

Religion and the Secular State: Indian Perspective

I. SOCIAL CONTEXT

India is an ancient land of religious pluralism and cultural diversity. This largest democracy on the globe is a federation of 35 constituents – 28 full-fledged States and seven Union Territories, two of which are self-governing and the rest ruled by the central government. The Hindu religion is predominant in as many as 29 of these constituents, its followers having a nearly 80 percent share in a country population of over a billion.¹

The 160 million Muslims of India – with a predominant Sunni majority – are the country's second largest community.² They are an overwhelming majority in Kashmir and Lakshadweep, a third of the population in Assam, about a quarter each in Kerala and West Bengal, and a fifth in the country's most populous state – Uttar Pradesh – while there is a sizable number of Muslim-majority districts, cities and townships situated in various parts of the country.

With a headcount of nearly 24 million, the Christians – with a predominant Catholic majority – are the country's third largest community.³ They are a majority in three north-eastern states – Meghalaya, Mizoram and Nagaland – and their population is much higher than the national average (2.5 percent) in Andamans, Arunachal Pradesh, Goa, Kerala and Manipur.

The Sikhs, with a total population of 16 million, are the majority in the state of Punjab and a minority everywhere else. Next to them are 8 million Buddhists – having a high percentage of population in Sikkim, Arunachal Pradesh and the Laddakh area of Kashmir – followed by 3.5 million Jains scattered all over the country.⁴ Besides these, there are small Zoroastrian, Jewish and Baha'i groups and a number of tribal faiths prevailing in certain parts of the country whose entity as separate religions is specifically recognized by State law and judicial decisions.⁵

II. THEORETICAL AND SCHOLARLY CONTEXT

The majority of Indians have never favored a theocratic State, but there have always been in the country undercurrents of thought suggesting a space for religion in State affairs. Until the beginning of the 20th century, India's war of independence from foreign rule was fought on the plank of equality of all faith traditions and of their followers. The scene changed thereafter and certain sections of the majority community began projecting their religion as an inseparable part of the future political ideology. As a reaction to this, some Muslim leaders began demanding special arrangements for their community in the country's forthcoming political structure.

These competitive aspirations eventually led to the partition of the country accompanying its independence from the British rule. During the thirty months of

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1. There is an official census in India now every ten years. The approximate population figures for all communities given here are based on the Census Report of 2001.

2. Among the minority Muslim groups are the Ithna Ashari Shi'as and the Isma'ilis.

3. The Census Reports mention Catholics and Protestants separately. Among the many other Christian groups are the Presbyterians, dominant in northeastern states.

4. Among the Buddhists the Mahamayana group is dominant, while the Jains are divided into Digambar and Svetambar sects.

5. Many of these are separately mentioned in the Census Reports. A leading case on their legal status is *SP Mittal v. Union of India* AIR 1983 SC 1.

Constitution-making since the advent of freedom, demands were made for the protection of certain religious traditions in the national charter under preparation, and some of these had to be accommodated.⁶

A quasi-secular ideology remained dominant in State affairs for about half a century after independence, but throughout these years certain concessions had to be periodically made in favor of particular religions. Towards the fag end of the 20th century, the majority community's protagonists of a different ideology that they called "*Hindutva*" took over the reigns of the nation and their ideology of "cultural nationalism" remained dominant in the country's governance throughout their six-year rule.⁷ They remain in political control over certain regions, but, for the time being, not at the federal level. Existence of these two competing political ideologies – one believing, in principle, in equality of all religions and the other in a privileged position for the historically oldest religion of the country – seems to have become a permanent feature of the Indian polity. On the whole, the favored ideology regarding the state-religion relationship in general is of a liberal cooperation – not of a rigid separation.

In a leading case, the Supreme Court of India stated that secularism is "more than a passive attitude of religious tolerance; it is a positive concept of equal treatment of all religions," asserting at the same time that "when the State allows citizens to profess and practise religion it does not either explicitly or impliedly allow them to introduce religion into non-religious and secular activities of the State."⁸ The idea that *Hindutva* was much more than merely a religious ideology once got active support from the country's apex court, but, as it evoked public outcry, the court had to issue a supplementary decision that its ruling did not mean to dilute the Indian concept of secularism.⁹

III. CONSTITUTIONAL CONTEXT

Adopted in the third year of independence from foreign rule achieved in 1947, the Constitution of India did not declare any religion to be the State religion or an otherwise privileged faith tradition. It declared "equality of status and opportunity" to be one of the basic ideals of future polity, and non-discrimination on the basis of religion one of the people's Fundamental Rights.¹⁰ Twenty-six years later the Preamble to the Constitution was amended to add the word "secular" to the prefatory description of the character of the country.¹¹ However, the concept of "secularism" adopted under the Constitution was and remains quite different from its western stereotype – in the Indian Constitution there is no US-type "non-establishment" clause erecting a "wall of separation" between State and religion, and no space for the French doctrine of *laïcité*. Religion has no substantive role to play in the affairs of the State, but there is no ban on allowing it a ceremonial role in State functions and official events. Conversely, the State is not at all prevented by law from playing a role in the affairs of religion and has, in fact, always held a pivotal position in this area of social life.

As regards religious freedom, the Preamble to the Constitution speaks of the solemn resolution of the people of India, inter alia, to secure themselves "liberty of thought, expression, belief, faith and worship." The chapter on people's Fundamental Rights guarantees to the individuals freedom of conscience and the right to "profess, practise and propagate" religion – clarifying that this right is not absolute and can be restricted by the

6. The Constitution was adopted by the Constituent Assembly on 26 November 1949 and enforced with effect from 26 January 1950.

7. A derivative from the name of the majority religion (Hindusim), the word *Hindutva* indicates an ideology which insists on the religio-cultural beliefs and practices of the majority community being an essential attribute of patriotism, national culture and social practice.

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

9. See the multiple so-called "Hindutva judgments" and the clarification ruling, all reported in the 1996 volume of *Supreme Court Cases*.

10. CONSTITUTION OF INDIA 1950, Preamble & art. 15-16.

11. The Preamble now describes India as a "sovereign, democratic, socialist and secular republic" – the words "socialist and secular" added by the 1976 amendment.

