

**RELIGIOUS DISCRIMINATION UNDER THE INDIAN CONSTITUTION: UNPACKING THE
CONTENTS OF RELIGION**

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Abstract

Grounds' are effectively the building blocks of discrimination law, both in theory and in practice. Understanding what a 'ground' means helps determine what the scope and efficacy of discrimination law can be. The primary objective of this paper is to answer the question, "What does 'religion' as a ground of discrimination mean?" As this paper argues, this has proven to be a particularly vexed question.

The paper goes about undertaking this enquiry in two stages. The first stage involves a study of cases involving direct religious discrimination, as decided by various High Courts, and the Supreme Court. What emerges from this study is that 'religion' has predominantly been understood to mean the 'religious status' of an individual. While there exists a normative justification for this pattern, I argue that there is a need to dig deeper because the approach does not explain all cases that have been litigated.

The second stage of the enquiry thus identifies and studies uncommon judicial opinions that exist on the periphery, which examine several elements beyond religious status. In these cases, 'religion' has been understood to include several elements that would ordinarily be construed to be a part of 'religious freedom'. This paper then proceeds to unpack the meaning/content of religion in these cases that exist on the periphery by exploring three alternatives. It argues that 'religion' under Articles 14 and 15 of the Constitution must be understood to include sincerely held religious beliefs as well.

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I. INTRODUCTION

Religious discrimination often brings to the fore instances of systemic violence and persecution, be it the genocidal treatment of Jews in Nazi Germany, or the indiscriminate detention of Muslims at Guantanamo Bay in the aftermath of the 9/11 terror attacks. Closer home, the Citizenship (Amendment) Act, 2019 and the potential detention of persons based on the National Register of Citizens too have stoked concerns of religious discrimination.¹

Religion as a ground of discrimination law is anomalous and complex. For one, it does not fulfil some of the identifying principles proposed to recognise a marker as a ‘ground’ of discrimination. According to Fredman, these identifying principles may include immutability² or a history of disadvantage³ or a lack of political representation⁴. Religion though does not neatly fit the bill for any of them. Religion is not immutable in the strict sense in that people do have the choice, albeit sometimes difficult to exercise, to opt out of a religion or to convert. This is unlike other markers such as race. Similarly, a history of disadvantage may vary across countries and societies. Dominant religions in one society may have a history of oppression in another. At times, religions also breed intolerance which adds to the complexity. Religious adherents may discriminate against other members of the same religion who are less observant or who espouse a different doctrine.⁵ Problems increase when faith is used as a basis to discriminate against people on the basis of sex or sexual orientation, leading to calls for the attenuation of ‘religion’ as a ground.⁶

What then does ‘religion’ mean? This seemingly innocuous question too adds to the complexity surrounding religion, and has now troubled several scholars in the area. The reason for this complexity becomes particularly clear when religion is compared to some of the other markers. To consider a few examples — ‘citizenship’ denotes membership rights granted by a country which brings along with it a set of rights and obligations; ‘language’ is a mode of communication, and would include braille, sign language and dialects; ‘place of birth’ is

¹Suhrith Parthasarathy, *Why the CAA Violates the Constitution*, THE INDIA FORUM (17th January 2021), available at <https://www.theindiaforum.in/article/why-caa-violates-constitution>.

²Sandra Fredman, *DISCRIMINATION LAW* 131 (2011, 2nd ed.).

³*Ibid.*, at 138.

⁴*Ibid.*, at 134.

⁵*Ibid.*, at 74.

⁶See A. McColgan, *Class Wars: Religion and (In)equality in the Workplace*, 38 *INDUSTRIAL LAW JOURNAL* (2009).

exactly what the phrase says it is and does not extend to the place of domicile. With these definitions, it becomes possible to identify individuals as Indian or Pakistani; Malayalam-speaking or Hindi-speaking, and so on. Religion however is not the same.

Admittedly, religion would include the religious identity of an individual. However, in a country such as India, a person's religiosity may be defined in more ways than one.⁷ A person may be a 'Hindu' in the eyes of the law,⁸ but a devout follower of the tenets of Jainism in practice. If Hindus were barred from applying for the post of an epigraphist at historical mosques in New Delhi,⁹ the individual may be discriminated against for being a Hindu. However, if the Government of the National Capital Territory of Delhi were to refuse any holiday whatsoever during the Paryushan festival, the same individual may be discriminated against for following the tenets of Jainism.

Moreover, religion is not only about identity but also about beliefs and practices. Hypothetically, let us presume the Code of Criminal Procedure were amended and a right to observe the facial expressions of a witness were incorporated as a manifestation of the right to a fair trial.¹⁰ In the course of a trial, the witness who is a Muslim woman refuses to lift her niqab for religious reasons. If one were to impugn the law as being discriminatory, one may say that she was treated unfairly because she was a Muslim. The discrimination was on account of her identity as a Muslim. However, it would be pedantic to suggest that one could arrive at that conclusion without considering the adverse impact caused by the compulsion to lift the niqab. The discrimination came to be because a religious practice was made more burdensome for a vulnerable group, i.e., Muslim women. Thus, the question that then confronts us is thus — when we talk about 'religion' in discrimination law, are we also concerned about religious practices and rituals?

The difficulty posed by this question becomes clearer when we compare the right against religious discrimination with the right of religious freedom. In several bills of rights, including Part III of the Constitution of India, religious rights are protected not only by a prohibition of

⁷This is not to say that this issue does not confront us in some of the other grounds in discrimination law as well. Gender, being one example that comes to mind.

⁸Section 2, Hindu Marriage Act, 1955.

⁹See *K.P.A. Nallamohammed v Director, Department of Archaeology*, 2011 SCC Online Mad 145 (Madras High Court). The facts in this case were the opposite of what has been hypothesized above.

¹⁰The facts in this example are an adaptation of the case facts in *R v N.S.*, 2012 SCC 72 (Supreme Court of Canada).

discrimination, but also by a protection of the freedom to choose, profess, propagate and practice one's religion. How do the contents of these two rights differ? In the above hypothetical, was the woman discriminated against for being a Muslim, or was her right to practice her religious beliefs freely impeded? The very same question has also arisen in the facts of *Resham v State of Karnataka*,¹¹ (popularly known as the hijab-ban case) where the constitutional validity of the insistence laid by educational institutions on Muslim female students removing the hijab inside their premises has been impugned.¹² Consider another situation,¹³ where a law that proscribed the intentional possession of a 'controlled substance' unless it is prescribed by a medical practitioner. Two employees ingest one such substance for sacramental purposes at a ceremony. When their employer learns about this incident, they are discharged. They are also barred from claiming unemployment benefits for having engaged in work-related 'misconduct'. Does the law, in this instance, impose an unreasonable burden on the freedom to follow religious practices? Or, does a neutrally worded law have a disproportionate impact on members of that religious denomination? On the face of it, there appears to be an overlap in the content of 'religion' insofar as these two rights are concerned.

Given these three distinguishing features of religion as a ground of discrimination, which set it apart from other markers of discrimination, the need to unpack its contents does assume significance. Put in other words, what is the meaning of 'religion' in discrimination law. This question assumes significance because of the direct bearing it has on the scope of discrimination law as a discipline. The extent of protection which discrimination law can offer flows not only from how its tools are designed, or how its objectives are framed, but also from how the various 'grounds' or 'markers' along which discrimination occurs are understood. Our understanding of 'grounds'/'markers' has a direct impact on how we are able to identify wrongs associated with those markers, and on how we structure remedies. An endeavour to unpack the contents of 'religion' is thus part of a larger exercise to understand the contours of discrimination law itself. In this paper, I propose to make precisely this attempt.

¹¹W.P. No. 2347/20222 (Karnataka High Court).

¹²*Resham v State of Karnataka*, W.P. No. 2347/2022 (Order dt. 10.02.2022) (Karnataka High Court). At the time of finalisation of this article for publication, the Judgement of the Karnataka High Court was still awaited. Hence, it remained to be seen if and how this question was addressed by the High Court.

¹³The facts in this example are an adaptation of the case facts in *Employment Division, Department of Human Resources, Oregon v Smith*, 494 U.S. 872 (1990) (Supreme Court of the United States).

There are two stages to my enquiry. The first includes studying our precedent on the issue, wherein I contend that the unpacking exercise has already been done to a large extent. The picture that emerges therefrom is that ‘religion’ only refers to the ‘religious status’ of an individual, namely, whether a person is a Hindu or a Muslim or a Christian as a matter of identity. A person does not necessarily need be a devout Hindu or Muslim or Christian. Normatively, Khaitan and Norton¹⁴ offer a sound explanation for the adoption of ‘religious status’ as a metric. However, I argue that this does not explain the entire picture.

The second stage of my enquiry is concerned with a handful of cases where courts and litigants have understood religion as something more than just ‘religious status’. Moreover, I also contend that this trend is only likely to expand in the future, as litigants may be strategically inclined to structure infringement of religious freedom as violations of the protection against indirect discrimination. To unpack the content of ‘religion’ for these cases that lie at the penumbra, I explore three possible alternatives. By a process of elimination, I arrive at the conclusion that in these few cases ‘religion’ may have to be understood as every sincerely held religious belief.

II. THE CONSTITUTIONAL SCHEME

Constitutionally, the right against discrimination on the grounds of religion and the right to freedom of religion are covered by two distinct set of provisions. Whereas Article 14¹⁵ guarantees equality before the law and equal protection of the laws to all persons, Articles 15(1) and (2) of the Constitution state,

“(1) The State shall not discriminate against any citizen on grounds only of religion, race, caste, sex, place of birth or any of them.

