2017 Written questions | Answered | House of Lords | Religious Freedom Jim Shannon: To ask the Minister for Women and Equalities, what the Government's policy is on protecting the right of (a) Christians and (b) people of other religious beliefs to wear or carry religious symbols in public. Nick Gibb | Women and Equalities: The Government believes that both Christians and people of other religious beliefs should be able to wear or carry religious symbols in public so long as they act within the boundaries of the law while doing so. 29 Jun 2017 | Written questions | Answered | House of Commons |

Visible Religious Symbols: European Court Ruling Urgent question on the recent Court of Justice of the European Union ruling allowing employers to ban workers from wearing religious dress and symbols in the workplace.

### Conclusion

India is the most diverse country with respect to religion. Being a secular country it does not have its own religion and every citizen has the right to choose, practice, propagate and even change his or

her religion. However, these rights are not absolute but subject to certain restrictions provided by the constitution. No person in the name of religion can do any act that is opposed to the public policy or creating any kind of disturbances or intolerance among the people of India.

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