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Working Paper

RETHINKING DOCTRINE

The Indian Supreme Court and the Definition of Religion

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Introduction

In an extraordinary portrayal of the complexities in the legal definition of religion Winnifred Sullivan analyses the trial around the placing of decorations on graves situated on public land in the city of Boca Raton in Florida. In this trial, the court had to judge whether vertical markers placed by the plaintiffs in violation of the city's cemetery regulations was an exercise of religion under the Florida Religious Freedom and Restoration Act of 1998 ("FRFA"). In order to decide whether such a practice fell within a religious tradition the court had to consider whether such a practice is asserted by an an authoritative sacred text, is affirmed in doctrine and practice and was observed continuously till contemporary times. If this practice did not meet any of the criteria specified, it would be considered a matter of personal preference. It was found by the court that the particular manner in which such markers and religious symbols are displayed-vertically or horizontally amounted to a matter of purely personal preference[1].

Analysing this decision Sullivan argues that "there is no accepted legal way of talking in the United States about the vast array of religious beliefs and practices that are represented"[2]. (Sullivan 2005,100). The navigation of the legal definition of religion determined by the requirements of the FRFA necessitated an oscillation between the plaintiffs' efforts to show their conduct was religiously motivated and the City's emphasis on institutional and textual sanction. Provocatively Sullivan argues for the inherent impossibility of religious freedom and the removal of protection of religious freedom as a special category. She argues that the free exercise clause in the U.S Constitution is inherently unworkable as there is no political consensus on how religion should be privileged in law with the incapacity of law to define religion [3].(Sullivan 2005, 150).

Is religious freedom impossible? It appears that Indian Supreme Court judges would agree. In *S.P. Mittal* v *Union of India*[4] the Supreme Court noted that religion was incapable of precise judicial definition and the reason for it is that there are problems with the concept itself, "some religions being more easily identifiable as religious and some are easily not identifiable as religious". This pronouncement was made despite efforts to develop standards for the definition of religion in *The Commissioner, Hindu Religious Endowments, Madras v Sri Lakshimindra Thirtha Swamiar of Sri Shirur Mutt*[5] where it was held that the courts must follow the essential practices test where the doctrines of a religion are tested by looking at its "essential practices".

These positions also stand in variance with guarantees of religious freedom in the Indian Constitution. Article 25 to 28 of the Constitution include the freedom of religion or conscience more specifically the right to profess, practice and propagate religion, the right to form educational institutions for religious

[1] *Warner v. City of Boca Raton*, 64 F.Supp.2d 1272
[2] Winnifred Faller Sullivan, *The Impossibility of Religious Freedom* (Princeton University Press, 2005)100.
[3] Ibid, 150
[4] 1983 SCC (1)51.
[5] AIR 1954 SC 282.

or charitable purposes, and a prohibition on religious instruction in state funded institutions. The question of religious freedom is also complicated by the nature of the relationship between state and religion in India, the idea of the strict separation between state and religion giving way to the concept of the equal treatment of religions. Such a concept allows the Indian state to "interfere" in religion in the guise of treating religions equally. This has empowered the state through constitutional provisions to abolish social practices including untouchability and intervene in the management of Hindu religious institutions[6]

This has resulted in the scholarship on how the Supreme Court defines religion showing a fixation with how secularism is practised by the Indian state, these concerns emerging from whether India can manage its social and religious diversity without threatening the rule of law such as that of Ronojoy Sen[7] and Marc Galanter[8]. The question of whether religion can be defined in law is already defined. This can be witnessed in Sen's analysis of Hinduism where he traces the genealogy of Hinduism as a term that originated in nineteenth century discourse as how colonial administrators and missionaries perceived diverse peoples as one unified Hindu community[9]. He uses this terminology to come up with the idea of reformist Hinduism and how that has been used by Supreme Court judges. This tells us how Hinduism is described by other people rather than what Hinduism is as a social phenomenon. Marc Galanter carries out a similar exercise in arguing that that the jurisprudence of the Indian Supreme Court on the definition of Hinduism reflects judicial preoccupation with the reform of Hinduism into an entity that can be easily regulated[10]. Judges may feel a sense of obligation to contribute to a sense of nationhood by providing a unified description of Hinduism. According to Galanter, this raises a wider question of whether judges are legitimately bound by the Constitution to actively engage in an exercise of reinterpreting Hinduism.

I propose a different route to answer the question of how religion is defined in law by analysing the Supreme Court files on two key cases which are *The Commissioner, Hindu Religious Endowments, Madras v Sri Lakshimindra Thirtha Swamiar of Sri Shirur Mutt* and *Sastri Yagnapurushdas v Muldas Brudardas Vaishya*[11]. The significance of these two cases lie in the former laying down the essential practices test and the latter laying down the definition of Hinduism. In doing so I try to understand how materials in the file reflect the legal doctrines arrived at by the courts. Is there a relationship? How do the original facts in a case relate to how legal doctrine has travelled?[12] I argue in this paper

[6] This can be found in Articles 17 and 25 of the Constitution.
[7] Ronojoy Sen, *Articles of Faith : Religion, Secularism and the Indian Supreme Court* (Oxford University Press , 2010).
[8]. Marc Galanter "Hinduism, Secularism and the Indian Judiciary" in *Law and Society in Modern India* (Oxford University Press, 1989) 237-258.
[9] See n.7.
[10] See n.8.
[11] AIR 1966 SC 1119
[12] A note is required here on approaching these materials as an archive and the procedures involved in obtaining them. Access involved contacting various officials of the Supreme Court including clerks, registrars and a sitting judge to obtain clarity on the procedure. In order to obtain these materials an interim application was filed making myself "a third party" to the suit and specifically requesting the court access to these materials for the purpose of research. This also involved making an appearance before the court. This cumbersome procedure is an indication of how a privileged legally savvy elite can afford access to such materials. Each case lies in a separate file identified by the High Court from which it had come on appeal. The records in each case are fragmented as papers in each file have been destroyed.

that one needs to understand the relationship between law and religion in the context of the social phenomena that religion identifies. My argument is that post- colonial legal history reflects a different trajectory from colonial legal history. In order to understand this difference one needs to identify how colonial legal frameworks have been redeployed in secular frameworks. Such redeployment does not mean a rehash of colonial ideas that are obsessed with the idea of religion but a concern with the social phenomena that religion actually identifies. This involves a distortion of colonial ideas and frameworks, In the first case involving the Shirur Mutt I argue that the essential practices test used by the court to derive the difference between the religious and the secular does not actually reflect the empirical aspects of this case. The essential practices test has to understood in the context of the relationship of how religion determines property claims. Such a claim rests on redeploying colonial frameworks – the same being illustrated by the manner in which the Court rethinks colonial categories of the idol as a legal entity and how religious freedom becomes a pre framed category through foreign judgements. In the second case of Sastri Yagnapurushdas I argue that the definition of Hinduism although dependent on colonial categories is reconstituted to account for post -colonial consensus on the issue of religion.

Locating the Essential Practices Test: *The Commissioner, Hindu Religious Endowments, Madras v Sri Lakshimindra Thirtha Swamiar of Sri Shirur Mutt*

The Legal Dimensions of the Essential Practices Test

This landmark judgement in the reform of Hindu religion institutions involved the superior (also known as the mathadipathi or mahant) of a Hindu religious institution known as the matha or mutt[13] challenging the state enactment governing Hindu religious institutions known as the Madras Religious and Charitable Endowments Act, 1951. This enactment was challenged on the ground that it infringed Article 26 of the Indian Constitution which guaranteed the freedom of the management of religious affairs and the establishment of religious and charitable institutions. In deciding this case the main question was the distinction between matters that were religious and those that were not. The court arrived at the following conclusions:

> Religion is certainly a matter of faith with individuals or communities and it is not necessarily theistic. There are well known religions in India like Buddhism and Jainism which do not believe in God or in any Intelligent First Cause. A religion undoubtedly has its basis in a system of beliefs or doctrines which are regarded by those who profess that religion as conducive to their spiritual well being, but it would not be correct to say that religion is nothing else, but a (1) Vide Davie v. Benson 133 U.S 333 at 342. doctrine or belief. A religion may not only lay down a code of ethical rules for its followers to accept, it might prescribe rituals and observances, ceremonies and modes of worship which are regarded as integral parts of religion and these forms and observances might extend even to matters of food and dress

[13] A matha is often compared to a Christian monastery as it is composed of monks but it differs in its function as it not only provides religious instruction but carries out a range of activities which may be deemed commercial and secular.