(2) No citizen shall, on grounds only of religion, race, caste, sex, place of birth or any of them, be subject to any disability, liability, restriction or condition with regard to-

(a) access to shops, public restaurants, hotels and places of public entertainment;

¹⁴*Infra* note 94.

¹⁵Article 14, Constitution of India, 1950.

(b) the use of wells, tanks, bathing ghats, roads and places of public resort maintained wholly or partly out of State of funds or dedicated to the use of the general public.”¹⁶

On a bare perusal of the text of Articles 15(1) and (2), it appears that there is an absolute right to be protected against discrimination by the State on the grounds of religion. Not only that, there is also an absolute right to this effect against non-State actors insofar as access to shops, public restaurants, hotels, wells, tanks etc. is concerned. More importantly, unlike Article 15(3) which empowers the State to make special provisions in favour of women, or Article 15(4) which empowers it to enact similar provisions for the advancement of socially and educationally backward classes of citizens, there is no provision which enables similar measures qua religious groups.

Article 16 of the Constitution carves out a similar right qua public employment, albeit with one exception. Articles 16(1), (2) and (5) of the Constitution state,

“(1) There shall be equality of opportunity for all citizens in matters relating to employment or appointment to any office under the State.

(2) No citizen shall, on grounds only of religion, race, caste, sex, descent, place of birth, residence or any of them, be ineligible for, or discriminated against in respect of, any employment or office under the State. ...

.... (5) Nothing in this article shall affect the operation of any law which provides that the incumbent of an office in connection with the affairs of any religious or denominational institution or any member of the governing body thereof shall be a person professing a particular religion or belonging to a particular denomination.”¹⁷

The Constitution thus envisages a scenario wherein a distinction on the grounds of religion may need to be made to maintain the ‘religious character’ of an institutions, or may be necessary for discharging certain ‘religious duties’. Such a distinction would not amount to discrimination. Clause (5) is noteworthy for another reason as well. The absence of a similar

¹⁶Article 15, Constitution of India, 1950.

¹⁷Article 16, Constitution of India, 1950.

provision in Article 15 buttresses the conclusion that, except for the scope carved out in Article 16(5), the protection against direct discrimination on the ground of religion is absolute.

Moreover, following the decision of the Supreme Court in *Lt. Col. Nitisha v Union of India*,¹⁸ the constitutional protection against indirect discrimination has been recognised in India. Unlike direct discrimination,¹⁹ this is rooted in Article 14 of the Constitution. To make out a case of indirect discrimination, a plaintiff would have to show that a neutrally worded measure had a differential effect along the lines of religion, and this in turn reinforced, perpetuated or exacerbated disadvantage.²⁰ Once the plaintiff has established these elements, the State may attempt to show that the provision, criteria or practice was necessary to attain the proposed objective.²¹ According to the Supreme Court, while a judge must accord some deference to the views of the State, whether or not the same objective could be attained by less discriminatory measures would have to be examined.²² Overall thus, it is plausible to contend that the right against religious discrimination as guaranteed under Articles 14 through 16 of the Constitution is a strong one.

Compare this with the protection offered by Article 25 of the Constitution. While conferring the right to freedom of conscience and the right to freely profess, practice and propagate religion, Article 25 makes exercise of these rights subject to “*public order, morality and health*”. Clause 2 of Article 25 further says,

“Nothing in this article shall affect the operation of any existing law or prevent the State from making any law—

(a) regulating or restricting any economic, financial, political or other secular activity which may be associated with religious practice;

*(b) providing for social welfare and reform or the throwing open of Hindu religious institutions of a public character to all classes and sections of Hindus.”*²³

¹⁸*Lt. Col. Nitisha v Union of India*, Writ Petition (C) No. 1109/2021 (Judgement dt. 25.03.2021) (“Nitisha”).

¹⁹See Dhruva Gandhi, *Locating Indirect Discrimination in India: A Case for Rigorous Review under Article 14*, 13(4) NUJS LAW REVIEW (2020).

²⁰*Nitisha*, *supra* note 18, at ¶ 69.

²¹*Ibid.*, at ¶ 70.

²²*Ibid.*

²³Article 25, Constitution of India, 1950.

Evidently then, the right to religious freedom is subject to a wider set of limitations as compared to the right against religious discrimination. One may thus argue that the former is a comparatively weaker right. More so, because Article 25(1) is also subject to the other provisions of Part III of the Constitution, and thereby to Article 15.

While it may now be settled law that fundamental rights ought not to be understood in silos,²⁴ it is apparent on a comparison of Articles 15 and 16 on the one hand with Article 25 on the other, that the Constitution offers a distinct set of protections and has carved out two distinct frameworks. Whether one pitches their case under Articles 14 through 16 as opposed to Article 25; the ramifications that might follow may be different. Therefore, in addition to the reasons surveyed in the Introduction of this paper, unpacking the contents of ‘religion’ in discrimination law is also important to maintain the constitutional scheme. If ‘religion’ is understood so capaciously that its contents overlap with ‘religious freedom’, there is a possibility that the distinction between the two sets of rights from becoming blurred. This paper will now turn to the precedent in India under Articles 14 through 16 to unpack the meaning of ‘religion’.

Before proceeding to a perusal of the case law though, there is one more noteworthy aspect about the comparison of Articles 15 and 16 with Article 25. Article 25 says, “*all persons are equally entitled to freedom of...*”. By using the phrase ‘*equally entitled*’, it would appear that Article 25 too carries a guarantee of non-discrimination.²⁵ If that were so, there are two distinct guarantees against discrimination that emerge from the text of Part III of the Constitution insofar as religion is concerned. Given that one is weaker than the other, there is an added reason to unpack the meaning of ‘religion’ for the purposes of these two fundamental rights.

III. UNPACKING ‘RELIGION’ IN PRECEDENT

A. Religion is Religious ‘Status’: The Predominant Trend

Religious discrimination, as a tool, has frequently been deployed in constitutional challenges to statutes codifying personal laws. In *Ammini v Union of India*,²⁶ the constitutional validity of

²⁴*Maneka Gandhi v Union of India*, (1978) 1 SCC 248.

²⁵*See Indian Young Lawyers Association v State of Kerala*, Writ Petition (C) No. 373/2006 (Judgement Dt. 28th September 2018), Nariman J. ¶ 29; Chandrachud J. ¶ 6. (“Sabrimala”).

²⁶*Ammini v Union of India*, 1995 SCC Online Ker 47 (Kerala High Court) (“Ammini”).

Section 10 of the Indian Divorce Act, 1869 was challenged on the grounds that Christian spouses could not seek divorce on the grounds of cruelty or desertion alone, which were independent grounds for spouses of other religions. Similarly, in *Preman v Union of India*,²⁷ Section 118 of the Indian Succession Act, 1925 was challenged on the ground that Christians were barred from bequeathing property for religious and charitable purposes. In *P.E. Matthew v Union of India*,²⁸ Section 17 of the Indian Divorce Act, 1986 was challenged on the ground that it required a confirmation by the High Court of a decree for dissolution of a marriage between Christian spouses.

In *Ammi*, the Kerala High Court held that insofar as cruelty and desertion were not treated as independent grounds of divorce, there was discrimination on the basis of religion and thereby, a violation of Article 15 of the Constitution.²⁹ Likewise, in *Preman*, the Court concluded that Section 118 of the Indian Succession Act, 1925 discriminated against Christians vis-à-vis non-Christians.³⁰ In *Matthew*, even though the Court arrived at the conclusion that there was no justification for continuing with a provision like Section 17 when parallel provisions were not found either in the Hindu Marriage Act, 1955 or in the Special Marriage Act, 1954,³¹ it did not strike down the provision on the basis that ‘personal laws’ were not ‘law’ for the purposes of Part III of the Constitution.³²

What is notable for our purposes is that in all three decisions, it was the religious identity of a person which was used as a metric to contest the constitutional validity of the laws. The cause of action in every case was framed as being a deprivation of certain benefits to a group of individuals, which was defined by a common religious identity. The Courts too understood religion under Article 15 as religious status, i.e. as membership to a particular religious group. A similar approach was also seen in *Thakur Sheokaran Singh v Daulatram*,³³ wherein the application of the rule of ‘Dadumpat’³⁴ was struck down for being discriminatory on the

²⁷*Preman v Union of India*, 1998 SCC Online Ker 158 (Kerala High Court) (“Preman”).

²⁸*P.E. Matthew v Union of India*, 1999 SCC Online Ker 126 (Kerala High Court) (“Matthew”).

²⁹*Ammi*, *supra* note 26, at ¶ 36.

³⁰*Preman*, *supra* note 27, at ¶ 43-45.

³¹*Matthew*, *supra* note 28, at ¶ 14.

³²*Ibid.*, at ¶ 12.

³³*Thakur Sheokaran Singh v Daulatram*, 1955 SCC Online Raj 24 (Rajasthan High Court).