State in the interest of public order, morality, health, and other provisions of the Constitution.¹² At the same time, all religious communities and every “denomination thereof” are guaranteed freedom to manage their own affairs in religion, acquire and manage property and establish institutions for religious and charitable purposes.¹³ The Constitution, however, makes it specifically clear that these guarantees for religious freedom will not preclude the State from introducing social reforms by law or from “regulating or restricting any economic, financial, political or other secular activity which may be associated with religious practice.”¹⁴

In recognition of the nation’s religio-cultural diversity the Constitution entitles every section of citizens in all regions of the country to conserve its distinct culture, language and script, imposing at the same time on all citizens a Fundamental Duty “to value and preserve the rich heritage of our composite culture.”¹⁵

Though the Constitution does not specify any “preferred or privileged” religion, there are in it some special religion-based provisions relating to the majority community. Its chapter on people’s Fundamental Rights declares that “untouchability”-- an age-old practice associated with Hindu religion according to which high-caste people have to keep a distance from members of the so-called lower castes – is abolished and its practice in any form is prohibited.¹⁶ On the other hand, the chapter on Directive Principles of State Policy under the Constitution directs the State to protect by law the holy cow (without, of course, a reference to the Hindu reverence for it).¹⁷ Moreover, certain denominational Hindu temples in two South Indian states – Kerala and Tamil Nadu – must, by a constitutional dictate, receive prescribed subsidies from public funds.¹⁸

There is no provision in the Constitution directing the State to remain neutral to religious issues; nor does it specifically ask the State to cooperate with the religious communities in respect to their faith affairs. The mandate is only for non-discrimination between people on religious grounds. The silence of the Constitution on this issue is taken as tacit approval for State intervention in religious affairs of all communities, and all organs of the State – legislature, executive and judiciary – have accordingly been taking active interest in such affairs in a way that may be inconceivable under a rigidly secular political set up. The legislative and administrative measures of this nature are financed by the State exchequer, and their validity is well-established despite the Constitutional ban on collection of taxes meant for promoting particular religions.¹⁹

Nowhere does the Constitution say or even remotely suggest that religion is to be the foundation or source of state law. Nor is there such a provision for religion in any legislative enactment. Parliament and state legislatures are empowered to make laws in the areas of personal status, family relations and religious endowments, shrine management and organization of inland and overseas pilgrimages, without saying that these are to be drawn on religious sources. But in practice, religious tenets are usually kept in mind while enacting such laws. Legislative enactments and administrative regulations in these areas – both those of the pre-Constitution era since retained and those enacted later – contain provisions based on religious sources.

The judiciary has in several cases interpreted Constitutional provisions relating to religious freedom to lay down its parameters and boundaries. A distinction has been made between “essential” and “non-essential” practices of religion, holding that the Constitution necessarily protects the former and not always the latter. In many cases, the judiciary itself has dwelt on religious beliefs to determine if an allegedly religious practice is “essential” or not. Sometimes the criterion adopted for this purpose has been how a

12. CONSTITUTION OF INDIA 1950, Preamble & art. 25.

13. Id., art. 26.

14. Id., art. 25 (2).

15. Id., art. 29 (1) and 51-A (f).

16. Id., art. 17.

17. CONSTITUTION OF INDIA 1950, art. 48.

18. Id., art. 290-A.

19. Id., art. 27.

community as a whole generally looks at it.

A crucial observation of the Supreme Court of India in this regard is worth quoting here:

The rights to religion guaranteed under Article 25 or 26 is not an absolute or unfettered right, they are subject to reform on social welfare by appropriate legislation by the State. The court therefore, while interpreting Articles 25 and 26 strike a careful balance between matters which are essential and integral part (of religion) and those which are not and the need for the State to regulate or control them in the interest of the community.²⁰

In a case relating to a prominent Muslim shrine, the Supreme Court cautioned people against treating “superstition” as religion.²¹ The concern of the court was well in accord with a provision of the Constitution which declares it to be a Fundamental Duty of the citizens “to develop scientific temper, humanism and spirit of inquiry and reform.”²²

IV. LEGAL CONTEXT

A. *Legislation on Change of Religion*

Though the Constitution recognizes people’s right to propagate their religion, the policy of the State is to prevent by law forced or induced religious conversions – the connotation of “inducement” for this purpose being quite large. There is no all-India legislation on the subject but penal laws to this effect have been enacted by a number of state legislatures.²³ Legal validity of the first two laws enacted in this regard during 1965-66 had been challenged by the Christians on religious grounds before the Supreme Court of India, but the court had ruled that the constitutional guarantee of the right to “propagate” religion did not mean right to convert others to one’s own religion.²⁴ The decision was faulted by some eminent constitutional-law experts, but it remains in force.

Although all such laws speak of conversion in general terms, the common understanding in the country is that they apply only to cases of conversion by the Hindus to a non-Hindu religion, and not vice versa. Certain staunch Hindu groups keep publicly organizing mass “re-conversion” of non-Hindus to Hinduism (and call it *ghar-wapsi*, i.e., returning home, thereby implying that those re-converted were originally Hindu), but none of the anti-conversion laws have ever been applied to them. In any case, these laws are mainly deterrent – there have hardly been any convictions under these laws in any case of conversion.

B. *Cow Protection Legislation*

Laws prohibiting killing of cows and their progeny have been enacted in a number of states in accordance with the provision of the Constitution relating to the protection of cow revered by the Hindus referred to above. Validity of some of these laws was challenged in several cases under the provisions of the Constitution relating to religious freedom and freedom of vocation and profession, but the courts have invariably upheld it.²⁵ In one such case, it was even observed that “ours being a secular State is not relevant” in judging an administrative action taken under such a law.²⁶ Despite a strict enforcement

20. *AS Narayana Deeshitalyu v. State of Andhra Pradesh* (1996) 9 SCC 548.

21. *Durgah Committee v. Syed Hussain* AIR 1961 SC 1402.

22. CONSTITUTION OF INDIA 1950, art. 51-A (h).

23. Arunachal Pradesh, Chhatisgarh, Gujarat, Himachal Pradesh, Madhya Pradesh, Orissa and Rajasthan. Tamil Nadu state had also enacted a similar law but has since repealed it.

24. *Stainislaus v. State of Madhya Pradesh* (1977) 2 SCR 611.

25. The first leading judgment of the Supreme Court of India on the subject was *Mohd Haneef Qureshi v. State of Bihar* AIR 1958 SC 731.