> In the first place, what constitutes the essential part of a religion is primarily to be ascertained with reference to the doctrines of that religion itself. If the tenets of any religious sect of the Hindus prescribe that offerings of food should be given to the idol at particular hours of the day, that periodical ceremonies should be performed in a certain way at certain periods of the year or that there should be daily recital of sacred texts or ablations to the sacred fire, all these would be regarded as parts of religion and the mere fact that they involve expenditure of money or employment of priests and servants or the use of marketable commodities would not make them secular activities partaking of a commercial or economic character; all of them are religious practices and should be regarded as matters of religion.....

In analysing the myriad ways in which this test has been applied Rajeev Dhawan argues that there are no adequate criteria to decide what is an essential practice. The courts do not provide criteria such as reliance on religious leaders, reliance on evidence, or the judge's own research. Does the judge use legal methods to determine the tradition or use the tradition's own methods? Criticising the essential practices test, Ronojoy Sen argues that the essential practices test has evolved over the several decades it has been in use and that this test has been influenced by the views and attitudes of the judges themselves[14]. Initially under the influence of Justice Gajendragadkar, the court attempted an agenda of social reform seeking to eliminate "unessential" practices that they deemed superstitious or irrational and rationalizing religion by putting the state in charge of religious endowments. This attitude underwent a transformation in the nineties due to Justice Ramaswamy who provided a philosophical basis to the test by emphasizing dharma or good consciousness as being the core of religion thus laying the emphasis on religious experience.

These arguments do not however indicate the circumstances in which the Shirur mutt decision has been arrived at. As Sen has pointed out it has been used significantly to decide control of Hindu endowments and to clarify the scope of Article 26 (d) of the Constitution which provides freedom to religious denominations. This is apparent in cases such as that of *Venkataramana Devaru v State of Mysore* [15] where the rights of a religious denomination the Gowda Saraswath Brahmins to exclude others from the community from entering the temple. A similar decision was taken in *Tilkayat Shri Govindlalji Maharaj v The State Of Rajasthan And Others*[16] wherein it was held that one needed to inquire whether the tenets of the Vallabh denomination and its religious practices require that the worship by the devotees should be performed at the private temples. A contrary position was taken in *Shri Jagannath Temple Puri Management Committee Represented Through Its Administrator And Another V. Chintamani Khuntia And Others,*[17] wherein it was held that duties performed by sevaks (temple servants) in the Temple are of a secular nature and the payment made to them is remuneration. It has also been used in cases not involving Hindu religious denominations. In *Durgah Committtee v Hussain Ali* it was held that the Sufi Chishtis were a religious denomination[18]

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[14] Ronojoy Sen, *Articles of Faith : Religion, Secularism and the Indian Supreme Court* (Oxford University Press , 2010).
[15] AIR 1958 SC 255
[16] AIR 1963 SC 1638.
[17] 8SCC 1997 422
[18] AIR 1961 SC1402. Interestingly in this case the Court made no reference to the history of Islam

The Development of the Essential Practices Test

What was the judicial intention in coming up with the essential practices test? A brief narration of the facts is required. Lakshmindra Tirtha Swamiar was installed as Mathadhipati of the Shirur Mutt [19]in the year 1919, when he was a minor, and he assumed management after 1926. At that time the Math was heavily in debt. Between 1926 and 1930 the Swami succeeded in clearing off a large portion of the debt. In 1931, however, came the turn of his taking over management of another mutt known as the Shri Krishna Math where he incurred various debts to meet the heavy expenditure attendant on the *Paryayam* ceremonies. The *Paryayam* was a festival attended by various devotes of the mutt from the region. The head of the mutt was under an obligation to feed the Pilgrims at this festival and he had to meet the expenses of feeding from the income of his Mutt and from contributions. It was an accepted norm that large amounts would be borrowed to meet the expenditure of the *Paryayam* as he would always be unable to meet it from the income. In 1946, due to scarcity and the high prices of commodities at that time, the Swami had to borrow money to meet the expenditure and the debts mounted up to nearly a lakh of rupees. This led to the intervention of the Hindu Religious Endowments Board (HRE Board), who called upon the head of the mutt to appoint a competent manager to manage the affairs of the institution. The head of the mutt alleged that this action of the Board was instigated by local interests in the District of Udipi where the mutt was situated[20]. The agent appointed by the HRE Board did not submit accounts to the head of the mutt and flouted his authority. This led the head of the mutt to file a suit in the local court for recovery of the account books and other articles belonging to the mutt, for rendering an account of the management and also for an injunction restraining the agent from interfering with the affairs of the mutt. The agent approached the HRE Board protesting the termination of his appointment which resulted in the Board sending the head of a Mutt a draft scheme of management which would give the Board extensive rights to interfere with the Mutt[21]. This led to the head of the mutt challenging the scheme in the High Court where it was held by the Judges that the scheme was not within the powers of the Board and that a number of sections in the Hindu Religious and Charitable Endowments Act were a violation of the Constitution (articles 19(1)(f), 25, 26 and 27 of the Constitution).

A perusal of the High Court decision shows a concern with the status of the head of the mutt. The Court refers to him as being a spiritual head and teacher. His duties are to carry on the worship of the deity installed in the mutt, and propagate the views of the religion of the institution. The Court adds that

> He is treated almost as a representative of the Godhead by his disciples and the followers. He is held in high esteem and the disciples consider any extraneous control over the head as lowering the dignity and the prestige he enjoys as such head. These are some of the salient rights and duties of a Mathadhipathi. It follows that to some extent he has the beneficial ownership of the properties while in respect of some of the properties he may be a manager. No doubt, the

[19] The Shirur Mutt is located near Udipi in the State of Karnataka and was founded by Sri Madhvacharya an exponent of Dwaita philosophy. The hagiography of the mutt suggests that it was founded around the 12th century A.D.
[20] Trustee Objection Statement
[21] Draft Scheme, Before the Board of Commisioners for Hindu Religious Endowments, Madras, O.A. No 471 of 1950

> management of the properties may bear a secular aspect but the secular and the religious aspects cannot be dissociated as they are inextricably mixed up when it is once established that the property and the income are at the disposal of the Swami for the sole and exclusive purpose of the spiritual welfare of himself and his disciples and followers.

How does one hold the beneficial ownership of such an institution? This reflects the contortions in understanding Hindu endowments law as a legal entity. In Hindu endowments, the idol is a juristic entity in which property is vested. The property is managed by the representative of the idol as its guardian and he is responsible for managing the property. In a well-known case known as *Vidya Varuthi Thirtha v Balusami Ayyar and Others*[22] in colonial endowments law it was held that the system of the common law trust was unknown in Hindu endowments law. The position on the mathadipathi or the head of the mutt was laid down as follows:

> These men had and have ample discretion in the application of the funds of the institution , but always subject to certain obligations and duties, equally governed by custom and usage.....Called by whatever name he is only the manager and custodian of the idol or the institution.....In no case was the property conveyed to or vested in him , nor is he a trustee in the English sense of the term, although in view of the obligations and duties resting on him, he is answerable as a trustee in the general sense for maladministration

In using colonial precedent, the Madras High Court did not question the ambiguity of such a concept as the mutt may not fall under a classical Hindu endowment having an idol. So, what is the status of the property? The irony of this formulation is that the head of the mutt becomes both a trustee and a beneficiary. Instead the Court sought to understand how the head of the mutt has the right to property under Article 19(1) (f) of the Constitution using another colonial precedent of *Umayal Achi v. Lakshmi Achi*,[23] which stated that the status of the head of the mutt was similar to that of the shebait or guardian of an idol having both beneficial and personal interest.