³⁴Dadumpat was a branch of the Hindu Rule of Debts, wherein if the debtor was a Hindu, the amount of interest recoverable could not exceed the principal.

grounds of religion because its benefit could not be availed by Christian or Muslim debtors, but was confined to Hindus.³⁵

Moreover, viewing wrongs pertaining to the religious identity of an individual as violations of a guarantee of non-discrimination as opposed to a violation of religious freedom has not been a trend confined only to cases involving personal laws. Courts have even arrived at a finding of a violation of Article 15(1) of the Constitution in cases, where public scholarship programmes have been limited to students of particular religious communities³⁶ or, where honorariums have only been granted to imams and muazzins of various mosques in a state³⁷ or, where persons professing Islam were disqualified from working as an epigraphist³⁸ or, where a sub-quota in reservations was carved out for certain minority religions.³⁹ In all of these cases, the fact that an individual belonged to, or identified with a particular religion, is what led to them suffering a wrong. Examples like these can be multiplied.⁴⁰

³⁵Thakur Sheokaran Singh v Daulatram, *supra* note 33, at ¶ 13.

³⁶Adam Chaki v Government of India, 2012 SCC Online Guj 5439 (Gujarat High Court). The fact that religion was understood as religious status/identity is evident from one of the concluding passages where the Court observes,

“We have already pointed out that if the Central Government floated a scheme in favour of the students irrespective of religion, the same could be saved but having restricted its benefit only in favour of students of five specific religions, it cannot escape the rigour of Article 15(1) of the Constitution. In these cases, those poorer and meritorious student of a religion not belonging to those five religions, who are now deprived of the benefit, would be entitled such benefit only if they would have belonged to those five religions. Thus, religion is the only reason for which those students are deprived....”

The Division Bench thereafter referred the questions before it to a Full Bench of three Judges.

³⁷Bharatiya Janata Party v State of West Bengal, 2013 SCC Online Cal 15870 (Calcutta High Court). In this case, the Court concluded,

“...The State Government cannot spend any money for the benefit of few individuals of a particular religious community ignoring identically placed individuals of the other religious communities since the State cannot discriminate on the ground of religion in view of the Article 15(1) of the Constitution of India.”

³⁸K.P.A. Nallamohammed v Director, Department of Archaeology, 2011 SCC Online Mad 145 (Madras High Court).

³⁹R. Krishnaiah v Union of India, 2012 SCC Online AP 113 (Andhra Pradesh High Court).

⁴⁰In State of Rajasthan v Thakur Pratap Singh [(1961) 1 SCR 222], the constitutional validity of Section 15 of the Police Act, 1861 was in issue. By this provision, Harijan and Muslim members of the community had been exempted from bearing the cost of the police force maintained in the area. The Court held that this was a clear case of discrimination on the basis of religion or caste.

In N Sreedharan Nair v Mottaipatti Chinna Pallivasal Muslim Jamath, [2003 SCC Online Mad 171], the validity of the Madras City Tenants' Protection (Amendment) Act, 1994 was challenged. By virtue of this amendment, an exemption had been granted to all properties owned by religious institutions from the purview of the parent statute. Insofar as the challenge qua Article 15(1) was concerned, the Court dismissed the challenge on the ground that the amendment did not *“discriminate between citizens on the basis of the religion they belong to”*. The exemption was granted *en masse* to all religious institutions. Therefore, the Court once again understood ‘religion’ as the religious status of citizens.

B. Explaining Contrary Precedents

Based on this survey, it does follow that courts have arrived at an understanding of what ‘religion’ means when a challenge of direct discrimination is before them. However, there have been instances when courts have not labelled classifications based on religious identities as discrimination. In *Gogireddy Sambireddy v Gogireddy Jayamma*⁴¹, a Hindu husband had impugned the vires of Sections 11 and 17 of the Hindu Marriage Act, 1955 insofar as it prohibited bigamy. It was contended that these provisions violated Article 15(1) of the Constitution. The court however, upheld the vires of the statute. In doing so, there were two strands to the reasoning adopted by the court. *One*, the Hindu Marriage Act was not applicable only to those individuals who adhered to the Hindu religion. Instead, it was applicable to members following other religions as well. Therefore, the classification could not be said to have been based on religion alone.⁴² *Two*, the Hindu Marriage Act while introducing monogamy was undoubtedly a social welfare legislation enacted under Article 25(2) of the Constitution. It would therefore be a travesty to hold a statute intended for the benefit of a certain class as discriminating against them.⁴³

On the face of it, the first of these reasons appears to be specious in that on the application of a ‘but-for’ test—but for a man being a Muslim, he would be liable to be punished for bigamy—discrimination is readily made out. Moreover, while the Hindu Marriage Act is admittedly not limited only to followers of Hinduism, it explicitly spells out the religions (such as Buddhism, Jainism and Sikhism) covered within its ambit. Therefore, preferential treatment in favour of a religion was readily made out, and the identification of ‘personal laws’ as the basis of classification was farcical.

A similar reluctance is also witnessed in *Srinivasa Iyer v Saraswathi Ammal*.⁴⁴ In that case, the challenge was to the prohibition of bigamy in the Madras Hindu (Bigamy Prevention and Divorce) Act, 1949. While upholding the constitutional validity of the statute, the Madras High Court observed, “... *the essence of that classification is not their religion but that they have all along been preserving their personal laws peculiar to themselves which was derived from the smritis, commentaries, custom and usage, in the same manner in which the Muhammadans are*

⁴¹*Gogireddy Sambireddy v Gogireddy Jayamma*, 1971 SCC Online AP 134 (Andhra Pradesh High Court) (“Sambireddy”).

⁴²*Ibid.*, at ¶ 10.

⁴³*Ibid.*

⁴⁴*Srinivasa Iyer v Saraswathi Ammal*, 1951 SCC Online Mad 272 (Madras High Court) (“Srinivasa Iyer”).

*subject to their personal law.*⁴⁵ Even the opinion of Chagla C.J. in *State of Bombay v Narasu Appa Mali*,⁴⁶ adopts a similar refrain. In that case, the challenge was to the validity of the Bombay Prevention of Hindu Bigamous Marriages Act, 1946. While upholding the constitutional validity of the law, Chagla C.J. observed, “....*Now, it is an historic fact that both Muslims and the Hindus in this country have their own personal laws which are based on their respective religious texts and which embody their own distinctive evolution and which are coloured by their own distinctive backgrounds..... Therefore, what the Legislature has attempted to do by the Hindu Bigamous Marriages Act is to introduce social reform in respect of a particular community having its own personal law.*”⁴⁷

In my opinion, the legal reasoning in these cases was specious and thus, they do not deter us from the conclusion which follows from the cases previously examined. This observation is further strengthened when we consider the decision of the Constitution Bench of the Supreme Court in *Shayara Bano v Union of India*.⁴⁸ While adjudicating the practice of triple talaq, Khehar CJI and Nazeer J. in a separate opinion observed, “...*There can be no doubt, that the ‘personal law’ has been elevated to the stature of a fundamental right in the Constitution.... Because, in accepting the prayer(s), this Court would be denying the rights expressly protected under Article 25.*”⁴⁹ Joseph J. in a concurring opinion held, “*Except to the above extent, the freedom of religion under the Constitution is absolute and on this point, I am in full agreement with the learned Chief Justice. However, on the statement that triple talaq is an integral part of the religious practice, I respectfully disagree.*”⁵⁰ While the decision has been critiqued on this point,⁵¹ what does follow is that three out of the five judges agreed on protection of personal laws under Article 25 of the Constitution. If this were so, and personal laws do share a nexus with religious freedom, a classification based on personal laws could easily have qualified as a classification based on religion in both *Sambireddy* and *Srinivasa Iyer*.⁵²

⁴⁵*Ibid.*, at p 268.

⁴⁶*State of Bombay v Narasu Appa Mali*, 1951 SCC Online Bom 72 (Bombay High Court) (“Narasu”).

⁴⁷*Ibid.*, at ¶ 12.

⁴⁸*Shayara Bano v Union of India*, Writ Petition © No. 118 of 2016 (Judgement dt. 22nd August 2017).

⁴⁹*Ibid.*, at ¶ 172 (Khehar CJI. And Nazeer J.).

⁵⁰*Ibid.*, at ¶ 24 (Joseph J.)

⁵¹Gautam Bhatia, *The Supreme Court’s Triple Talaq Judgement*, INDIAN CONSTITUTIONAL LAW & PHILOSOPHY (22nd August 2017), <https://indconlawphil.wordpress.com/2017/08/22/the-supreme-courts-triple-talaq-judgment/>.

⁵²The contention advanced in this paragraph deals with the scope of the word ‘religion’. However, while we debate the scope of that word, it is equally important to remember that the range of cases to which this debate may be applicable is still conditioned by the decision of the Bombay High Court in *Narasu*. Both Chagla C.J. (¶ 15-16) and Gajendragadkar J. (¶ 23) agreed that the phrase ‘laws in force’ in Article 13 of the Constitution does not include ‘personal laws’. Therefore, although the correctness of this decisions has now been questioned [Sabrimala,

Perhaps, a better reason for the court's decision can be found in the second prong of the rationalisation employed in *Sambireddy*, i.e. a prohibition of bigamy was a social welfare measure adopted under Article 25(2). The court was reluctant to adopt a levelling down approach. Only because a social welfare legislation had been enacted for one religious community, and not for the other, did not entail that the former be struck down. There could also be an external explanation for these two decisions. Commentators have observed that one of the reasons why Muslim personal law was not further codified or amended post-independence, around the same time when Hindu personal law was reformed, was owing to a belief that a traumatised post-partition Muslim minority must not be made subject to the decisions of a Hindu majority legislature.⁵³ The legislators wanted a call for reform to emanate from within the Muslim community. Moreover, in the aftermath of the partition, there was also a political need for accommodation of different communities.⁵⁴ Viewed from this lens, the decisions in *Srinivasa Iyer* and *Sambireddy* can also be explained as conscious attempts to not disturb a delicate social balance.