26. *State of West Bengal v Ashutosh Lahiri* AIR 1995 SC 464.

of these laws, allegations of their violation sometimes leads to communal tensions.

C. Bodies Dealing with Religious Communities

Established in 1978 and given a statutory status in 1992, the National Commission for Minorities is – along with its function to recommend measures for the welfare of the minorities – vested with quasi-judicial powers to look into complaints of religion-based discrimination against members of minority communities.²⁷ Similar bodies have since been set up in a number of states, but not in any of states where the national-level majority – the Hindus – is a minority.²⁸ Appointments to these bodies are made by the governments which are not bound by any specific selection process; and their independent functioning is amenable to political influence and bureaucratic control. In practice, they generally act as advisory bodies for the governments. The Commission's Chair is always an ex officio member of the National Human Rights Commission, as provided in the latter body's governing statute, and can place there the issues and grievances brought to its notice. The central and state Minorities Commissions often hold consultations with religious leaders on the problems of the respective communities, but the governing statutes do not make it mandatory.²⁹

There are otherwise no bilateral formal relations between the State and the religious communities, and religious bodies are not recognized as interlocutors at the level of the State.

A full-fledged Ministry of Minority Affairs was set up by the central government a few years ago, and it is now the parent body for the other official agencies and departments relating to various socio-religious matters and welfare schemes pertaining to religious minorities. Some state governments also have Minority Welfare Departments, while in the Muslim-dominated state of Jammu and Kashmir there is a government Department of Religious Affairs.

The Constitution of India does not list the religious communities in the country; nor is there in place any system for compulsory registration of religious communities under any law. There is a specific provision in the Constitution clarifying that for the purposes of elections there will be a common electoral roll without regard to the religious affiliation of the citizens.³⁰ The Census Reports of India issued every twenty years, however, contain checklists of all religious groups and provide statistical information on their population in various parts of the country.

By a Government Notification issued in 1993 under the governing statute of the National Commission for Minorities referred to above, Muslims, Christians, Sikhs, Buddhists and Parsi Zoroastrians were recognized as national-level religious minorities;³¹ and similar notifications have since been issued also by the governments of those states which have State Minorities Commissions. While in some states the Jains have also been included among the recognized religious minorities – treating Jainism as a religion separate from Hinduism – at the national level this has been a contentious issue not yet resolved – an appeal to the Supreme Court on this issue was not decided in favor of the community.³²

Besides the central and state Minorities Commissions, there is a large-sized government-appointed non-statutory body known as the National Integration Council which periodically meets to advise the government on issues of communal harmony.

27. National Commission for Minorities Act 1992. This author was the Commission's Chair for three years during 1996-99.

28. State Minorities Commissions are operative in Andhra Pradesh, Bihar, Delhi, Karnataka, Madhya Pradesh, Maharashtra, Rajasthan, Tamil Nadu, Uttar Pradesh, Uttarakhand and West Bengal.

29. A critical evaluation of the working of these bodies may be seen in this author's book *Minorities Commission: Minor Role in Major Affairs* (Pharos Media: 2001).

30. CONSTITUTION OF INDIA 1950, art. 325.

31. Welfare Ministry's Notification of 27 May 1993 issued under Section 2 of the National Commission for Minorities Act 1992.

32. *Bal Patil v. Union of India* (2005) 6 SCC 690.

V. STATE AND RELIGIOUS AUTONOMY

A. *Separate Identity of Some Religions*

As already noted above, neither the Constitution nor any legislative enactment prevents the State from intervening in matters even if they relate to religious doctrine or is otherwise of a purely religious nature. A major issue on which the State has adopted a policy is whether certain religions of India are variations of the same religion or represent different faith traditions independent of each other. Three minority religious communities – Sikhs, Buddhists and Jains – believe their respective religions to be independent faiths different from Hinduism, but many legal provisions bracket them (or some of them) with followers of the Hindu religion.

While empowering the State to remove by law caste-based restrictions on entry into Hindu temples, the Constitution declares that the word “Hindu” in this context would include Buddhists, Jains and Sikhs.³³ As the practice is not in vogue among any of these three communities, the idea probably was to allow them entry into the Hindu temples with a view to fostering solidarity among the four religious groups. The four family-law enactments of 1955-56, all titled “Hindu” laws, clarify that the word “Hindu” used in their text includes Buddhists, Jains and Sikhs; and various Hindu religious-endowment management laws are made applicable to the first two among them.³⁴

The official bracketing of the three religious communities with the Hindu religion is sometimes resented by those communities – especially by the Sikhs who are the largest religious group among them.³⁵ Undoubtedly, it provides indirect support to those religio-political groups among the majority community who claim these faiths to be different streams or off-shoots of their religion and insist on distinguishing between religions of Indian and “alien” origins.

B. *Legislation on Shrines and Pilgrimage*

As noted above, the Constitution guarantees to all religious communities and denominations “freedom to manage their own affairs.” At the same time, however, the Constitution places several religious matters within the reach of the central and state legislatures for the purposes of necessary legal regulation – among them are religious endowments and religious institutions, and pilgrimages within and outside of India.³⁶ Accordingly, administration of religious places is regulated by a number of general and community-specific legislative enactments under which the central or state government nominates its representative on the shrine-management boards.³⁷ Appointment of non-Buddhists on the management board of the most prominent Buddhist shrine in India situated in the city of Gaya has been an unresolved apple of discord.³⁸ Several inland and overseas religious pilgrimages of various communities (including the great Islamic pilgrimage to the holy cities of Islam situated in Saudi Arabia known as the “Haj”) are controlled and managed by government departments or statutory bodies.³⁹

33. CONSTITUTION OF INDIA 1950, art. 25, Explanation II.

34. Hindu Marriage Act 1955, Hindu Minority and Guardianship Act 1956, Hindu Adoption and Maintenance Act 1956, Hindu Succession Act 1956, Bombay Public Trusts Act 1950, Bihar Hindu Religious Trusts Act 1950, Orissa Hindu Religious Endowments Act 1969, etc.

35. A Private Member’s Bill was once moved in Parliament for deletion of the provision of Constitution referred to above, and unsuccessful attempts have been made to secure a separate family law Act for the Sikhs.

36. CONSTITUTION OF INDIA 1950, art. 246 & Schedule VIII, Concurrent List (Entry 28), Union List (Entry 20), State List (Entry 7).