This justification of the unique status of the head of the mutt is followed by efforts to understand how religious and secular functions intertwined within the mutt. The Court argues that obligations like the feeding of the Brahmins who visit the mutt at the time of the *Paryayam* are binding on the head of the mutt and that." Customs and usages vary from mutt to mutt and an attempt to apply the axe and cut down the expenditure purely from a secular angle of vision is not to view the matter in the proper perspective". The Court argues for the right of the head of the mutt to enjoy and utilise the income in a manner in which the person holding the property is entitled to spend it under law. Various sections of the enactment are seen as being restrictive of his power to enjoy property and it holds that:

> Regarding the management of the properties, In our opinion, a separation of religious affairs from secular affairs of a Mutt in such watertight compartments is not possible. The property of the mutt and its income exist for one purpose and only one purpose and that is the religious purpose. It has

[22] AIR 1922 PC 123
[23]AIR 1944 Mad 340

to be applied and utilised for the maintenance of the mutt, for carrying on the worship and for the propagation of the religion……

The Swamiji's tranquillity and peace of mind which are so essential for deep contemplation may also be disturbed.

It was these concerns that were taken up by the Supreme Court and these concerns that brought about the formulation that the essential part of a religion has to be justified according to its doctrines. The examples that the court gives in the context of how rituals are performed such as "offerings of food should be given to the idol at particular hours of the day, that periodical ceremonies should be performed" is justified by saying that financial expenditure on these activities do not make them secular activities of a commercial or economic character". The Supreme Court confirmed the position of the High Court on the word "property", as used in article 19(1) (f) of the Constitution and should interpreted in a liberal and wide manner and arguing for the position of the head of the mutt as being a peculiar kind of property interest which involves both personal and beneficial interest. This interest is manifested in the head's large powers of disposal and administration and his right to create derivative tenures in respect to endowed properties.

It is in this context that the Court invokes Article 25 arguing that:

A Mathadhipati is certainly not a corporate body; he is the head of a spiritual fraternity and by virtue of his office has to perform the duties of a religious teacher. it is his duty to practise and propagate the religious tenets, of which he is an adherent and if any provision of law prevents him from propagating his doctrines, that would certainly affect the religious freedom which is guaranteed to every person under article 25.Institutions as such cannot practise or propagate religion; it can be done only by individual persons and whether these person propagate their personal views or the tenets for which the institution stands is really immaterial for purposes.

The records of the Supreme Court reveal clashes between the head of the mutt and the agent appointed by the Board. These clashes involve an inability to separate the notion and idea of property from religion itself. In proceedings before the local court the head of the mutt alleges that the agent of the Board was required to pay him:

Every month Rs 1000, 25 Kaide muras of bettige rice and 300 coconuts per mensem and every year 6 muras of blackgrain and muras of greengram for his expenses and the expenses of the poojas , ceremonies and viniyogas of the mutt and for the salaries of the personal and puja staff ……and also deliver to the Plaintiff [the head of the mutt]the vegetable loads and other perquisites to be collected from the Mutt tenants[24].

[24] Plaint No.O.S. 280 of1950, In the Court of the Subordinate Judge of South Kanara.

The head of the mutt argues that the entire income collected by the agent of the Board was not being entered in the accounts and that the agent was indulging in fraud by collecting more monies from the tenants of the mutt and that "a good proportion of the vegetable loads are being misappropriated. The Board however alleged that the head of the mutt has by imprudent and wasteful and unnecessary expenditure allowed the institution to be involved in heavy debts".[25] It particularly targeted the celebration of the festival of *Paryayam* as being beyond necessity in a large scale and for the personal use and pleasure of the head of the mutt. In response to the affidavit filed by the Board the head of the mutt refutes these charges arguing the expenses on the *Paryayam* were necessary and not for personal use and that he had maintained adequate accounts for them. He also argues that the agent of the Board had not reduced the debt of the mutt.[26]

Distinctions between the Religious and the Secular in the Shirur Mutt case

These problems are further seen in the Draft Scheme of Management[27] for the takeover of the mutt which tries to make a distinction between religious and secular affairs. This involves the appointment of an Executive Officer to manage the secular affairs of the mutt. The Executive Office in the conduct of such secular affairs shall place at the disposal of the head of the mutt all things that are necessary for the conduction of religious affairs. He was responsible for the proper upkeep and maintenance of the mutt and for the performance of services and festivals.

The dilemma of mixing the religious and the secular is seen a matter of control over property particularly temple wealth. The Scheme mentions that Jewels and other costly articles of the mutt which are not required for daily use shall be kept in a separate safe and that[28]:

> The key of one lock shall be in the custody of the Swamiar and that of the other in charge of the Executive Officer. Jewels and vessels required for daily use shall be in the custody of the Executive Officer. No jewels or metallic article shall be pledged, lent, converted or sold without the previous sanction of the Board.

Whereas some of these concerns echo colonial preoccupations with rituals leading to wasteful expenditure and temples as a site of unaccounted wealth, the manner in which such issues are resolved is entirely different as the Supreme Court does not accept these presumptions but arrives at a framework based on modern law-the right to property. It derives the right to religious freedom from its understanding of the right to property. The manner in which cases from other jurisdictions are cited reveal this pattern.

In arriving at the definition of religion in the essential practices test the Supreme Court explicitly rejected the test in *Davis v Beason*[29] which defined religion as "reference to one's views of his relation

[25] Counter-Affidavit of V. Sivasankar Rao on behalf of the Respondent Board, High Court of Judicature, Madras.
[26] Reply Affidavit of the Petitioner in C,M.P NO 2591 of 1951, High Court of Judicature, Madras
[27] Draft Scheme, Before the Board of Commisioners for Hindu Religious Endowments, Madras, O.A. No 471 of 1950
[28] Ibid. Para 20.

to his Creator and to the obligations they impose of reverence for His Being and character and of obedience to His will". It is in disagreement with this test that the court points out that religions in India like Buddhism and Jainism do not believe in God or in any Intelligent First Cause. Religion may have its basis in a system of beliefs or doctrines but religion was also practice i.e. rituals and ceremonies.

In arriving at the essential practices test the court argues that such practices are automatically restricted by:

> …….article 25(2)(a) contemplates is not regulation by the State of religious practices as such, the freedom of which is guaranteed by the Constitution except when they run counter to public order, health and morality, but regulation of activities which are economic, commercial or political in their character though they are associated with religious practices.

The justification for this is provided in an Australian case known as *Adelaide Company v Commonwealth*[30] which referred to protection for acts done in pursuance of religious belief as part of religion. The reference to the Australian case needs to be seen in reference to its facts. In 1941 a company of " Jehovah's Witnesses " incorporated in Australia commenced proclaiming and teaching matters which were prejudicial to war activities and the defence of the Commonwealth. Steps were taken against them under the National Security Regulation. The legality of this action was questioned, the High Court of Australia holding that the action of the Government under these Regulations did not infringe Section 116 of the Australian Constitution, which guaranteed freedom of religion and that political activities arising out of religious belief was subject to the powers of the State to ensure peace and security.