The reluctance to arrive at a finding of a violation of Article 15(1) in case of a distinction based on religious status is also seen in *Squadron Leader Giri Narayana Raju v Officer Commanding 48 Squadron*⁵⁵. In *Raju*, the constitutional validity of a Circular dated 28th March 1970 issued by the Air Headquarters, New Delhi was impugned. Under this Circular, it was made compulsory for all Air Force Personnel to wear crash helmets. However, it was also clarified that this Circular would not apply to Sikh personnel or to others who wore a turban while riding the vehicles covered by the Circular. It was this exemption which was under challenge for being discriminatory. The petitioner had been caught riding a scooter without a crash helmet, and had been reprimanded by the Air Force Officer Commanding-in-Chief of the Central Air Command.⁵⁶

supra note 25, at ¶ 375-397] a challenge to several customs and uncodified personal laws on the grounds of religion continues to be constrained by *Narasu*.

⁵³Mohammed Ayoob, *A just and equal code*, THE HINDU (13th October 2018), <https://www.thehindu.com/opinion/op-ed/a-just-and-equal-code/article23944012.ece>.

⁵⁴Justin Jones, *Towards a Muslim Family Law? Debating Muslim women's rights and the codification of personal laws in India*, 28(1) CONTEMPORARY SOUTH ASIA (2020).

⁵⁵*Squadron Leader Giri Narayana Raju v Officer Commanding 48 Squadron*, 1974 SCC Online All 291 (Allahabad High Court) ("Raju").

⁵⁶*Ibid.*, at ¶ 2.

The Court nullified this challenge by stating that the classification carved out by the exemption was between personnel who wore a turban and those who did not.⁵⁷ Wearing a turban would not only minimise the risk of a head injury in case of an accident; wearing a helmet along with a crash helmet would be inconvenient.⁵⁸ According to the Court, Sikhs wore a turban because it had religious significance for them and this religious sentiment was widely acknowledged. The inclusion of Sikhs in the exemption then was only clarificatory in nature.⁵⁹ Therefore, there was no discrimination.

As to the question of religious discrimination, we only have the Court's observation that, "...on the face of it, the instruction would apply to Sikh personnel driving such a vehicle without a turban as well. But it is not necessary for me to express any final opinion on that point."⁶⁰ Therefore, the Court consciously steered away from the question of a distinction based on religious status, i.e. between Sikh and non-Sikh individuals, even though it could have examined it. The Court may have done so because the petitioner in this case had not suffered any harm on account of his religious status. A constitutional challenge on the grounds of religion was only an afterthought. In the absence of any conclusive finding on the point of religious discrimination, this decision too does not lead us away from the inference that 'religion' for the purposes of direct discrimination has been understood as religious status.

In this regard, one other decision which may need to be explained is that of the Supreme Court in *John Vallamattom v Union of India*.⁶¹ The issue in this case was identical to the one before the Kerala High Court in *Preman* — the constitutional invalidity of Section 118 of the Indian Succession Act on the ground that it barred Christians from making religious or charitable bequests. The Court concluded that there had been a breach of Article 14 of the Constitution. However, as to Article 15, unlike the Kerala High Court, Khare C.J. in a concurring opinion (with which Sinha J. agreed⁶²) observed,

“So far as the second argument of the learned counsel for the petitioner is concerned, it is suffice to say that Article 15 of the Constitution of India may not

⁵⁷*Ibid.*, at ¶ 12.

⁵⁸*Ibid.*, at ¶ 12.

⁵⁹*Ibid.*, at ¶ 11-12.

⁶⁰*Ibid.*, at ¶ 12.

⁶¹*John Vallamattom v Union of India*, (2003) 6 SCC 611 (Supreme Court of India) (“*John Vallamattom*”).

⁶²*Ibid.*, at ¶ 46.

have any application in the instant case as the discrimination forbidden thereby is only such discrimination as is based, inter alia, on the ground that a person belongs to a particular religion...In other words, the right conferred by Article 15 is personal. A statute, which restricts a right of a class of citizens in the matter of testamentary disposition who may belong to a particular religion, would, therefore, not attract the wrath of clause (1) of Article 15 of the Constitution of India.”⁶³

It is hard to see how the discrimination perpetuated by Section 118 of the Indian Succession Act is not one based on the religious membership of an individual. A testator could not make a charitable bequest because of her Christianity.⁶⁴ Moreover, the distinction drawn between citizens and class of citizens also appears to be specious in that even if that distinction were to hold true, discrimination against a class of citizens is discrimination against individual citizens as well. However, leaving aside the incorrect application of the principle to the facts, the point remains that the Supreme Court in *John Vallamattom* too understood religion as religious status.⁶⁵

Overall then, even accounting for the cases where courts have not returned findings of a violation of Article 15(1) where a distinction was made basis the religious status of an individual, it would appear that there has been some consensus as to the content of the word ‘religion’. While I will address the normative desirability of this position subsequently, it is noteworthy that most, if not all, of these cases involved a claim of direct discrimination. Insofar as indirect discrimination is concerned, there are few precedents that guide us. However, in the ones there are, it appears that litigants have adopted a more capacious understanding of the word ‘religion’.

Moreover, intuitively, it also appears that it would be difficult to pitch the cases surveyed in this Part as violations of Article 25. One reason could be that the harm in many of these cases is comparative in nature. A second could be that while a distinction has been drawn on the

⁶³*Ibid.*, at ¶ 39.

⁶⁴The reasoning of the then Chief Justice appears to be shakier when his findings under Article 14 are considered. He had observed (¶ 29) that there was no reason forthcoming from the State to exclude persons professing Christian faith from the purview of charitable bequests.

⁶⁵The only contrary viewpoint in this regard emanates from the concurring opinion of Nariman J in *Sabrimala*. Nariman J observed, “Where the practice of religion is interfered with by the State, Articles 14, 15(1), 19 and 21 would spring into action. Where the practice of religion is interfered with by non-State actors, Articles 15(2) and Article 17 would spring into action.” (¶21.8). It would appear that Nariman J. espouses a more expansive view of ‘religion’.

basis of religious identity, harm was not done to the ability to choose, profess and practice one's religion. Instead, it was caused to other civil rights. Therefore, some of the work vis-à-vis a demarcation between the two fundamental rights has already been done by the precedent on the issue.

Before proceeding to the next Part, it is worth mentioning that the understanding of 'religion' observed in this Part, may be carried forward in several indirect discrimination challenges as well. If, say, in the constitutional challenge⁶⁶ to the Uttar Pradesh Prohibition of Unlawful Conversion of Religion Ordinance, 2020, the fact that an overwhelming number of persons arrested have been of Muslims⁶⁷ is used to make out a case of indirect discrimination, 'religion' would be understood as the religious status of being a Muslim. Similarly, if the exclusion of Muslim minorities in the application of the Citizenship (Amendment) Act, 2019 to the population left out of the National Register of Citizens is considered as an instance of indirect discrimination,⁶⁸ the understanding of 'religion' for the purposes of this challenge will once again remain unaltered. Therefore, even while considering the content of 'religion' in a handful of indirect discrimination precedent, it is important to realise that the nub of the controversy that needs resolution is not as broad. Moreover, the difference between direct and indirect discrimination is not relevant for the enquiry in this paper. It is only a matter of coincidence. Such a capacious understanding could equally have been witnessed in direct discrimination challenges.

IV. A CAPACIOUS UNDERSTANDING OF 'RELIGION'

A. A re-consideration of Precedent

Unlike the cases studied in Part II, there have also been a few where 'religion' has been understood as being 'something more' than just religious status. In fact, when we re-visit these

⁶⁶Akshita Saxena, *Breaking- Please in Allahabad High Court Challenges UP Government's Ordinance on Religious Conversions 'in the name of love jihad'*, LIVELAW.IN (11th December 2020), <https://www.livelaw.in/top-stories/allahabad-high-court-love-jihad-religious-conversions-right-to-marry-life-up-government-ordinance-constitution-freedom-of-religion-pil-167100>.

⁶⁷See: Omar Rashid, *54 arrested in U.P. under unlawful conversion ordinance so far*, THE HINDU (15th January 2021), <https://www.thehindu.com/news/national/other-states/54-arrested-in-up-under-unlawful-conversion-ordinance-so-far/article33582567.ece>.

⁶⁸See *Shoot the Traitors: Discrimination against Muslims under India's new Citizenship Policy*, HUMAN RIGHTS WATCH (9th April 2020), <https://www.hrw.org/report/2020/04/09/shoot-traitors/discrimination-against-muslims-under-indias-new-citizenship-policy>.

cases, it appears in hindsight that the rights at issue could also be construed as falling within the domain of Article 25. In *Bombay Mutton Dealer Association v State of Maharashtra*,⁶⁹ the petitioners were an association of persons involved in the slaughter of animals and the sale of meat products, who were aggrieved by a closure of meat selling shops and a ban on the sale of meat during the Paryushan festival (an annual holy festival of the Jain community). In hindsight, this could have been construed as infringing upon the autonomy of an individual to adopt and follow religious practices, whether it be the performance of sacrifices or the consumption of meat itself.⁷⁰ Alternatively, it may be understood as a neutrally worded rule having a disproportionate impact on the religious practice of a particular group or sect. The court in that case though did not frame the issue as a violation of Article 25, but as being a potential violation of Articles 14 and 15 of the Constitution.⁷¹ Therefore, one may infer that the court adopted the alternate understanding.