37. Laws enacted for this purpose include the central Wakf Act 1995, local Hindu Religious Endowments Acts in force in almost all states, Sikh Gurdwara Acts of Delhi and Punjab, and special statutes governing some prominent Hindu and Muslim shrines – e.g., the Vaishno Devi shrine in Kashmir and the Sri Jagannath Temple of Orissa (Hindus), the Dargah of Ajmer (Muslims), and the Nander Gurdwara (Sikhs). The shrine-management bodies constituted and functioning under all these laws have government nominees among their members.

38. This is done under the provisions of the Bodhi Gaya Temple Act 1949.

39. The Ministry of External Affairs manages the Hindu pilgrimage to Mansarovar mountains around Tibet.

Elaborate security arrangements and public facilities are provided by the State authorities at religious places and pilgrimage sites attracting large crowds.

Many religious buildings and places have been included among the protected monuments and archeological sites managed by State authorities functioning under central and state laws. These laws prevent the State from changing the religious character of such buildings and sites,⁴⁰ but congregational prayers are not allowed in many old mosques which the Muslim community resists.

Under several state laws, construction of new religious places or renovation of old ones requires prior official sanction.⁴¹ Unauthorized construction of religious places on public lands has nevertheless been and remains an unchecked menace. Very recently, the Supreme Court of India has taken notice of the trend and directed the government to take remedial measures.⁴² A general law relating to places of worship enacted in 1988 prohibits use of all religious institutions for promotion or propagation of any political activity, harbouring criminals, storing arms and ammunition, keeping contraband goods, putting up an authorized construction or fortification, carrying on any unlawful or subversive act, and promoting disharmony or feelings of enmity between various religious groups, etc.⁴³ Certain ancient religious practices of the Hindus relating to shrines have been prohibited by penal legislation. Among them are the customs of *devadasi* (perpetual dedication of young girls to deities), and *sati* (immolation of a deceased person's widow on his funeral pyre).⁴⁴

In recent years a historically unsubstantiated belief propounded by some groups of Hindu religious leaders claim, that the site of an ancient mosque in the holy city of Ayodhya was the spot where the most popular Hindu god, Ram, was born in the pre-historic past, led to an enormous religious conflict. When the conflict was at its height and was spreading to some other old mosques too, Parliament enacted a law declaring that all places of worship in the country would retain their specific religious identity and affiliation as on the Independence Day (15 August 1947) and any attempt to convert a shrine belonging to one religion into that of any other will be a punishable offense.⁴⁵ The infamous Ayodhya mosque conflict which had already reached a point of no-return had to be specifically exempted from the scope of this law which was meant to ensure protection of other non-Hindu shrines from such disputes. While the long-drawn out litigation relating to the Ayodhya dispute was yet to be decided, the mosque was demolished in a mob frenzy – after which the site was acquired by the government through a special law.⁴⁶

Another dispute relating to the Hindu god Ram relates to a part of the sea in South India. The government's plan to build a dam there was challenged in the Supreme Court by a group of Hindu religious leaders claiming it to be the spot where Ram's army had built a bridge to cross over to Lanka to fight the demon king Ravana. The court stayed the proposed action and has yet to finally dispose of the case.

C. *Judicial Intervention in Religious Matters*

Contrary to the practice of secular countries in the West, the judiciary in India has never hesitated in discussing, explaining and adjudicating on purely religious issues including the nature and characteristics of various religions of India. "Acceptance of the

Under the control of the same Ministry the great Haj pilgrimage of the Muslims is managed by a Central Haj Committee constituted and functioning under the Haj Committee Act 2002 – and on almost all international airports of the country there are separate "Haj Terminals."

40. See, e.g., Ancient Monuments and Archeological Sites and Remains Act 1958, Sections 5 and 16.

41. See, e.g., Rajasthan Religious Buildings and Places Act 1954, West Bengal Religious Buildings and Places Act 1985, Punjab Religious Premises and Land (Eviction and Recovery) Act 1997.

42. Issued on 15 February 2010.

43. Religious Institutions (Prevention of Misuse) Act 1988.

44. Madras Devadasis (Prevention of Dedication) Act 1947, Karnataka Devadasis (Prevention of Dedication) Act 1982, central Commission of Sati (Prevention) Act 1987.

45. Places of Worship (Special Provisions) Act 1991.

46. Acquisition of Certain Sites at Ayodhya Act 1993.

Vedas with reverence, recognition of the fact that means of salvation are diverse and realization of the truth that the number of gods to be worshipped is large, that indeed is the distinguishing feature of Hindu religion,” observed the Supreme Court of India in a leading judicial decision.⁴⁷

There have been judicial decisions ruling that a ban on sale of non-vegetarian food in the cities regarded holy by the Hindus, and teaching of astrology drawn on Hindu scriptures in State universities, do not contravene provisions of the Constitution relating to freedom of trade and vocation and religious freedom respectively.⁴⁸ While the Hindu family-law enactments of 1955-56 clarify that the word “Hindu” applies to all its “forms and developments” (especially signifying some of these including the Aryasamaj),⁴⁹ in numerous cases the courts have examined the tenets of various denominations and cults to rule that they are part and parcel of the Hindu religion.⁵⁰ In some cases, the courts have adjudicated also on religious disputes between the Hindus and one or another of the other three communities legally bracketed with them (as stated above). In a leading case, a High Court had to adjudicate a dispute between Hindus and Jains on the issue if a Jain temple could house a Hindu religious symbol.⁵¹

Disputes relating to Islamic beliefs and practices also often reach the judiciary. Besides entertaining and deciding in some case Sunni-Shi’a disputes over use of mosques and religious rituals, the courts have also examined the creed of the Ahmadiya community regarded by mainstream Muslims as heretics since they regard its founder a “sub-prophet” (running contrary to the mainstream Muslim belief that there can be no prophet after Muhammad), and decided that they are Muslim.⁵²

The pivotal place of the Holy Qur’an in the Muslim faith, and of the Granth Sahib in the Sikh religion, have been examined and testified in some judicial decisions.⁵³ The courts have also entertained and decided religious disputes among various denominations and groups of the Christians and their churches.⁵⁴ In a recent case the right of Parsi Zoroastrians to build a residential colony (on a state-allotted land) reserved for their co-religionists was upheld.⁵⁵ Administrative bans on offering prayers on the roads outside the mosques have always been upheld.⁵⁶ Similar restrictions on the use of voice-amplifiers in the religious places of Hindus, Muslims and Christians, have been uniformly upheld by the courts.⁵⁷ The Jehovah’s Witnesses, who consider singing of the National Anthem to be against their faith, have succeeded in obtaining a Supreme Court verdict in their favor.⁵⁸

D. Working of Religious Organizations

All religious communities in India are free to act in private non-religious spheres. Many of them have established health services and provide relief to victims of natural calamities and communal riots. The State controls these activities only in respect of

47. *Sastri Yahnapurushdasji v. Muldas B. Vaishya* AIR 1966 1119.