Other American cases were also cited such as *Minersville School District, Board of Education, etc. v. Gobitis*[31], *West Virginia State Board of Education v. Barnette*[32], and *Murdock v. Pennsylvania*[33]. The analysis in the first two cases is on how practices arising out of religious belief could affect political obligations. The third case involved commercial activities arising out of religious practices and that such activities have to be construed as religious activities. This indicates the notion of religious freedom is understood not as religious freedom per se but as restrictions on religious freedom which is already pre -defined. The Indian Supreme Court ironically does not reflect here on the Indian State's interference in religion which is unlike the American and Australian state and how that could affect the content of the freedom of religion and restrictions imposed on it.

The abolition of Article 19 (1) (f) has made the right to property no longer a fundamental right but a constitutional right. However, this does not change how property determines the way religion is

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[29] 133 U.S. 333 (1890)
[30](1943) 67 CLR 116
[31] 310 U.S. 586 (1940)
[32] 319 U.S. 624 (1943)
[33] 319 U.S. 105 (1943)

defined. A further examination of endowments cases is required to understand the so called inconsistency in the application of the essential practices test. This requires an examination of endowments and trusts law particularly the idea of religious endowments also being charitable endowments.

Religion, Caste or Tradition: *Sastri Yagnapurushdas v Muldas Brudardas Vaishya*

The Evolution of the Legal Definition of Hinduism

The Indian Supreme Court jurisprudence on the definition of Hinduism has been widely analysed. Sen argues that the Supreme Court ruling on what is Hindu or Hinduism is embedded in a discourse of classical Hinduism which originated with nineteenth century social reform movements as a response to colonial interventions.[34] Sen identifies two "models" of Hinduism used by the Indian Supreme Court which are inclusivist and exclusivist. In the inclusivist model he refers to the manner in which the social reformer Vivekananda articulated the idea of Hinduism as a universal religion practising universal toleration and whose foundation was in the Vedas which was the fundamental unifying force among all Hindus. According to Sen these ideas was taken up by a leading Indian philosopher Radhakrishnan who also emphasised on the Vedas being the core of Hinduism but stressed on the assimilative influence of Hinduism. Sen identifies exclusivist Hinduism as being the philosophy of Vinayak Savarkar who understood Hinduism in a territorial context- the concept of being Hindu was seen as an attachment to a holy land covering the Indian subcontinent. Therefore, Muslims and Christians could not be considered Hindus as their loyalties were to other holy lands such as Arabia and Palestine. Savarkar derives the concept of Hindutva[35] from his concept of Hinduism asserting that Hindus formed a common race, nation and civilisation.

Sen further examines how these philosophies have been reflected in the Indian Supreme Court's decisions particularly the case of *Sastri Yagnapurushdas v Muldas Brudardas Vaishya* which will be discussed in detail in this paper. This case involved a community known as the Satsangis or the followers of Swaminarayan who argued that entry to temples had to be restricted to members of their community and that they constituted a religion separate from Hinduism.

Sen argues that Radhakrishnan's ideas influenced the definition of Hinduism in the Yagnapurushdas case where the court used various sources to define Hinduism. Radhakrishnan's ideas allowed the court to come up with a civilizational understanding of Hinduism including its assimilative influences, the understanding that its foundations were laid in the Vedas and that it was a way of life. This was eventually used to deny the Satsangis' claim. He examines further how this model of inclusivism was

[34] These involved figures such as Raja Rammohan Roy, Dayananad Saraswathi and others who sought to root out various "defects" in Hinduism such as idolatry, polytheism, child marriage, widow burning by arguing that these practices are not found in the Vedas which they identified as the sacred texts of Hinduism. For a sense of how practices were related to texts see Lata Mani, *Contentious Traditions: The Debate on Sati in Colonial India*. (Oxford University Press, 1998)

[35] Hindutva has been considered as an inspiration for Hindu nationalist parties such as the ruling Bharatiya Janata Party in India.

expressed in cases such as the Ram wherein there the claim that the Ramakrishna Mission was a separate religion was also set aside. The usefulness of these models is examined in the well-known case of *Ramesh Yeshwant Prabhoo vs Shri Prabhakar Kashinath Kunte*[36] specifically known as the Hindutva rulings. In this case members of Hindu nationalist parties were prosecuted for making appeals to religion in violation of The Representation of People's Act, 1951 an enactment dealing with the conduct of elections. One of the most significant aspects of the case was whether the appeal to Hindutva was legitimate as it was an appeal to religion. The court argued that Hindutva was "a way of life" and also conflated Hinduism and Hindutva saying that these terms are not be understood narrowly but are indicative of a way of life of the Indian people and that Hindutva is reflective of Indianisation. Sen argues that although the court was silent on the real meaning of Hindutva as being related to the philosophy of Savarkar it appropriated Radhakrishnan's ideas of Hinduism as a way of life. This was done by collapsing inclusivist and exclusivist models. The Court was able to argue about a uniform culture of Indianisation because the inclusivist model symbolised by Radhakrishnan emphasised the true teachings of Hinduism and the weeding out of superstition. The emphasis on the Vedas which contained no doctrine provided a basis for both inclusiveness and exclusiveness.

Is Sen's understanding of the evolution of the legal definition of Hinduism correct? His emphasis on one source of the court's decision does not provide an indication of how legal doctrine has travelled. If one looks at the case's citation trajectory it is obvious that it has been used to support the legislative framework governing the Hindus as a religious community. In *Narayan v Aravindakshan*[37] the idea of Hinduism in the case were used to decide the validity of a Hindu marriage. Similarly in *Uma Devi and Others v Maharaja Partap Singh*[38] and *Commissioner of Wealth Tax, Madras v Sridharan*[39] such a conception of Hinduism was used to decide matters of Hindu succession. In only one case there is a trajectory that is similar to what happened in the Hindutva ruling wherein in a case on the recognition of Madrasas the court made a distinction between foreign religions originating outside India (such as Islam) and religions originating within India (such as Buddhism, Jainism etc.)[40].

The Case and its Contentions

On 12th January 1948, Sastri Yagnapurushdas and four other followers of the Swaminarayan sect[41] known as the Satsangis filed a suit in the Court of the Joint Civil Judge, Senior Division, Ahmedabad. and on behalf of the Satsangis of the Northern Diocese of the sect at Ahmedabad. Their apprehension was that Muldas Bhudardas Vaishya, the President of the Maha Gujarat Dalit Sangh at Ahmedabad, planned to enter the temples of the Swaminarayan sect situated in the Northern Diocese at Ahmedabad in exercise of the legal rights conferred on them by the Bombay Harijan Temple Entry Act, 1947. Section 3 of this enactment provided that every temple to which the Act applied shall be open to Harijans for worship in the same manner and to the same extent as other Hindus. The followers of the

[36] AIR 1996 1113
[37] AIR 2006 Ker 26
[38] AIR 1990 HP 62
[39] (1976) 4 SCC 489
[40] Committee of Management of Anjuman Madarsa Noorul Islam Dehra Kalan decided by the Allahabad High Court on 5th April 2007
[41] I use the word sect as this is the man ner in which the litigants have been named in the case

Swaminarayan community had alleged that the Swaminarayan temple of Sree Nar Narayan Dev of Ahmedabad and all the temples subordinate to this temple were not temples within the meaning of the Act. Their contention was that the Swaminarayan sect represented a distinct and separate religious sect unconnected with the Hindus and Hindu religion, and that their temples were outside the purview of the Act. An injunction preventing Muldas Vaishya and his followers from entering the temple was sought During these proceedings the Act was amended and the Constitution of India came into force. The followers of the Swaminarayan sect argued that the Act was inconsistent with the Constitution and the fundamental rights guaranteed within it. It was contended by them that the Swaminarayan sect was an institution distinct and different from the Hindu religion, and, therefore, the rights under the Act could not apply to or affect their temples. The trial judge ruled that the Swaminarayan sect was not distinct and different from Hindu religion and that their temples were temples which were used as places of religious worship by the congregation of the Satsang which formed a section of the Hindu community. The trial Judge, however, came to the conclusion that it had not been established that the temples were used by non-Satsangi Hindus as places of religious worship by custom, usage or otherwise, and that they did not come within the meaning of the word "temple" under the Act. Therefore, Muldas Vaishya and his followers could not enter the Swaminarayan temple.