Similarly, in *P.P. John v Zonal Manager, South Central Zone*,⁷² the petitioner was an office assistant in the Life Insurance Corporation of India, and claimed to be a member of the Worldwide Church of God. One of the essential religious doctrines of this sect was that Saturday ought to be observed as a day of Sabbath. Therefore, the Petitioner would apply for a leave on Saturdays with an undertaking to work on Sunday, or to put in extra hours on other days. While this leave was initially granted on a few occasions, the authorities then initiated disciplinary action against the petitioner for continually being absent on Saturdays.⁷³ It was this disciplinary action which gave rise to the grievance of the petitioner. As in the case of *Bombay Mutton Dealers Association*, the denial of a leave on every Saturday could be categorised as an infringement of the right to freely follow one's religious tenets. Alternatively, it could have been argued that the neutral practice of denying leave on Saturdays constituted indirect discrimination on the grounds of his religion. In this case, when the petitioner eventually approached the court, he not only contended that Article 25 had been violated, but that Articles 14 and 16 had been infringed as well.⁷⁴

⁶⁹*Bombay Mutton Dealer Association v State of Maharashtra*, 2015 SCC Online Bom 6002 (Bombay High Court) (“*Bombay Mutton Dealer Association*”).

⁷⁰Given the binding precedent in *Mohd Hanif Quareshi v State of Bihar* [(1959) SCR 629] where the Supreme Court held that the sacrifice of cows during Bakr-Id was not an essential religious practice under Article 25, the petitioners may not have wanted to frame their case as a violation of religious autonomy.

⁷¹*Ibid.*, at ¶ 21.

⁷²*P.P. John v Zonal Manager, South Central Zone*, 1995 SCC Online AP 261 (Andhra Pradesh High Court) (“*P.P. John*”).

⁷³*Ibid.*, at ¶ 2.

⁷⁴*Ibid.*, at ¶ 7, 59.

In both of these cases, ‘religion’ was understood as being something more than just ‘religious status’. Put otherwise, the equation of ‘religion’ with ‘religious status’ does not always suffice. What also happened on such an understanding was that a neat demarcation between Articles 14 through 16 on the one hand, and Article 25 on the other came to be blurred.⁷⁵ There was an overlap between the two rights. With the decision of the Supreme Court in *Sabrimala*, this overlap is only likely to increase in the future as it may be strategically preferable for litigants to construct their case as a violation of Article 15, even though it may appear to be a violation of Article 25 at first glance.

B. *Sabrimala* & Future Trends

In Part I of this paper, I observed that the text of Article 25(1) makes it subject to the other provisions of Part III of the Constitution, and thereby, *inter-alia* to Article 15 itself. This observation also finds support in the concurring opinion of Chandrachud J. in the *Sabrimala* case, where it was held, “*The subjection of the individual right to the freedom of religion under Article 25(1) to the other provisions of Part III was not a matter without substantive content.*”⁷⁶ There are however two additional aspects of the concurring opinion of Chandrachud J. which entrench a weaker status of the fundamental right protected by Article 25(1).

As observed in Part I, the fundamental right guaranteed by Article 25(1) is also subject to ‘morality’. The concurring opinion interpreted this word as follows,

“.... *In defining the content of morality, did the draftspersons engage with prevailing morality in society? Or does the reference to morality refer to something more fundamental? Morality for the purposes of Articles 25 and 26 cannot have an ephemeral existence. Popular notions about what is moral and what is not are transient and fleeting..... Hence morality for the purposes of Articles 25 and 26 must mean that which is governed by fundamental constitutional principles.....*

⁷⁵On the flip side, there have also been cases wherein although a violation of Article 25 has been alleged, some of the arguments made have been in the nature of indirect discrimination. For instance, in *Abdul Jalil v State of Uttar Pradesh*, [(1984) 2 SCC 138], the petitioners were Sunni Muslims who were aggrieved by a direction which had ordered them to shift their graves. While the cause of action was framed as a violation of Articles 25 and 26 of the Constitution, one of the arguments raised was that the “*impugned direction amounts to disproportionate interference with the religious practice of the Sunnis to respect their dead...*”. One therefore notices in this contention semblances of an indirect discrimination action.

⁷⁶*Sabrimala*, *supra* note 25, ¶ 7, 13 (Chandrachud J.).

... Constitutional morality must have a value of permanence which is not subject to the fleeting fancies of every time and age. If the vision which the founders of the Constitution adopted has to survive, constitutional morality must have a content which is firmly rooted in the fundamental postulates of human liberty, equality, fraternity and dignity....”⁷⁷

The concept of equality and non-discrimination was thus read into the restriction of ‘morality’, and thereby, the hierarchy between Articles 14 through 17 on the one hand and Article 25 on the other was reinforced. A reading of the word ‘morality’ as ‘constitutional morality’ also finds support in the concurring opinion of Misra CJ and Khanwilkar J.⁷⁸ The other notable aspect of the concurring opinion of Chandrachud J pertained to the understanding of Article 26. Interestingly, while the Constitution carries the phrase “*Subject to... the other provisions of this Part*” in the text of Article 25, it is conspicuous by its absence in the text of Article 26. A question therefore arose as to whether or not the right of freedom guaranteed to every religious denomination to manage its own religious affairs was subject to the other provisions of Part III of the Constitution. Following the opinion of Chandrachud J, this question may now be answered in the affirmative. The learned Judge observed,

“...In omitting the additional stipulation in Article 26, the Constitution has consciously not used words that would indicate an intent specifically to make Article 26 subordinate to the other freedoms. This textual interpretation of Article 26, in juxtaposition with Article 25 is good as far as it goes. But does that by itself lend credence to the theory that the right of a religious denomination to manage its affairs is a standalone right uncontrolled or unaffected by the other fundamental freedoms? The answer to this must lie in the negative.....

... Thus, the absence of words in Article 26 which would make its provisions subordinate to the other fundamental freedoms neither gives the right conferred upon religious denominations a priority which overrides other freedoms nor does it allow the freedom of a religious denomination to exist in an isolated silo.....

Once Articles 25 and 26 are read in the manner in which they have been interpreted, the distinction between the articles in terms of the presence or absence of a clause

⁷⁷Sabrimala, *supra* note 25, ¶ 11, 12 (Chandrachud J.).

⁷⁸Sabrimala, *supra* note 25, ¶ 106-111 (Misra CJ and Khanwilkar J.).

of subjection should make little practical significance to the relationship between the freedom of religion with the other freedoms recognized in the fundamental rights. If the Constitution has to have a meaning, is it permissible for religion – either as a matter of individual belief or as an organized structure of religious precepts – to assert an entitlement to do what is derogatory to women? Dignity of the individual is the unwavering premise of the fundamental rights...”⁷⁹

Based on these observations, one may reasonably infer that the hierarchy that exists textually *inter se* Articles 14 through 17 and 25, with the former prevailing over the latter, extends to Article 26 as well. Even if that inference is found to be unacceptable, it may, at the very least, be argued that Article 26 cannot prevail over Articles 14 through 17, and any conflict arising between the two sets of rights must be harmoniously resolved on a case to case basis. This was the proposition emanating from the concurring opinion of Nariman J.⁸⁰

What we are concerned with though is the implication of this decision on the legal strategies adopted by litigants. Litigants may increasingly want to frame an infringement of their religious rights as a violation of Article 15 as opposed to Articles 25 and 26. To consider this point, let us suppose for a moment that the case facts of *Islington London Borough Council v Ladele*,⁸¹ arose in India. In this case, the claimant was a registrar of births, deaths and marriages. Following the enactment of the Civil Partnership Act, 2004, she had been required by her employer to conduct civil partnerships between persons belonging to the same sex. She refused to do so on the ground that she considered same sex unions to be contrary to her Christian beliefs. This refusal invited disciplinary action against her on the ground that it violated the local authority’s equality and diversity policy. Similar facts arising in India is not beyond the realm of contemplation.

In at least two cases — one before the Delhi High Court⁸² and one before the Kerala High Court⁸³ — same sex couples have been denied a registration/solemnisation of their marriage under the Special Marriage Act, 1954. In both these instances, the constitutional validity of the statute to the extent that it excludes same sex marriages has been impugned. Even if one of

⁷⁹Sabrimala, *supra* note 25, ¶ 13, 14, 15 (Chandrachud J.).

⁸⁰Sabrimala, *supra* note 25, Fn. 2, p. 53 (Nariman J.).

⁸¹*Islington London Borough Council v Ladele*, [2010] 1 WLR 955 (Court of Appeal) (“Ladele”).

⁸²*Vaibhav Jain v Union of India*, W.P. (C) No. 7657/2020 (Delhi High Court).

⁸³*Nikesh P.P. v Union of India*, W.P. (C) No. 2186/2020 (Kerala High Court).

these courts were to read down the provisions of the Special Marriage Act, 1954, a similar objection to the one raised in *Ladele* being raised by a marriage officer discharging duties under the Special Marriage Act is not implausible. A marriage officer could contend that registering same sex marriages was contrary to their religious beliefs, and thus, they could not be compelled to do so statutorily.