48. *Om Prakash v. State of Uta Pradesh* (2004) 3 SCC 402, *Bhargava v. University Grants Commission* (2004) 6 SCC 402.

49. Hindu Succession Act 1956, Section 2 and parallel provisions of the other three Hindu family-law enactments of 1955-56.

50. Among these are the Anand Marg Panth, the Swami Narayan Satsang and the Sri Aurbindo sect.

51. *Tejraj v Madhya Bharat* AIR 1958 MB 115.

52. *Shihabuddin Koya v Ahammad Koya* AIR 1971 Ker 206.

53. See, e.g., *Chandanmal Chopra v. State* AIR 1986 Cal 104, *Shiromani Gurdwara Praabandhak Committee Amritsar v. SN Dass* AIR 2000 SC 1421. The petition in the former case which sought proscription of the Muslim holy book on the plea that it excites violence against non-Muslims was forcefully dismissed by a non-Muslim judge of the Calcutta High Court.

54. See, e.g., *PMA Metropolis v. Moran Mor Marthoma* AIR 1996 SC 2001.

55. *Zoroastrian Cooperative Housing Society v. District Registrar, Cooperative Societies* (2005) 5 SCC 632.

56. *Masood Alam v. Police Commissioner* AIR 1956 Cal 9.

57. *Om Biranguna Religious Society v. State* (1996) 100 CWN 617, *Navin Kumar v. Bombay Administration* AIR 1989 Bom 88, *Church of God (Full Gospel) in India v. KKRM Colony Welfare Association* AIR 2000 SC 2773.

58. *Bijoy Emmanuel v. State of Kerala* AIR 1987 SC 748.

funding from outside India. All associations having a “definite religious program” wishing to receive foreign contributions are required by law to register themselves with State authorities and inform them of each such contribution received. In the absence of such registration they need to seek prior clearance for every such transaction.⁵⁹

Religious entities can seek voluntary registration under state laws on fulfilling certain conditions and this makes them *sui generis*.⁶⁰ A number of state laws exempt religious institutions or faith-based practices from their general provisions – among such laws being those relating to business, taxation, acquisition of private property by the State, policing, and security forces.⁶¹

VI. RELIGION AND AUTONOMY OF STATE

A. *Influence of Religion on Governance*

There is no law in the country placing any restrictions on mixing up religion with politics. Several religio-political organizations either directly contest general elections, or sponsor and promote parties of such a nature.⁶² An attempt was made in 1993 to empower the State to ban such parties and enforce complete separation of religion and politics by means of amendments to the Constitution and the election law of the country. The move had to be abandoned due to stiff opposition from various political and religious quarters.⁶³ In a leading judgment delivered at about the same time, the Supreme Court of India forcefully advocated complete separation of religion and politics, observing:

In a secular polity like ours mingling of religion with politics is unconstitutional, in other words, a flagrant breach of the constitutional features of secular democracy. It is therefore imperative that religion and caste should not be introduced into politics by any political party, association or individual, and it is imperative to prevent religious and caste pollution of politics...If a political party espousing a particular religion comes to power that religion tends to become, in practice, the official religion. All other religions come to acquire a secondary status, at any rate, a less favorable position. This would be plainly antithetical to the entire constitutional scheme.⁶⁴

The court however stopped short of giving any binding ruling in the matter, and the ideology of religion and politics mix remains intact.

Though members of bureaucracy and armed forces are not allowed to directly participate in general elections, many of them are influenced by the ideology of the religio-political organizations operative in the country, and this is bound to adversely affect in practice the theoretical neutrality of the State to religion. No law has, however, been enacted to tackle this rather ticklish problem.

A social stratification called the “caste” system is part and parcel of the Indian society as a whole. Mistreating the so-called “lower” castes is declared to be an offense under the Constitution which also prohibits discrimination between citizens on the ground of caste, yet the State can make “any special provision” for what the Constitution calls the

59. Foreign Contribution (Regulation) Act 1978.

60. The laws under which such registration can be sought are the Religious Societies Act 1880 and Societies Registration Act 1860.

61. See, for instance, the Companies Act 1956, Section 28, Income Tax Act 1961, Section 10 and Police Forces (Restriction of Rights) Act 1966, Section 3.

62. Among such political parties are the Hindu Mahasabha, Vishwa Hindu Parishad, Shiv Sena and Bajrang Dal (all Hindu), Muslim League and Ulama Council (Muslims), and the Church Council for Youth Movement of South India.

63. The Constitution (80th Amendment) Bill 1993 and Representation of the People (Amendment) Act 1993, both of which proved abortive.

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

“Scheduled Castes.”⁶⁵ Such special provisions have been extensively made for them in several ways – reserved electoral constituencies, quotas in government employments and “triple-benefits” (quota, lower eligibility criteria, and rebate in payable fee) in educational institutions. The national policy is to give a fair representation to the Scheduled Castes in all government departments and at all levels. Two special laws have been enacted to prescribe stringent penalties for those degrading them or violating their civil rights.⁶⁶

Under the Constitution, the list of Scheduled Castes was to be initially specified by the government (in the name of the President), and Parliament was given the power to amend and update the lists from time to time.⁶⁷ The Scheduled Caste net is until this day restricted to three chosen communities – Hindus, Sikhs and Buddhists.⁶⁸ The so-called “lower castes” are vocation-based and are shared by all Indian communities, yet Muslims and Christians (including the low-caste Hindus converting to these religions) have been persistently kept out of the ambit of Scheduled Castes on the plea that their egalitarian faiths as known to the rest of the world do not recognize the caste system. Both these communities have recently challenged the discriminatory law before the Supreme Court which has yet to arrive at a decision. Presence of a large number of religion-specific Scheduled Caste politicians and public servants in the central and state governments, as also in local bodies like district boards and city corporations, aggravates the already existing situation of imbalance of various religious communities’ representation in the governance of the country.