This led to an appeal to the High Court of Bombay in 1957 wherein it was urged that the injunction barring Muldas Vaishya from entering the temple was violative of the Untouchability Offences Act of 1955 (the UTA). The High Court took the view that the injunction granted by the court was not violative of this enactment but a new state enactment which was The Bombay Hindu Places of Public Worship (Entry Authorisation) Act, 1956 (the BHPW Act) that adopted the provisions of the UTA had to be considered. In this context the High Court sent the case back to the trial court for recording a finding on the issue "whether the Swaminarayan temples were Hindu religious institutions within the meaning of Art. 25 (2) (b) of the Constitution[42]". The trial court reaffirmed the earlier decision and the main question that was argued before the High Court was whether the followers of the Swaminarayan sect could be said to profess Hindu religion and be regarded as Hindus or not. It was then contended by the followers of the Swaminarayan sect that they may be Hindus for cultural and social purposes, but they are not persons professing Hindu religion, and as such they do not form a section, class or sect or denomination of Hindu religion. It was argued that Swaminarayan, the founder of the sect, considered himself as the Supreme God, and therefore could not be assimilated to the Hindu religion. It was also argued that the temples had been established for the worship of Swaminarayan himself and not for the worship of the traditional Hindu idols, and that again showed that the Satsangi sect was distinct and separate from Hindu religion. It was further contended that the sect propagated the ideal that worship p of any God other than Swaminarayan would be a betrayal of his faith, and lastly, that the Acharyas who had been appointed by Swaminarayan adopted a procedure of "Initiation" (*diksha*)

[42] Article 25(2)(b
(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 Explanation I . The wearing and carrying of kirpans shall be deemed to be included in the profession of the Sikh religion Explanation II In sub clause (b) of clause reference to Hindus shall be construed as including a reference to persons professing the Sikh, Jaina or Buddhist religion and the reference to Hindu religious institutions shall be construed accordingly.

which showed that on initiation, the devotee became a Satsangi and assumed a distinct and separate character as a follower of the sect.

The High Court concluded that it was impossible to hold that the followers of the Swaminarayan sect did not profess Hindu religion and did not form a part of the Hindu community and that this was not violative of the provisions related to religious freedom in the Constitution.The main question before the Supreme Court was whether High Court was right in holding that the Swaminarayan sect was not distinct from the Hindu religion and that their temples were Hindu temples which were subject to temple entry legislation. In trying to decided what was the Hindu religion the court draws on a wide variety of sources such as the Orientalist and scholar of religions Monier Williams, the Encyclopaedia of Ethics and Religion, Radhakrishan, Toynbee, Max Mueller and others. The Court asserts:

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

Elaborating further on this theme the Court notes unlike other religions and religious creeds, Hindu religion is not tied to any definite set of philosophic concepts as such and that the worship of idols is not necessary. In constructing a history of Hinduism, Buddhism, Sikhism and Jainism are mentioned and that their founders were motivated to root out corruption in Hindu thought which led to them also founding separate creeds. What was common among all of them was that they revolted against the dominance of rituals and the power of the priestly class and preached in regional languages and not in Sanskrit.

An effort is then made to place the founder of the Swaminarayan sect within this framework. Swaminarayan originally known as Sahajananda was born in 1780 and is mentioned as having been appalled by the practices of the Vallabhacharya sect of Vaishnavism to which he belonged to and that he sought to reform the sect. He is also mentioned as having erected a temple within the tradition of Vaishnavism and as having launched a crusade against the licentious habits of the gurus of the Vallabhacharya sect.

In narrating the history of the Swaminarayan sect, the Court notes the temples that have been established by Sahajananda. Around 1826-27 Swaminarayan through a formal document divided India into two parts, establishing a northern diocese with the temple of Nar Narayan at Ahmedabad, and the

southern one which included the temple of Lakshminarayan at Wartal. Subordinate to them various other temples were established in India. In understanding the tenets of the Swaminarayan sect the Court examines the following texts 1) the Lekh (which referred to the establishment of temples) 2) the Shikshapatri (originally written by Swaminarayan but rendered by his disciple Shatanand) which was a summary of Swaminarayan's instructions and principles to be followed by his disciples in their lives 3) the Satsangijiwan which is an account of the life and teachings of Swaminarayan.4) the "Vachanamrit" which is a collection of Swaminarayan's sermons.

The examination of these texts is important for the derivation of the teachings of Swaminarayan. The sources that the Court uses to understand these texts are Monier Williams and the Gazetteer of Bombay. These teachings involved practices that were ritualistic and practices that were moral. An example of the ritualistic practices were as follows:

> My male followers should make the vertical mark (emblematical of the footprint of Vishnu or Krishna) with the round spot inside it (symbolical of Lakshmi) on their forehead

Illustrations of moral practices were the injunction that "abstaining from injury is the highest of all duties and almsgiving to the poor". Practices that appeared to be neither strictly ritualistic or strictly moral were prohibitions against the consumption of alcohol and meat partaking of food with low caste people; caste pollution; company of atheists and heretics and otherpractices which might counteract the effect of the founder's teachings. Of particular emphasis was the authority of Swaminarayan to admit followers as candidates for regular discipleship, giving them the Panch Vartaman, formula forbidding lying, theft, adultery, intoxication and animal food[43].

In examining these teachings, the Court comes to the conclusion that the Swaminarayan sect is not different from the Hindu religion. It makes an attempt to place the Swaminarayan sect within the framework of the history of Hinduism in a two- fold manner. Firstly, Swaminarayan is linked to another reformer Ramanuja in the context of his teachings. His teachings are seen as related to the Vedas and his adulation of the deity Krishna to Vaishnavism as a branch of Hinduism. His effort to root out defects in the Vallabhacharya sect considered to be part of Vaishnavism. However, in the building of this history Swaminarayan fulfils a certain dynamic which is:

> Even a cursory study of the growth and development of Hindu religion through the ages shows that whenever a saint or a religious reformer attempted the task of reforming Hindu religion and fighting irrational or corrupt practices which had crept into it, a sect was born which was governed by its own tenets, but which basically subscribed to the fundamental notions of Hindu religion and Hindu philosophy. It has never been suggested that these sects are outside the Hindu brotherhood and the temples which they honour are not Hindu temples……

[43] The Court takes this statement from the Gazetteer of the Bombay Presidency.

Other arguments advanced by the followers of the Swaminarayan sect were brushed aside. It was argued that no person becomes a Satsangi by birth and it is only by initiation that the status of Satsangi is conferred on a person, Persons of other religions and Harijans can join the Satsangi sect by initiation and that Swaminarayan himself is worshipped as God. These arguments were rejected on the ground that people of other religions were entitled to benefit from Swaminarayan's blessings and the worship of Swaminarayan was consistent with the Hindu philosophy that saints are born to restore the balance of religion. Finally, the Court concludes by expressing the necessity of abiding by the provisions of the Constitution which had come into force during the litigation granting the right of entry into temples for all castes.