Should such a marriage officer frame her grievance as a violation of Articles 14 and 15, or of Article 25? Ordinarily, one might suppose that the right at play here is covered by Article 25. By being compelled to register a marriage contrary to her religious beliefs, the marriage officer would be prevented from practising her religion, and thus, her right to freedom of religion would be violated. However, as Article 25 is subject to other the provisions of Part III, as also acknowledged by Chandrachud J., this right would be subject to the same sex couple's right against non-discrimination. Moreover, following the decision in *Sabrimala*, the ambit of the right would also be curtailed by constitutional morality, a facet of which is the equality and dignity of all individuals. From a strategic point of view thus, the marriage officer's chances of success under Article 25 would be limited.

She may thus try and frame her cause of action as an infringement of Articles 14 and 15. Under these provisions, she would have two options. She could either contend that 'but for' her religious beliefs no disciplinary action would have been taken against her and therefore, a case of direct discrimination under Article 15 was made out. However, this argument would not pass muster if the local authority had initiated, or was willing to initiate, disciplinary action against all employees refusing to perform same sex unions irrespective of their religion.⁸⁴ Alternatively, she could contend that the seemingly neutral policy of requiring all marriage officers to solemnise marriages of all couples under the Special Marriage Act, 1954 had a disproportionate impact on those people whose religious beliefs proscribed same sex unions. This argument does seem plausible. Moreover, as seen previously, after *Nitisha* in cases of indirect discrimination, the State would have to show that no less restrictive alternative was available.⁸⁵ Therefore, post-*Sabrimala*, a litigant would in fact want to frame their cause of action as one of indirect religious discrimination so as to increase their chances of success.

⁸⁴See Opinion of Lord Neuberger in *Ladele*, *supra* note 81, at ¶ 39.

⁸⁵*Nitisha*, *supra* note 18, at ¶ 70.

In fact, even in cases such as *P.P. John*, a litigant might favour pressing indirect discrimination — the neutral practice of requiring employees to work every Saturday imposing a disproportionate burden on followers of the Worldwide Church of God — as the primary ground of challenge. Similarly, if cases such as *Mohammed Fasi v Superintendent of Police*⁸⁶ — a case where Muslim head constable was denied permission to sport a beard in light of Standing Orders requiring a clean shaven face⁸⁷ — were to arise today, petitioners might consider framing the issue as one of indirect discrimination for similar reasons. The short point that emerges therefore is that there is a real likelihood of the contents of ‘religion’ under Articles 25 and 26 being subsumed into ‘religion’ under Articles 14 through 16, in order to circumvent the weaknesses inhering in the former set of provisions. Moreover, this is especially likely to happen in cases of indirect discrimination.⁸⁸ Given a dearth of indirect discrimination claims involving religion though, it is not possible to conduct a descriptive study of instances when ‘religion’ may have been understood more capaciously. This paper will now therefore turn to the scholarly debate on the issue to discern whether an answer can be culled out.

V. SEARCHING FOR AN ANSWER IN SCHOLARSHIP

A. Religion as ‘Identity’

In the context of similar decisions by the Court of Justice for the European Union and the European Court of Human Rights,⁸⁹ Ronan McCrea observes that if every kind of religious belief were allowed to be protected by indirect discrimination law, the compelling nature of the unique disadvantages protected by that law would be hard to see.⁹⁰ While limiting the protection offered by discrimination law to a select category of cases may also be harmful in that several legitimate grievances may remain unaddressed, it would be more detrimental to the objectives of discrimination law if every deeply felt belief were accommodated.⁹¹

⁸⁶Mohammed Fasi v Superintendent of Police, 1985 SCC Online Ker 26 (Kerala High Court).

⁸⁷*Ibid.*, at ¶ 19-21.

⁸⁸As argued previously, this issue is less likely to arise in cases of direct discrimination because the wrong meted out in those cases is usually a comparative wrong based on membership to a religious group, or is a wrong caused to other civil rights using religious identity as a marker of differentiation. However, this is not to say that there cannot be cases where religious practices are not used a proxy to distinguish on the basis of religious membership. Even if those cases were to arise, the content of the word ‘religion’ as unpacked for indirect discrimination, should equally apply for direct discrimination actions as well.

⁸⁹Ronan McCrea, *Singing from the Same Hymn Sheet? What the differences between the Strasbourg and Luxembourg Courts tell us about Religious Freedom, Non-Discrimination and the Secular State*, 5(2) Oxford Journal of Law and Religion 1 (2016).

⁹⁰*Ibid.*, at p. 28

⁹¹*Ibid.*

According to McCrea, the protection offered by a prohibition of religious discrimination should be limited only to identity-based wrongs. Practically, this might also add to the legitimacy of the relief claimed, and increase the chances of success.⁹² The practical dimension in favour of this view is also brought to the fore by Thornton and Luker.⁹³ On perusing religion as a ground in the Australian context, Thornton and Luker observe that when religion is regarded as a fixed identity, it is more readily recognised as a basis for discriminatory treatment.⁹⁴ In other words, it is easier for a judge to ‘see’ discrimination when religion is understood only as a person’s religious status. There is greater ambivalence in legal responses when one enters the domain of religious practices.⁹⁵

It appears that McCrea, Thornton and Luker would espouse the standard adopted by Indian courts in discrimination challenges, and contend that it be adopted even in those cases where ‘religion’ may be understood by litigants as something more than just ‘religious status’. In fact, one finds a normative justification of the standard adopted in our precedent in the more recent works of Khaitan and Norton.⁹⁶

Concerned with the theoretical distinction between the right of religious freedom and the right of protection against religious discrimination, they sum up the argument they seek to advance as,

*“Religious freedom is concerned with protecting an interest in our ability to (not) adhere to our religious commitments. The right against religious discrimination is concerned with a separate interest in ensuring that our religious group does not suffer relative sociocultural, political, or material disabilities in comparison with other religious groups.”*⁹⁷

To make this argument, they first examine the notion of religious adherence itself. They contend that from the viewpoint of an (non)adherent, religion has two components. The first is that of ‘belief’, or what is otherwise referred to as *forum internum*,⁹⁸ and the second is the

⁹²*Ibid.*

⁹³ Margaret Thornton and Trish Luker, *The Spectral Ground: Religious Belief Discrimination*, 9 MACQUARIE LAW JOURNAL 71 (2009).

⁹⁴*Ibid.* at p. 79.

⁹⁵*Ibid.*

⁹⁶ Tarunabh Khaitan and Jane Calderwood Norton, *The right to freedom of religion and the right against religious discrimination: Theoretical distinctions*, 17(4) INTERNATIONAL JOURNAL OF CONSTITUTIONAL LAW 1125 (2019).

⁹⁷ *Ibid.* at p. 1145.

⁹⁸*Ibid.*, at p. 1131

performative side, or *forum externum*.⁹⁹ Moreover, Khaitan and Norton are not concerned with every possible religious adherent, but with a committed interest. A committed perspective of religious adherence, they say, helps avoid the pitfalls of (i) the overinclusion of just about any ideology, belief or practice, (ii) an under-inclusion of dissenting and heterodox religions, and (iii) the exclusion of atheism or agnosticism.¹⁰⁰

After having examined a committed perspective of religious adherence, Khaitan and Norton proceed to analyse what they term as a non-committal perspective. According to them, a non-committal perspective does not focus as much on the adherence to a religion but on the membership to a group. All members of a religion need not necessarily adhere to its tenets.¹⁰¹ From this perspective, an external, sociological reality defines the religious group.¹⁰² Not only that, this perspective also tracks the social and economic costs that are saddled onto the membership.¹⁰³ A good example of the non-committal perspective was seen in the case of *Raju*, when the Allahabad High Court identified that there may be certain Air Force personnel who may be Sikhs (i.e. belong to a religious group), but not wear a turban (i.e. not be religious adherents). In that case, the exemption granted to Sikhs not wearing a turban might have still classified as discrimination on the basis of religion.

Having drawn a conceptual difference between a committal and non-committal perspective, Khaitan and Norton argue that freedom of religion and the right against religious discrimination track different interests. Freedom of religion is valuable because it protects the decisional autonomy in matters of religious adherence.¹⁰⁴ In a companion work,¹⁰⁵ they contend that the scope of the freedom of religion is very broad, and that when deciding whether or not a belief merits protection, a court must only be concerned with whether the belief is plausible and sincere.¹⁰⁶

As to the right against religious discrimination, they contend that the rationale for this right must be found in the prohibition of discrimination more generally. Since redressing current or

⁹⁹*Ibid.*, at p. 1132.

¹⁰⁰*Ibid.*, at p. 1132-33.

¹⁰¹*Ibid.*, at p. 1133.

¹⁰²*Ibid.*, at p. 1134.

¹⁰³*Ibid.*, at p. 1135.

¹⁰⁴*Ibid.*, at p. 1137.

¹⁰⁵Tarunabh Khaitan and Jane Calderwood Norton, *Religion in Human Rights law: A normative restatement*, 18(1) INTERNATIONAL JOURNAL OF CONSTITUTIONAL LAW 111 (2020).