Despite being the second largest religious community of the country, the Muslims are overly under-represented – in many cases unrepresented – in the governance of the country. Neither in the three organs of the State nor in bureaucracy does the extent of their presence go anywhere near their population figures. This has been confirmed time and again both by special committees constituted by the government and the various Minorities Commissions referred to above. Leaders of the community have since long been demanding a quota in government jobs and educational institutions, but the demand has never found favor with the rulers who believe that this would be contrary to the provision of the Constitution against religion-based discrimination between citizens. In two south Indian states, this demand has been implemented to a certain extent, and a fourth state, in eastern India, has just announced the same, but the same step taken in a third state has recently been struck down by the local High Court for being allegedly *ultra vires* the Constitution.⁶⁹

In 2004, the government had appointed a special national Commission to examine this demand of the Muslims and other religious minorities but its report submitted three years later recommending quota for them by way of positive discrimination and affirmative action is still unattended to by the government.⁷⁰ This Commission has also recommended that the Scheduled Castes net be made religion-neutral, but the proposal is being strongly opposed by various political groups and the government has not yet shown any inclination to take action on it.

VII. STATE FINANCIAL SUPPORT FOR RELIGION

There is no legal ban on the State providing financial and logistic support to any

65. CONSTITUTION OF INDIA 1950, art. 15-17.

66. Protection of Civil Rights Act 1955, Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act 1969.

67. CONSTITUTION OF INDIA 1950, art. 341.

68. Constitution (Scheduled Castes) Order 1950 – which originally restricted the net of “scheduled castes” to the Hindu community – as amended in 1956 and 1990 to include in it Sikhs and Buddhists respectively.

69. Quota for the Muslim groups is in force for a long time in Kerala and Karnataka, and has been recently introduced in West Bengal. The High Court of Andhra Pradesh has twice cancelled a similar step taken there.

70. The Commission (of which this author was a member), has also recommended that the Scheduled Caste net should be delinked from religion and opened to lower castes among all communities. Report of the National Commission for Religious and Linguistic Minorities, Ministry of Minority Affairs, Government of India, May 2007.

religious organization or institution. Religious endowments of all communities not only enjoy certain exemptions under tax laws, there are State-appointed and financially supported bodies to oversee their management. Educational and technical training centers controlled by religious organizations are also given periodic subsidies. State-aided management boards of religious endowments and shrines pay salaries to their staff. In one case, a state-controlled Muslim endowment board was recently directed by the Supreme Court to pay regular salaries to religious officials of the mosques under its management.⁷¹ All state-subsidized religious bodies have, of course, to strictly comply with official accounts and audit regulations.

In the past, the State has subsidized special celebrations of religious figures and other similar activities, including centenaries of the founders of Sikh and Jain religions and an international Eucharistic Conference organized by the Christians. Constitutional validity of the subsidy being provided for a long time by the government to airlines carrying Muslim pilgrims to Saudi Arabia for the great Haj pilgrimage has recently been challenged in the Supreme Court which has yet to pronounce its decision.

VIII. CIVIL LEGAL EFFECTS OF RELIGIOUS ACTS

Despite a provision in the Constitution for “endeavors” to be made by the State to “secure for the citizens a uniform civil code throughout the territory of India” there remains in force in the country a dual system of marriage laws under which individuals can make a choice between the secular and the religious matrimonial laws.⁷² This choice can be exercised by all citizens living in or outside India at the time of getting married – and an already solemnized religious marriage can also, at any time during its subsistence, be converted into a secular marriage by registering it under the civil marriage law.⁷³

Legal effects of marriages solemnized under the religious laws – including Muslim and Jewish laws which, unlike those applicable to other communities remain uncodified⁷⁴ – are fully recognized by the State on a par with those of civil-law marriages. The Hindus, Buddhists, Sikhs and Jains are now governed by common laws of marriage, family relations, and succession enacted by Parliament during 1955-56.⁷⁵ Members of these four communities can intermarry under these laws, and will in such cases continue to be governed by the Hindu laws of marriage, divorce and succession. Only for marrying outside these communities do they need to have recourse to the secular marriage law, in which case they and their children and future generations will be governed also by the secular succession law.⁷⁶ The matrimonial law among these statutes provides that a marriage may be solemnized by customary rites prevalent among either party’s family, and the legal effects of some such rites are either recognized by specific legislation or have been affirmed by the courts.⁷⁷

Post-marriage conversion to a religion other than Hinduism, Buddhism, Jainism and Sikhism by either spouse is a ground for divorce in the hands of the other.⁷⁸ On the converting spouses, modern Hindu law imposes loss of all family rights including those to act as guardian of their children, be consulted by the non-converting spouse before adopting a child or letting their child be adopted by someone else, and receive maintenance from relatives in cases of minority or infirmity.⁷⁹ This is diametrically opposed to an old

71. *All India Imams Organization v. Union of India* AIR 1993 SC 2086.

72. CONSTITUTION OF INDIA 1950, art. 44.

73. The two laws on this subject are the Special Marriage Act 1954 and the Foreign Marriage Act 1969.

74. Codified community-specific laws are the Christian Marriage Act 1872, Parsi Marriage and Divorce Act 1936 and Hindu Marriage Act 1955.

75. Hindu Marriage Act 1955, Hindu Succession Act 1956.

76. Special Marriage Act 1954, Section 21-A, Indian Succession Act 1925.

77. See Hindu Marriage Act 1955, Section 7 (all communities), Anand Marriage Act 1909 (Sikhs), *Babay v. Jayant* AIR 1981 Bom 283 (Buddhists).