The Evidence and its Ramifications

Although there has been concerns on the aspects within the Supreme Court decision that led to the conclusion that Hinduism is a way of life, such conclusions appear to be a continuation of the statements made in the lower courts. The Bombay High Court decision states that Hinduism is a religion not only based on the Vedas but on other scriptures as well. Every tradition which has sought to purify Hinduism has been absorbed by it with the result that Hinduism cannot be expressed as a creed. This is also reflected in the judgement of the Civil judge at the civil court of Ahmedabad who relying on the evidence of Shastri Yagnapurushdas himself remarks that the Hindu religion is a Vedic religion. There is an effort to trace the origins of the Swaminarayan sect to other sects showing its roots in Vaishnavism and an effort to see the scriptures of the sect as being revered by other sects. It is also argued as in the Supreme Court decision that its teachings can found in the Hindu faith and that the founder merely effected reform in the Hindu religion not of belief but of morals. However, unlike the Supreme Court decision the civil court argues that the Buddhism is a distinct religion because of its atheistic teaching and Jainism does not recognise the authority of the Vedas. It also distinguishes Jews, Muslims and Christians on the ground that distinctions on inter-dining and intermarriage do not apply to them in the manner they apply to Hindus. This distinction is interesting as the civil court judge appears to see caste as being essential to constitute Hinduism.

What was the kind of evidence that allowed the court to come to such conclusions? As we saw there are two main questions 1) Whether the followers of Swaminarayan constituted a separate religion 2) Whether the temples of the followers of Swaminarayan were Hindu temples

Religion and the followers of Swaminarayan

In the litigation that lasted for three years before the civil court the evidence that the followers of the Swaminarayan sect involved different kinds of claims 1) that the Swaminarayan sect constituted a separate religion 2) that Swaminarayan was God himself.3) that the Swaminarayan sect was not a religion as it had practitioners that followed other religions 4) the Swaminarayan sect was not a caste

but a sampradaya. Most of the evidence in this case made some or all of these assertions. In understanding this evidence I argue that the court has failed to understand the notion of tradition vis-à-vis religion and persists in seeing the idea of sampradaya as a "sect" being part of religion and not as a tradition.

Some illustrations of this evidence can be seen in the various affidavits[44] that were filed in this litigation in the lower courts in support of the Swaminarayan sect which the Supreme Court had the opportunity to examine Jugaldas Garbaddas a goldsmith by profession traces the worship of Swaminarayan to his ancestor Harivallabhdas Prabhudas. He states that his ancestor belonged to the "Smarta" religion and embraced the Swaminarayan religion and was ex-communicated by the Smarta community Yet another claim of excommunication by a community on the ground of following Swaminarayan was asserted by Popatlal Vrijvallabhdas Choksey (one of the plaintiffs in the case). He asserts that he exclusively worships Swaminarayan and performs *pooja* or worship. The claims that Swaminarayan was God took the form of exclusive worship. An affidavit filed by Ravjibhai Desabhai Patel asserts that in their temples only the idols of Swaminarayan and his parents were installed and idols of other deities were actually those of Swaminarayan himself. Evidence from individuals not part of the Swaminarayan sect asserting that non-Hindu Satsangis do not visit and that the idols in the temple do not have Bhavna -they are not available for worship was also adduced[45].

Jerbanoo Mistry a housewife states that she belongs to the Parsi religion and is a Satsangi but has not become Hindu and that she believes that the *Bhagwan* (the Lord) is Swaminarayan. In assertion of her Parsi status she states that all her dealings are only with the Parsi community and that I "interdine and intermarry my daughters (and my sons) only with the Parsi community" and that she has been through the Navjyot ceremony. In making for the case of the Satsangis as being a sampradaya she claims that:

> the principles of the Swaminarayan Sampradaya are so laid down that a person belonging to every community, even by observing the religion, manner and customs of his own community can become a Satsangi.

Some of these assertions are reiterated by Mansuralibhai Vaji Bhayani a Khoja Ismaili Muslim who similarly remarks that interdining and intermarriage is only with members of the Khoja Ismaili community whose practices he observes and that his ancestors up to five generations have been members of the Satasangi sampradaya. He mentions observing the Panchvartman or the five rules of conduct of the sect and that he believes the Shri Swaminarayan to be *Bhagawan* the Lord. Yet another affidavit by Islamdar Gafoor a Muslim also mentions following the *Panchvartman* and that it is not necessary to convert to Hinduism from Islam. All these affidavits mention that *shudhi* or the practice of conversion to Hinduism is not required and that they are entitled to take Darsan (or see the deity).

[44] It is to be noted that only some of the affidavits are available in the file and not all the affidavits. The selectivity by which only certain affidavits have been preserved provides an insight to the mindset behind the making of the judgement

[45] Affidavit of Narbadashankar Ambashankar Shukla witness No for the plaintiff dated 20-7-1949

A sadhu (religious ascetic) Shastri Gopalchandradasji asserts in his affidavit that the Swaminarayan sect is not a section of the Hindu community and that non-Satsangi Hindus do not make use of the temples of the Sampradaya. He further states that:

> Even if a man who has become Satsangi according to the principle laid down in our Sampradaya, follows the social customs, usages and traditions of his community, our Sampradaya does not take any objection to the same.

Contradictions abound in these accounts. Yagnapurushdas the main plaintiff refers to Hindu Satsangis and non-Hindu Satsangis remarking that the Swaminarayan religion is based on the Vedic religion. He comments that Hindu Satsangis believe in Swaminarayan as *Bhagwan* [the Lord] whereas the non-Hindu Satsangis do not. This is reiterated by another plaintiff Navinchandra Vadilal Choksi. In his deposition he states that he does not cease to be Hindu by being initiated as a Satsangi.

The evidence on the side of Muldas Vaishya arguing for entry into the temple was also contradictory in nature. Khandhubhai Karasanji Desai a non-Satsangi and an Anawala Brahmin by caste in deposing before the court says "It is very difficult for me to say what religion I belong to". In trying to make the case that the Swaminarayan followers were a section of the Hindu religion and were barring lower castes from entering their temples he claims to have performed *darshan* to the idols there and says that he does not know whether a non-vegetarian by caste is prohibited from entering the temple. The argument for exclusive worship is rejected on the ground that Satsangis worship other Hindu gods.

The political involvement of the individuals involved in this case also dictated their evidence. Muldas Vaishya the President of the Maha Gujarat Dalit Sabha was active in the temple entry movement. Trikamlal Jamnadas Patel a Congressman states that his main objective is the abolition of untouchability is the programme of the Congress and this involves the entry of Harijans into temples. He narrates an incident wherein he had gone with Harijans to the temple and was not allowed entry. He also states that he went to the temple previously as a non-Satsangi Hindu and there was no bar on Hindus entering the temple. The evidence of Gulzarilal Nanda a Satsangi and Minister in the Bombay Government is also adduced. He asserts that the Swaminarayan followers are one of several cults prevalent among the Hindu community and that the followers of Swaminarayan adopt Hindu law in respect to customs and practices.

This evidence is characterised by a plethora of terms to refer to the followers of Swaminarayan i.e. sect, cult, community, religion, God, incarnation. The clash between English terms and terms in the Sanskrit and Gujarati languages are obvious. Is *darsan* worship and is *pooja* ritual? What does it mean to say that an idol has *Bhavna*? Does *Bhagwan* mean God? Does Satsang mean congregation? Does

Purna Puroshottam mean an incarnation of God? This translation into a Western Christian framework in the context of legal categories poses problems.

In the file on record there are no affidavits of the Harijans themselves. The High Court judgement briefly mentions one Ranchodbhai Nathabhai who states that he has not seen any non-vegetarian Hindu enter the temple and himself is not allowed to enter the temple but takes *darshan* of the dome from outside the temple. The fact that the Swaminarayan sect abided by caste rules was itself admitted by Shastri Yagnapurushdas who stated in his affidavit that Harijans were admitted in accordance with the rules and regulations of the sect.