¹⁰⁶*Ibid.*, at p. 114.

historical group disadvantages lies at the heart of discrimination law, the main purpose for regulating religious discrimination cannot be to protect individual religious adherence.¹⁰⁷ Instead, it is non-committal religious group membership that lies at the heart of discrimination law.¹⁰⁸

Khaitan and Norton's work thus is of immense explanatory value in that they provide a normative justification for the standard adopted in Indian case law. A non-committal perspective helps understand why Indian courts have understood religion as 'religious status' in discrimination challenges. As seen in the cases examined in Part II, the harm suffered by the litigants was often in terms of their civil or non-religious rights — what Khaitan and Norton would define as "*sociocultural, political, or material disabilities*"¹⁰⁹ associated with membership to a religious group. Therefore, to focus only on rights emanating from religious adherence under discrimination law would not capture these harms. However, as observed previously, the realm of controversy though in Indian precedent may lie elsewhere.

B. Religious 'Membership' does not provide all the answers

The question that comes to the fore in cases such *Bombay Mutton Dealers Association* (the closure of meat-selling shops case) and *P.P. John* (the case where an employee who was not allowed to observe Sabbath on Saturdays), and that might arise if a situation akin to *Ladele* were to confront us, is the very opposite. To what extent should courts accommodate aspects of religious adherence in the content of the word 'religion' under discrimination? Put differently, the question pertains to the extent to which religious practices or manifestations of religious beliefs ought to be protected by discrimination law. It is this question, one which lies at the juncture of the right to religious freedom and the right against religious discrimination, that might pose a challenge to our courts and that needs some resolution. Unfortunately, Khaitan and Norton do not help answer it.

This is so for a couple of reasons. *Firstly*, it is not always possible to pigeonhole the rights violated into religious adherence and religious membership. We can consider the example of the Muslim woman who was asked to remove her niqab. From a committed perspective, it plausible to contend that her decisional autonomy as regards following a religious practice was

¹⁰⁷Khaitan and Norton, *supra* note 96, at p. 1142.

¹⁰⁸*Id.*, at p. 1143.

¹⁰⁹*Id.*, at p. 1145.

violated. From a non-committal perspective, she was adversely affected because of her status as a Muslim. Her interest in the membership of the group was affected. *Secondly*, in cases of an overlap it is not always possible to accord primacy to one of the two rights in a given fact scenario. Being able to discern that, “the primary right violated in the facts of this case is X”, might help a Judge ascertain the standards to be applied to adjudicate the case at hand. In the same example of the witness wearing a niqab, it is difficult to conclusively assert as to which of the two wrongs assumes primacy. While the distinction between religious adherence and religious membership explains a substantial portion of the Indian precedent on the issue, it does not take a Judge faced with a petition by a woman asked to remove her niqab much further.

Khaitan and Norton might argue that a petitioner in such case would have to show that the disadvantage was suffered by other members of her religious group as well.¹¹⁰ If that threshold were cleared, the wrong caused would be in terms of a disability or a cost attached to religious membership and not merely religious adherence. However, following the decision in *Nitisha*, where the Supreme Court has cautioned against an over-reliance on statistical evidence and has consciously avoided laying down a quantitative threshold before indirect discrimination is made out,¹¹¹ it is doubtful if courts would require petitioners to prove that harm was suffered by other Muslim women as well. On the contrary, it might be inclined to presume that several other similarly placed Muslim women may face a similar hurdle in complying with their religious tenets. Therefore, at least in India, a quantitative threshold is of little assistance in demarcating instances of religious adherence from religious membership.

In any case, it may now not be apposite to say that primary aim of discrimination law in India is to only redress relative group disadvantage. In *Nitisha*, the Supreme Court has signalled a shift towards substantive equality, as the primary objective of discrimination law.¹¹² One of the prongs of the substantive equality model, as proposed by Fredman,¹¹³ is the need to accommodate difference and achieve structural change. Accommodating difference necessarily means that individuals who do not conform with a group norm are not left out of the protection offered by discrimination law. With such an objective, it would be even more

¹¹⁰*Id.*, at p. 1144. While admitting that the bar is high, they say that it is unavoidable in that discrimination law is unavoidable.

¹¹¹*Nitisha*, *supra* note 18, at ¶ 68.

¹¹²*Id.*, at ¶ 44, 45.

¹¹³Sandra Fredman, ‘*Substantive Equality Revisited*’, 14(3) INTERNATIONAL JOURNAL OF CONSTITUTIONAL LAW 712 (2016).

difficult for a judge to emphasize on the requirement to prove that several other members of the religious group had been adversely affected. Therefore, 'religious membership' does not by itself help resolve cases involving an overlap between religious freedom and religious discrimination.

Having said that, it is important to acknowledge that Khaitan and Norton are themselves cognizant of these shortcomings. They state their primary purpose to be to carve out a distinct normative justification for the right to religious freedom and the right against religious discrimination.¹¹⁴ Even in a subsequent work, while spelling out that the two rights might overlap, they only contend that the scope of the latter ought to be narrower.¹¹⁵ They add that in an overlap, if an instance of indirect discrimination is justifiable, an infringement of religious freedom too would stand justified because the former is usually subject to a higher level of judicial scrutiny.¹¹⁶

C. Should we protect every religious belief?

A different perspective on the controversy that might exist in Indian discrimination law vis-à-vis the scope of 'religion' is provided by Lucy Vickers.¹¹⁷ Vickers, while studying religion at the workplace in the United Kingdom, says that the freedom of religion and the protection from discrimination on the grounds of religion are closely linked. For a meaningful enjoyment of autonomy, equality and dignity, protecting both these rights is equally important.¹¹⁸ For the present paper though, it is Vickers' understanding of indirect discrimination that is of some significance. In the context of workplace discrimination, she says that indirect discrimination tracks the difficulties experienced by some groups in complying with what appear to be neutral requirements on account of their religious beliefs.¹¹⁹ These beliefs, Vickers says, need not be shared by a minimum number of adherents to be protected. According to her, freedom of religion can be accorded maximum protection if beliefs held by even individual adherents are

¹¹⁴Khaitan and Norton, *supra* note 96, at p. 1144.

¹¹⁵Khaitan and Norton, *supra* note 105, at p. 129.

¹¹⁶*Ibid.*, at p. 128.

¹¹⁷Lucy Vickers, RELIGIOUS FREEDOM, RELIGIOUS DISCRIMINATION AND THE WORKPLACE (2008).

¹¹⁸*Ibid.*, at p. 43.

¹¹⁹*Ibid.*, at p. 126-27.

safeguarded.¹²⁰ Courts should focus on whether it would be proportionate to require defendants to accommodate such beliefs rather than on whether the belief merits protection.¹²¹

Although Vickers' suggestion is attractive in that it (i) helps realise the objective of accommodating difference in a substantive equality model, and (ii) focusses on the difficulties imposed on following religious tenets by neutrally worded rules, it has a few shortcomings. It would blur the difference between Articles 14 through 16 on the one hand, and Article 25 on the other. Even though the Constitution accords greater leeway to the State to restrict religious freedom, the State may have to satisfy a slightly higher threshold to justify its measures in a discrimination challenge. In a case like *Ladele*, in response to a marriage officer's claim, the State could simply have argued that her right to religious freedom was subject to Articles 14 through 16. By understanding religion in discrimination law capaciously, the State may have to justify that there was no less discriminatory alternative available. The State's ability to enact certain types of legislations may be curtailed.

The other problem is the one that McCrea identifies. Expanding the scope of religion to include 'every' religious belief might dilute the force of discrimination law. The problem is one of moral equivalence. A disproportionate impact of the Freedom of Religion Ordinance, 2020 on Muslims in terms of arrests may differ in its moral colour from a case like *Ladele*. According the same protection to both, might lower the moral force underlying the act of labelling the former as discriminatory. McCrea therefore contends that it is preferable to relegate some cases to the realm of religious freedom, even if at times that means not fulfilling some of the goals of discrimination law.

From a survey of the scholarly debate on the issue, we are thus left with two imperfect solutions. One is to understand religion only as the religious status of an individual, and the other is to understand it so capaciously that it includes every religious belief. However, before commenting on whether one of these solutions ought to be picked, it might be of some importance to consider a third alternative as well.

¹²⁰*Ibid.*, at p. 130.

¹²¹Lucy Vickers, *Religious Discrimination in the Workplace: An emerging hierarchy*, 12(3) ECCLESIASTICAL LAW JOURNAL 280, 289 (2010).

VI. ESSENTIAL RELIGIOUS PRACTICE: IS THIS THE ANSWER?

The ‘essential religious practices’ (“ERP”) test has till date only been confined to challenges under Articles 25 and 26 of the Constitution. In this Part, I consider whether it can provide a viable alternative to unpack the contents of ‘religion’ in some of the penumbral cases. One of the earlier iterations of the ERP test as we know it today can be traced back to the decision of the Supreme Court in *Durgah Committee, Ajmer v Syed Hussain Ali*.¹²² Gajendragadkar J. speaking for a Constitution Bench observed,

*“Whilst we are dealing with this point it may not be out of place incidentally to strike a note of caution and observe that in order that the practices in question should 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 services which are not an essential or an integral part of religion are apt to be clothed with a religious form and may make a claim for being treated as religious practices within the meaning of Article 26.”*¹²³

The Court therefore stated that it was not enough for a practice to be considered as religious in nature, it must also be an essential and integral part of the religion. In *Tilkayat Govindlalji Maharaj v State of Rajasthan*,¹²⁴ the Court elaborated on how a religious practice could be construed as being essential or integral. It observed,

“In deciding the question as to whether a given religious practice is an integral part of the religion or not, the test always would be whether it is regarded as such by the community following the religion or not. This formula may in some cases present difficulties in its operation. Take the case of a practice in relation to food or dress..... In cases where conflicting evidence is produced in respect of rival contentions as to the competing 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 in an integral part of its religion, because the community may speak

¹²²*Durgah Committee, Ajmer v Syed Hussain Ali*, (1962) 1 SCR 383 (Supreme Court of India) (“Durgah Committee”).