78. Hindu Marriage Act 1955, Section 13 (1) (iii).

79. See such provisions in the four Hindu-law Acts of 1955-56.

law of the British period still in force which (with an unacknowledged aim of promoting conversion of the natives to the then rulers' religion – Christianity) had provided that change of religion would not result in loss of civil rights.⁸⁰ Since that law protects only the converting persons, the courts have upheld the provision of the modern Hindu succession law that children born to a Hindu convert after his or her conversion would not inherit from any of their Hindu relatives unless they reconvert to Hinduism before succession in any case opens.⁸¹

The Muslim family and succession laws remain fully applicable to the Muslims, except if one opts for a civil marriage in which case secular laws of marriage and succession become applicable (whether it is a marriage within the Muslim community or outside it). Some aspects of Muslim law have been turned into statutes based on Islamic sources.⁸² The secular law of transfer of property exempts from its scope the Muslim law of gifts, and gifts made in accordance with Islamic law take full legal effect.⁸³

The Indian Penal Code regards bigamy as an offense only if the family law applicable to a case treats a bigamous marriage as void.⁸⁴ The Muslims (men only) therefore remain exempt from its ambit, while all other communities are now covered by this provision. This situation resulted into numerous cases of fake conversion to Islam by non-Muslim married men (including Hindus, Sikhs, Muslims and Christians) for the purpose of defeating anti-bigamy provisions of the laws applicable to them. The practice of such unscrupulous conversion by non-Muslims to Islam (under a mistaken belief that it gives them a free hand to indulge in bigamy) has now been stopped by the Supreme Court of India, laying down that a non-Muslim husband cannot remarry even after conversion to Islam without getting the first marriage dissolved.⁸⁵ The provisions of the Civil Service Regulations, both central and provincial, requiring civil servants to obtain government's prior consent before entering into a bigamous marriage (or, in the case of a woman employee, marrying a man who is already married) now apply only to the Muslims but are seldom used.⁸⁶ The validity of such provisions has in some cases been challenged for their alleged conflict with the religious-freedom clauses of the Constitution, but the courts provided no relief.⁸⁷

The rule of Muslim law that apostasy of a husband would automatically dissolve the marriage and that the wife can thereupon marry someone else (without attracting anti-bigamy provisions of the Penal Code) remains in force, but the corresponding rule regarding a Muslim wife's apostasy is no more enforceable by virtue of a statutory provision. This provision has an exception to its rule meant to encourage re-conversion of women converting to Islam – if a non-Muslim woman marries a Muslim after converting to Islam but later reverts to her birth religion, her marriage to the Muslim husband would be automatically dissolved.⁸⁸

The Christians are governed by marriage and divorce laws codified in the 19th century on the basis of laws then in force in Britain.⁸⁹ The provisions of these laws extending them also to marriages only one party to which is a Christian remain intact, but such marriages can also now take place under the general law of civil marriages. The Parsi Zoroastrians are governed by an old statute drawn on their religious sources.⁹⁰ The general law of succession – which exempts Hindus and Muslims from many of its

80. Caste Disabilities Removal Act 1850.

81. Hindu Succession Act 1956, Section 26.

82. Dissolution of Muslim Marriages Act 1939, Muslim Women (Protection of Rights on Divorce) Act 1986.

83. Transfer of Property Act 1882, Section 129.

84. Indian Penal Code 1860, Sections 464-65.

85. *Sarla Mudgal v. Union of India* AIR 1995 SC 1531, *Lily Thomas v. Union of India* (2000) 6 SCC 224.

86. See, e.g., Central Services (Conduct) Rules 1964 (Rule 10), All India Services (Conduct) Rules 1968 (Rule 21).

87. The anti-bigamy provision of the Rajasthan Government Servants (Conduct) Rules 1971 was unsuccessfully contested in the Supreme Court of India very recently (February 2010).

88. Dissolution of Muslim Marriages Act 1939, Section 4.

89. Christian Marriage Act 1872, Indian Divorce Act 1869.

90. Parsi Marriage and Divorce Act 1936.

provisions – contains two separate chapters applicable to Christians and Parsis, both based on religious principles.⁹¹ Religious courts of various communities, known by different names, remain operative in various parts of the country. The Parsi matrimonial courts and Church of Scotland Kirk Sessions among these have statutory recognition,⁹² while decisions of the other such courts operating privately may be recognized by secular courts in their discretion as arbitration awards. In a writ petition challenging the constitutional validity of Muslim Shari'a at courts, pending for decision for long in the Supreme Court of India, the government has defended the system arguing that it is a form of alternative dispute resolution (ADR) which lessens the burden of State courts.

IX. RELIGIOUS EDUCATION OF THE YOUTH

Every religious community is free to establish and administer educational institutions of its choice, though according to the Constitution no citizen can be denied admission on the ground of religion to any institution maintained or aided by the State.⁹³ For the minorities, this freedom is specified by the Constitution as a Fundamental Right and the State is precluded from discriminating in any way against their educational institutions in giving financial aid.⁹⁴ Although under the Constitution this right of the minorities is unconditional, it has over the years been diluted to a large extent by the process of administrative regulations and judicial decisions. In a case relating to a prominent Christian college, the Supreme Court decided that in all minority educational institutions, minority community students should be admitted on only half of the total seats available – thus virtually creating an equal space for those of the majority community.⁹⁵ The ruling professedly given in the interest of “national integration” made no reciprocal arrangement for the minorities either in the state-established or majority-owned institutions.

The Constitution bans imparting of religious education in any educational institution “maintained wholly out of State funds” (except if one has been established under an endowment or trust requiring the same), but there is no such restriction on unaided and partially aided institutions.⁹⁶ It further says that if any religious instruction is imparted or a worship conducted in a state-recognized or aided institution, the students shall not be required to take part in it without their (or their guardian's if they be minors) free consent.⁹⁷ In practice, religious events and ceremonies do take place in most educational institutions, including those established and run by the State, and their students irrespective of their different faiths generally do not mind being in attendance. Also, there are thousands of educational institutions in the country with denominational or sub-denominational names recognized and aided by the State – most of which offer optional instruction in religion and theology – and a much larger number of seminaries established and run by different communities not receiving any State aid. The Ministry of Education at the Centre administers a “Modernization Scheme” for Muslim seminaries, but there have not been many takers, for fear of undue State intervention in their administration and curriculum. For the same reason, community leaders have not agreed to government's recent proposal to create a Central Board for regulating *madarsas* (Muslim religious schools), though such Boards are operating in some states.⁹⁸

In 2004, a statutory National Commission for Minority Educational Institutions was created, empowered by its statute to help the minorities in the exercise of their educational rights under the Constitution, but its jurisdiction does not extend to religious schools.⁹⁹

91. Indian Succession Act 1925, Part V, Chapters II and III.

92. Under the Parsi Marriage and Divorce Act 1936 and Church of Scotland Kirk Sessions Act 1897.

93. CONSTITUTION OF INDIA 1950, art. 29 (2).

94. *Id.*, art. 30.