The Swaminarayan Temple as a Hindu temple

Marc Galanter in his analysis of this Supreme Court decision notes that the Satsangi's main scripture the Shikshapatri specifically mandates caste injunctions. He remarks that the court ignores this in judging them as Hindus and allowing temple entry. He comments that the court superimposes its own understanding of the true teachings of Hinduism on the Satsangis by finding out that they belong to the same category as that of reforming saints who subscribe to fundamental Hindu tenets and philosophy. Galanter poses the question of how Hinduism could be assimilative and at the same time be reduced to fundamentals.

The history of the trial tells a different story. Whereas the Supreme Court and the High Court may have held that the Swaminarayan temples were Hindu temples based on the evidence that the followers of Swaminarayan were Hindu, the litigation at the stage of the lower courts differs sharply. In confirming the injunction against the entry of non-Satsanghi Harijans the civil judge in his order on 29th January, 1948 distinguishes the Satsanghis teachings from Hindu philosophy by relying on a number of affidavits filed in the litigation which stated that the temple was only for Satsanghis and not for Hindus in general rejecting the affidavits of non Satsanghi non-Harijans. The judge proceeded to distinguish Hindu philosophy from the philosophy of Satsanghis arguing the goal of Moksha or Salvation essential to Hindu philosophy is different in the case of Satsanghis. Whereas ordinary Hindus believe that on reaching salvation the residence of the soul is Golok the Satsanghis believe that on reaching Golok salvation is the service of Lord Krishna (Swaminarayan did not approve of meditation on Lord Shiva and Brahma). The court also took note of the fact the Swaminarayan had his own idols in temples which were to be worshipped along with the idols of his parents. There was a distinction between idols that were consecrated by a Guru and idols that were respected. In recording this evidence the court notes that Harijan Satsangis are allowed to enter the temple but need to stand at the place allotted to them and that affidavits filed by Harijans disassociate themselves from Muldas Vaishya and do not make a case for temple entry. Most importantly however the court established that this could not be a temple as it was not dedicated to an idol[46]. It understood ownership being vested in

[46] Dedication to an idol is a crucial element under Hindu endowments law. If dedication is not proved the place concerned cannot be considered a temple or a Hindu endowment.

the Satsanghis themselves relying on an earlier litigation filed by the Satsanghis in connection with property and administration of their temples. In this case the District Court held that the juristic owner was in the community of worshippers and could not be extended to the idol. The judge comes to the conclusion that the Satsanghis are a separate institution from Hinduism although they have several teachings in common. He records his sympathies with Harijans although he does not grant temple entry

> I quite sympathise with their legitimate aspirations and personally no one would be more glad than myself to see that the class of Harijans enjoy equal status with the rest of Hindus …….

The trial took another twist after the Bombay Harijan Temple Entry Act was amended and the civil court was asked by the High Court [47]nearly a year later to confirm whether such temples are within the enactment. In this case the court deliberated the various amendments to the Act and particularly the definition of the word "temple" which was defined as a place of religious worship by custom or usage and used by the members of the Hindu community (substituted for Hindus in general other than Harijans). Due to this amendment, the question for investigation was reframed as being whether the members of the Satsangi community are part of the Hindu community and if they are part of the Hindu community whether they use the temples by custom or usage.

In deciding whether the Satsangi community was part of the Hindu community the Court went into the texts of the Satsangis stating that Swaminarayan had kept intact teachings of the Vedic dharma embodied in the Hindu religion and the idea of Swaminarayan as an incarnation of God (an *Avtar)* was part of the Hindu religion. The court rejected the evidence of Muslims and Parsis on the ground that they had not been initiated into the sect and that they are subject to different rituals[48]

But how were the Satsangis Hindus? Interestingly this question revolved around what the word Satsang itself meant. In analysing the scriptures of the Satsangis the distinction between the word Satsangi and Kusangi was noted. Satsangi referred to a person seeking truth by following the teachings of Swaminarayan (such as observing the Panchvartman). The Kusangi was a member of the community that the Satsangi came from but which did not observe such teachings. The court observed in this case that the Satsangi remained part of the caste that he belonged to i.e. a Brahmin remained a Brahmin despite being a Satsangi. Therefore, the Satsangis cannot be considered a community. On this basis, the court arrives at the conclusion that the Satsangis form part of the Hindu community.

In deciding whether the Hindu community or a section therof use the Satsangi temples as a matter of custom or usage it was held by the court that the occasional visits by non-Satsangi members of the Hindu community do not constitute or achieve any legal right. In interpreting the Bombay Temple Entry Act the court states:

[47] Finding on issue sent down by the High Court in appeal No.30 of 1948 from order of the Jt Civil Judge dated 22-8-1948
[48] It is unclear how the court came to this conclusion as the Muslim and Parsi affidavits on record mention having undergone initiation or *Diksha* in becoming a follower of Swaminarayan.

……. the Act does not and cannot be taken as abolishing distinctions between sects and sects or sampradayas and Sampradayas of the Hindu religion

In continuation of this argument the court then held that the right of worship can only be granted to non-Satsangi Harijans along with Satsangi Hindus of higher castes. The Act cannot be construed as to allows Harijans from one Sampradaya to use temples exclusively belonging to another Sampradaya that the Dwij or higher castes are not allowed to enter.

The matter went back on appeal to the High Court wherein the injunction was modified and the followers of Swaminarayan were asked to give the concession that the non-Satsangi Harijans could have *Darshan* from the footsteps of the temple from where the idols would be visible.

The judgment in this case was finally passed by the Joint Civil Judge on 24-9-1951 after the Indian Constitution had come into force. In deciding the temple entry claim it was noted that the followers of Swaminarayan did not object to having Harijans in their temples and had a number of Harijans in the Satsang and did not object to the admission of non-Satsangi Harijans. Therefore, did the non-Satsangi Harijan have the right to enter the temple and was this derived from the right of a non-Satsangi High caste Hindu? It reiterated that the Satsangis were not a community as they comprised of Hindus, Muslims, Parsis and Harijans and as Satsangis they were bound by certain ties such as the initiation or *Diksha* and the bond of guru and chela (disciple). Their temples were the benefit of a class of people which were the Satsangis.

In looking at the status of the Harijans the court observes that the Satsangi Harijans are not allowed to worship in the same manner and extent as the Satsangi high caste Hindus but that they have made no complaint about this and that this was not a suit for equal worship by Satsangi Harijans. The Court relies on the affidavits on non-Satsangi Hindus who state that they do not go to the temples of Swaminarayan for worship. It notes that MuldasVaishya who had filed the suit for temple entry and was the President of the Maha Gujarat Dalit (Harijan) Sangh, Ahmedabad and a member of the Central Legislator had not filed an affidavit and had not made any claim. It remarks that there was no seriousness in the movement for temple entry. It also dismisses the evidence of Gulzarilal Nanda arguing that he had no evidence that non-Satsangi Hindus visited the temple. It was thus ruled that non-Satsangi Harijans could not enter the Swaminarayan temple.

The matter did not end there and was sent on appeal to the High Court. Due to the Constitution being in force the civil judge was now asked to adjudicate whether the Swaminarayan temple was a Hindu religious institution under Article 25 (2) (b) of the Constitution. This issue was decided on 24th March

1958 long after the Constitution had come into force. The question had however changed. From determining whether Harijans had the right to enter temples used by Hindus it now became whether the followers of Swaminarayan were Hindus and if they were it would be consequentially deemed that their temples were Hindu. A relationship was sought to be drawn between the followers of a religion and the spaces that they frequented. This relationship was complicated by the Bombay Hindu Places of Public Worship (Entry Authorisation) Act 1956 that had just come into force which had considerably widened the definition of "Hindus" which included all sections and classes of Hindus and all sub-divisions, castes, sub-castes, sects or denominations.