¹²³*Ibid.*, at ¶ 33.

¹²⁴*Tilkayat Govindlalji Maharaj v State of Rajasthan*, (1964) 1 SCR 561 (Supreme Court of India).

with more than one voice and 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 enquire whether the practice in question is religious in character and if it is, whether it can be regarded as an integral or essential part of the religion, and the finding of the Court on such an issue will always depend upon the evidence adduced before it as to the conscience of the community and tenets of its religion”¹²⁵

To sum up, the Constitution only accorded protection to practices that were an essential or integral part of the religion. To determine whether or not a practice was essential, courts would consider the tenets of the religion and the ‘conscience of the community’. Subsequently,¹²⁶ the Court also clarified ‘what’ would classify as ‘essential. A practice would be essential if the nature of the religion would change without it.¹²⁷

If the apprehension with the approach propounded by Vickers is that it might dilute discrimination law, the ERP test might be an alternative to address this concern. By adopting such a test, a court might be able to strike a balance between accommodating difference and not diluting the moral legitimacy of the law. The ‘essentiality’ requirement would ensure that discrimination law was only concerned with the core components of a religion, and thus, it was *indeed* the religiosity of an individual which was used to perpetuate disadvantage, stereotypes or harm. However, this is not to say that the ERP test does not raise its fair share of concerns.

Gautam Bhatia has lucidly argued how the ERP test is founded on a misinterpretation of the precedent in *Commissioner, Hindu Religion Endowments v Lakshmindra Thirtha Swamiar of Sri Shriru Matt*¹²⁸ and in *Ratilal v State of Bombay*.¹²⁹ According to Bhatia, the proposition emanating from these judgements which preceded *Durgah Committee* was that courts should concern themselves with enquiring whether a practice was essentially religious in nature as opposed to being essentially secular. These two decisions did not stand for a test which says that courts should determine whether a practice was an essential part of the religion itself or

¹²⁵*Ibid.*, at ¶ 57.

¹²⁶*Commissioner of Police v Acharya Jagdishwarananda Avadhuta*, (2004) 12 SCC 770 (Supreme Court of India).

¹²⁷*Ibid.*, at ¶ 9.

¹²⁸*Commissioner, Hindu Religion Endowments v Lakshmindra Thirtha Swamiar of Sri Shriru Matt*, 1954 SCR 1005.

¹²⁹*Ratilal v State of Bombay*, 1954 SCR 1035.

not.¹³⁰ Following Bhatia's critique, one may then argue that 'religion' under Articles 25 and 26 ought to be understood so broadly as to include any religious belief sincerely held. The protection offered by the Constitution should not only be confined to ERP.

The criticism of ERP though, runs deeper. Prof. Faizan Mustafa and Jagteshwar Sohi have contended that the ERP test deprives religious adherents of a constitutionally guaranteed right of freedom of conscience, and leads to the court effectively playing clergy.¹³¹ According to them, the fallout of the ERP has been that even though the Constitution guarantees to each individual the autonomy to follow their conscience and to entertain religious beliefs of their choosing, this autonomy seemingly has no value outside the foundational text.¹³²

To illustrate the issues that flow from the court adorning the role of a clergy, they take the example of a case before the Bombay High Court¹³³ where members of a particular sect claimed that capturing and worshipping cobras during the Nagpanchami festival was an essential part of their religion.¹³⁴ While the petitioner relied on a local religious text (Shrinath Lilamrut), the Court considered the general religious texts of Hindus (Dharma Shastras) and concluded that the practice was not essential.¹³⁵ A similar trend was also seen in *Fasi*. As mentioned previously, in this case, a police officer had impugned a decision refusing him permission to sport a beard. While the petitioner relied on the Hadiths of Sahih Al Bukhari, the court emphasised on how he had not able to point out any such requirement in the Quran.¹³⁶ Interestingly, the State had cited instances of prominent Muslim dignitaries not sporting beards as evidence of its non-essentiality.¹³⁷ In both these cases, the court externally defined what counted as religious and this definition was contrary to the beliefs of the petitioners themselves.

Fasi, in fact, is a classic example of a case where a petitioner might want to adopt a capacious understanding of 'religion' and frame the cause of action as indirect discrimination instead of

¹³⁰See Gautam Bhatia, *Freedom from Community: Individual Rights, Group Life, State Authority and Religious Freedom under the Indian Constitution* (Working Paper, 29th February 2016), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2739235.

¹³¹Faizan Mustafa and JS Sohi, *Freedom of Religion in India: Current Issues and Supreme Court Acting as Clergy*, *BYU LAW REVIEW* 915, 925 (2017).

¹³²*Id.*, at 937.

¹³³*Gram Sabha of Village Battis Shirala v Union of India*, W.P. (C) No. 8645/2013 (Decided on 15th July 2014) (Bombay High Court).

¹³⁴*Ibid.*, at ¶ 13.

¹³⁵*Ibid.*, at ¶ 14.

¹³⁶*Fasi*, *supra* note 86, at ¶ 7.

¹³⁷*Ibid.*, at ¶ 6.

a violation of religious freedom. Therefore, if the ERP test were to be imported into discrimination law, the issues associated with the court playing clergy might plague this jurisprudence as well. Inconsistency and unpredictability in adjudication, and a lack of clarity on what counts as evidence,¹³⁸ is only a part of the problem. It is the court externally defining what amounts to 'religious'¹³⁹ which may prove to be counter-productive. Our quest to expand the contours of 'religion' beyond 'religious status' is partially motivated by a desire to accommodate difference. If in the process of implementing the ERP test, the court substitutes a petitioner's idea of religiosity with what its own understanding the same, it may result in eradicating as opposed to accommodating difference. Not to mention, the autonomy to define one's conscience may itself be denuded.

Overall then, we are left with three imperfect solutions. The *first* is to emphasize that 'religion' in discrimination only refers to the 'religious status' of an individual. The *second* is to accommodate religious beliefs within the fold of discrimination law, but only those which cross the ERP threshold. The *third* is to accommodate every sincerely held religious beliefs. Each one of these solutions is imperfect, and has its own set of pitfalls. According to me, a choice amongst one of these three choices may boil down to a process of elimination wherein the option which best advances the objectives of discrimination law is selected.

If we were to insist that a petitioner must have suffered a comparative wrong or have been deprived of certain material benefits on account of religious identity, an artificial divide may have to be carved out between religious adherence and religious membership. Given the difficulty in carving out such a distinction and the fact that the case might touch upon the religious beliefs of an individual, the sequitur might be that cases that need courts to make such a distinction are relegated to the realm of religious freedom only. Protection under discrimination law would be barred. This outcome would certainly not advance the objectives of discrimination law. On the other hand, as has been examined previously, emphasizing on an ERP requirement would not only denude the autonomy of an individual to follow their conscience, but also lead to the court substituting an individual's understanding of religion with its own. If one of the objectives of discrimination law were to accommodate difference, an ERP

¹³⁸Rajeev Dhavan, *Religious Freedom in India*, 35(1) THE AMERICAN JOURNAL OF COMPARATIVE LAW 209, 223 (1987).

¹³⁹Bhatia, *supra* note 130.

requirement might be counterproductive. Given that these alternatives mitigate rather than advance the objectives of discrimination law, we would, in my opinion, have to discard them.

Therefore, for the want of a better alternative, courts might have to understand 'religion' capaciously enough in cases lying at the penumbra to include every sincerely held religious belief. Admittedly, this will not stem the strategic circumvention of Article 25 by litigants. It might also blur the distinction, at least in some cases, between Articles 14 through 16 on the one hand, and Article 25 on the other. However, in my opinion, the benefits of expanding the scope of discrimination law might outweigh the costs of these consequences.

VII. CONCLUSION

In this paper, I have sought to conduct an enquiry as to the meaning of 'religion' as a ground of discrimination. On studying the precedents on religious discrimination, I concluded that our courts have done this exercise to a large extent. They have understood 'religion' as being the religious identity or status of an individual. They have not confined the scope of protection offered only to religious adherence. Khaitan and Norton provide a sound normative justification for such a choice of standards. Individuals are often saddled with civil, social and political disabilities on the basis of their membership to a religious group. This membership could be by birth or by law. It need not necessarily be contingent on how devoutly one believes in the religion's tenets. While most of our precedents involved direct discrimination claims, I have argued that this understanding would apply to several indirect discrimination challenges as well.

The nub of the controversy in India is instead likely to arise in a few cases where 'religion' is understood as being something more than the 'religious status' of an individual, and is understood to include 'religious practices' and 'rituals' as well. Moreover, this problem might only balloon in the future, as litigants try to strategically circumvent Article 25, and pitch their case under Articles 14 through 16 of the Constitution. The latter set of articles offer a stronger protection. In this paper, I have thus examined three possible alternatives which might help resolve the problem. My opinion is that none of these alternatives are ideal solutions. However, for the want of a better option, in these penumbral cases, we might, at the moment, have to understand 'religion' so capaciously as to include every sincerely held religious belief. The consequences of such an approach too will have to be accepted as is.