95. *St Stephen's College v. University of Delhi of India* (1992) 1 SCC 558.

96. CONSTITUTION OF INDIA 1950, art. 28 (1) & (2).

97. *Id.* art. 28.

98. Such Boards have been established in Bihar, West Bengal and some other states.

99. Established and regulated in its work by the Minority Educational Institutions Commission Act 2004.

X. DISPLAYING RELIGIOUS SYMBOLS IN PUBLIC PLACES

Religion, culture and history are in fact so inter-mingled in India that it is really not possible to keep them in separate watertight compartments. The National Flag and Emblem of India are based on symbols which can be seen both as religious and historical or cultural, while the National Anthem is even more explicitly religious in its wording and meaning. A large number of religious days observed as festivals by various communities, including birth anniversaries of the founders of all religions, are public holidays in India. State dignitaries publicly celebrate these festivities and issue felicitation messages to the citizens on all such occasions. Religio-political parties, of which there is no dearth in the country, contest general elections at various levels with clearly religious symbols and slogans which have an obvious religious connotation; and the courts have upheld the practice, linking some such symbols and slogans with the culture of India.¹⁰⁰

There is no law in India banning wearing of religious symbols in public places and the citizens' freedom in this regard is generally respected everywhere including educational institutions and public offices. Some legislators, judges, government officers and public servants freely wear religious dress or symbols without any restriction. The practice of the Sikhs to publicly carry a *kirpan* (sword) on ceremonial occasions is specifically protected by the Constitution as their Fundamental Right.¹⁰¹ Their religious practice of growing a beard and wearing a turban, although not mentioned in the Constitution, are also recognized and respected everywhere including police and military services; they are also exempt from a security requirement of transport regulations that two-wheeler drivers must wear helmets. Many Muslims, too, wear a beard in public places, government offices and State educational institutions, but in some cases they have been denied this right and their appeals have been differently decided by various courts. In a very recent case, a Muslim student of a Christian school expelled for growing a beard against the school's discipline was given relief by the Supreme Court.¹⁰²

Muslim women can freely wear anywhere the *hijab* (traditional scarf) or even a *burqa* (top-to-toe covering), though the custom is dying out among modern-educated Muslims. This practice is not interfered with by law except when a woman's photograph is legally necessary as a proof of identity for the purposes of obtaining passports, voters' cards and other official documentation.¹⁰³ The Christians and Jews, too, freely wear religious dress and symbols everywhere including government offices and State institutions and there never has been any dispute in this regard.

XI. FREEDOM OF EXPRESSION AND OFFENSES AGAINST RELIGION

The Indian Penal Code contains a separate chapter on "Offences against Religion," besides some related provisions found in some of its other chapters.¹⁰⁴ The offenses punishable under these provisions are (i) injuring or defiling a place of worship with an intention to insult the religion of any class of persons; (ii) deliberate and malicious act intended to outrage religious feelings of any class of persons by insulting their religion or religious beliefs; (iii) disturbing a religious assembly lawfully engaged in the performance of religious worship or ceremonies; (iv) trespassing in a place of worship or graveyard or disturbing an assembly for funeral with a view to wounding religious feelings of any person or persons; and (v) uttering words or making a sound or gesture with an intention to wound religious feelings of any person or persons. The Code further provides punishments for making, publishing or circulating (in or outside a place of worship or religious assembly) any statement, rumour or report with an intent to incite or likely to incite one community to commit an offense against another community or promote on

100. See, e.g., *Ramanbhai v. Dabhi* AIR 1965 SC 669, *Manohar Joshi v. Nitin Patil* (1996) 1 SCC 169.

101. CONSTITUTION OF INDIA 1950, art. 25, Explanation I.

102. Case decided in December 2009.

103. *Sikdar v. CEO* 1961 Cal 289, *Peeran Saheb v. Collector* AIR 1988 AP 377.

104. Indian Penal Code 1860, Sections 153A, 153B, 295-298.

grounds of religion or community feelings of enmity, hatred or ill-will between various religious groups or communities.¹⁰⁵ The prescribed punishment for these various offenses is imprisonment up to three years and fines.

Statutory laws relating to armed forces provide for conviction by court martial and punishment of persons governed by the Act if they commit the offense of defiling any place of worship, insulting religion, or wounding religious feelings of any person.¹⁰⁶ The election law of India prohibits religious appeals in electioneering, declaring it to be both a ground for disqualifying a candidate and an offense punishable by law.¹⁰⁷

None of these provisions of the Penal Code, armed forces laws, and the election law, is religion-specific – all of these are equally applicable to all religions. The validity of some of these provisions has been challenged in the courts under the freedom of speech and expression clause of the Constitution, but the courts have generally upheld the same.¹⁰⁸

The Code of Criminal Procedure empowers the State governments to proscribe any newspaper, book or document which in its opinion is offensive to religion within the meaning of the provisions of the Penal Code mentioned above – mainly if it promotes religious enmity or disharmony or offends religious feelings of any community.¹⁰⁹ An order issued under this provision is appealable to the High Court which can set it aside in case the court differs from the government's opinion. The validity of this provision under the Constitution has also been upheld.¹¹⁰ In several cases, both the State governments and the High Courts have used their respective powers under this provision -- among the books, movies and plays proscribed being those found offensive by the Hindus, Muslims and Christians.

XII. CONCLUSION

India is a unique State, believing in secularism and yet preserving its spirituality through constitutional provisions, legislation, State policy and judicial pronouncements. Maintaining a rational balance between secularity and religiosity, accommodating religious sensitivities of the people to a reasonable extent, avoiding religion-based discrimination among the citizens as far as possible, and endeavoring to put them on a par regardless of religious affiliation, are the basic features of religion-state relations in India. God and Caesar both have a place under the constitutional and legal set up of the country, but the scope of “what belongs to God” remains wider in India than in most other professedly secular societies.

105. Indian Penal Code 1860, Section 205.

106. Army Act 1950, Section 64, Air Force Act 1050, Section 66.

107. Representation of the People Act 1951, Section 125.

108. *Ramjilal Modi v. State of UP* 1957 SC 620, *Kedar Nath Singh v. State of Bihar* AIR 1962 SC 955.

109. Code of Criminal Procedure 1973, Sections 95-96.

110. *Gopal* (1969) 72 BLR 278; *Lal Singh* 1971 CrLJ 1519.