In justification of the conclusion that the followers of Swaminarayan were Hindus the court used predictable criteria which had been used previously. Swaminarayan's teachings did not depart from the Hindu religion as they were based on the Vedas (it was noted that Sastri Yagnapurushdas himself admitted that there is no Hindu religion that does not believe in the Vedas). His teachings had references to Hindu deities and that he had sought to reform Hinduism. However some additional criteria was added, the court observing that idol worship was essential to Hindusim and that Hindu idols were present in these temples. Hindu festivals were also celebrated in the temple. It then relies on the three affidavits submitted on behalf of Muldas Vaishya which the earlier court decision had mentioned as not having weight. Suddenly the assertions by Khandubhai Desai, Gulzarilal Nanda and Trikamlal Patel asserting that non-Satsangi Hindus visit the temple become reliable evidence. This is bolsterd by the evidence of another witness Venibhai who states that he has been to the temple having done so for twenty years and that non-Satsangi Hindus also do so[49]. The language of Venibhai's affidavit appears tailored to the sensibilities of the court by mentioning Swaminarayan as a "reformist" and that idols of various Hindu deities were placed in the temple.

The shifts in judicial discourse in the context of the temple entry question can be characterised at two levels. The first level is at the level of legal change where there have been changes in law. The litigation began with the effort to enforce the provisions of the Bombay Harijan Temple Entry Act. Due to the amendment in the Act which changed how a temple was viewed in law by replacing dedication with custom or usage in the context of providing rights from the viewpoint of worshippers the litigation underwent a shift. A further change in the coming into force of the Indian Constitution and the subsequent passing of the Bombay Hindu Places of Public Worship (Entry Authorisation) Act 1956, forces the court to examine whether their actions are in conformity with the provisions for throwing open religious institutions to lower castes. This led to the eventual confirmation by both the Supreme Court and the High Court that the Swaminarayan followers were Hindus and that their temples were Hindu temples.

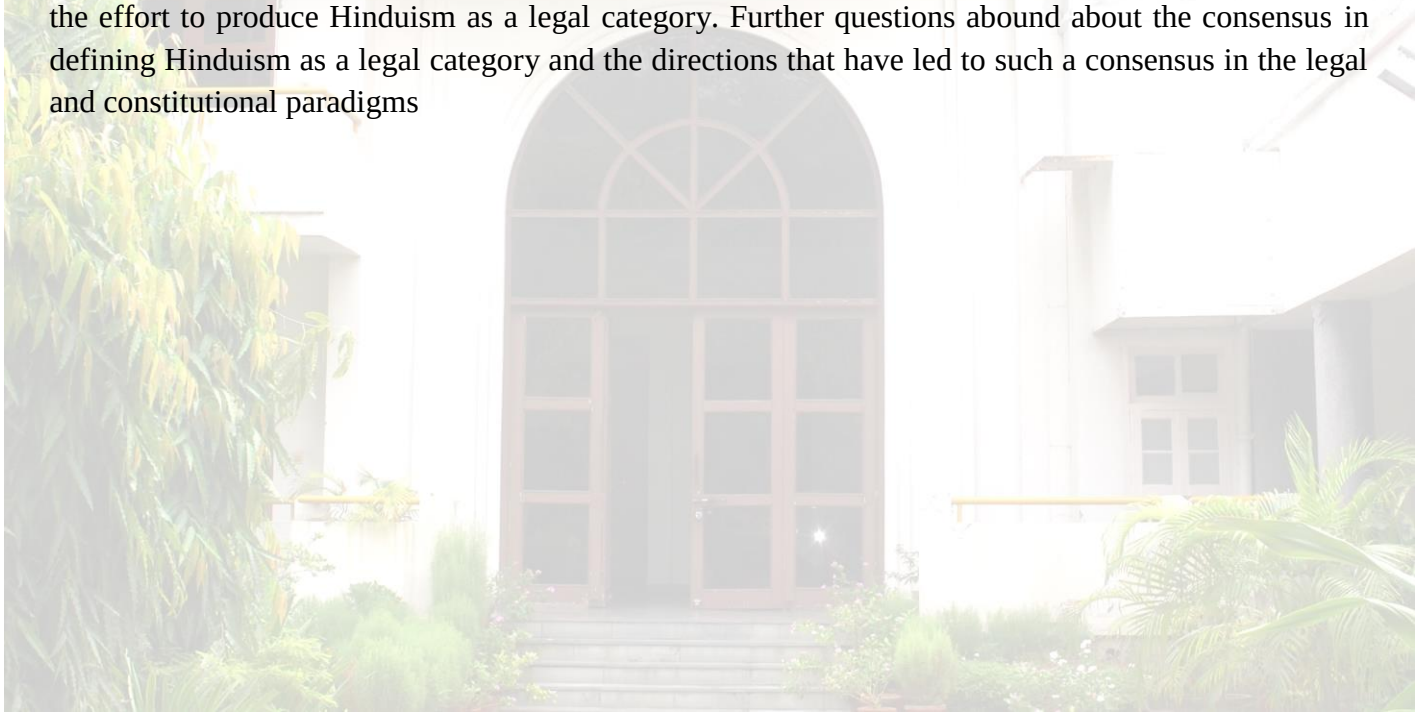
But the shift in definitions do not explain the change in legal discourse. Why is it that the contradictions in this evidence have been passed over by the court? How has political discourse

[49] The evidence for another witness Keshavlal who also stated that non-Satsangi Hindus went to the temple was rejected when he did not turn up for cross examination.

affected this decision? How did political influence in the form of affidavits vague in content and substance from the legislators from the Congress gain paramountcy? Whereas all these questions are relevant they do not tell what the crucial, Due to the change in definitions the legal definition of a Hindu became a normative category that could be related to both spaces and practices. Therefore, the problem of temple entry for Harijans could not be resolved by ruling that Satsangi Harijans should be treated on par with Satsangi high caste Hindus in the context of the right to worship. It was that rights to worship for Harijans could be given only within the framework of Hinduism itself. It was only by declaring Harijans as Hindus one could grant them rights of worship.

Conclusion

Sullivan's argument that courts cannot define religious freedom and it should be subsumed under rights to general equality also acknowledges that definitions of religion by U.S courts operate with a notion of Protestant religion in mind. In understanding the Indian Supreme Court's record on religious freedom, the difficulty arises as there is no coherent definition of religion. It also does not appear that the court is interested in defining the parameters of religious but is concerned more with the social phenomena that religion identifies. In the case of Shirur Mutt we saw that the essential practices test was determined on the basis of the consolidation of the position of the head of the mutt. In the Yagnapurushdas case the court although using a framework determined by colonial conceptions of Hinduism i.e. idol worship being crucial to constituting Hinduism, there is an effort to distort these categories by speaking about true Hinduism which does not have caste distinctions. The efforts to build a "modern" Hinduism rests on shifts in legal categories and portrays tensions and directions in the effort to produce Hinduism as a legal category. Further questions abound about the consensus in defining Hinduism as a legal category and the directions that have led to such a consensus in the legal and constitutional paradigms



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GLOSSARY

The references are mainly taken from W. J. Johnson *A Dictionary of Hinduism* (Oxford University Press 2014) and The Wiley Blackwell Companion to Zoroastrianism edited by Michael Stausberg, Yuhan Sohrab-Dinshaw Vevaina (Wiley and Sons, 2015) with condensation.

Avtar a term applied principally to the 'descent-forms' or 'incarnations' of Viṣṇu, a Hindu deity

Bhagwan fortunate', 'having shares', 'adorable', 'Lord', 'God'

Bhavna (Bhava) **'**existing' and 'becoming'

Darsan **'**looking' or 'viewing'

Diksha 'consecration' or 'initiation'

Pooja (puja) 'worship' 'veneration' or 'homage'

Navjot initiation ceremony of a child belonging to the Zoroastrian religion