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PROTECTION OF RELIGIOUS RIGHTS IN INDIA

Mara Malagodi·

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A. INTRODUCTION

This Chapter analyses the protection of religious rights under the Indian legal system; it focuses on the articulation of India's peculiar notion of secularism and its impact in the negotiation of the individual and collective dimensions of religious rights and their legal protection. The Chapter is divided into five sections. The first section provides a historical background to the Indian legal system and the development of the framework

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protecting religious rights. The second section analyses the manner in which religious rights are given effect by investigating their constitutional regulation, the competence of the various legislative bodies within the Indian federal system, the powers of the Supreme Court together with the array of remedies at its disposal when Fundamental Rights are violated, and the position of international law within India's legal system. The third section illustrates the various constitutional and statutory materials protecting religious rights, the nature of their limitations and the leading cases interpreting these provisions. Eight issues are explored in detail within this section: secularism; freedom of religion; right to equality; discrimination on the basis of religion in employment; the issue of 'Untouchability'; the personal laws system and the demand for a Uniform Civil Code; criminal law provisions related to religion; and the special treatment of the cow. The final section offers brief conclusionary observations.

B. BACKGROUND

The legal treatment of religion in contemporary India reflects the peculiar notion of secularism developed post-independence and the legacy of pre-colonial and colonial legal institutions. The Preamble of the Indian Constitution expressly provides that India is a secular state; however, it has been argued that India is not truly secular for a number of reasons. First, the Indian legal system does not feature the 'wall of separation' between state and religion prescribed by the modern Western model(s).[1] Second, recurring bouts of communal violence have taken place in India since Independence and religious minorities often suffer discriminatory treatment.[2] Third, the Hindu Right (*Hindutva*) rose to power at the centre in the mid-1990s and has in the process appropriated the meaning of and demand for secularism.[3]

In response to such points, it is fair to note that India has devised its own version of secularism, which has been pivotal in preserving democracy and national unity since Independence and has over the years guaranteed the protection of religious rights. Such protection has been articulated through an institutional framework in which the State both recognises and protects the country's religious plurality, while at the same time frequently intervening in the religious domain. Religious law is part of the official Indian

[1] Madan, T.N. 1987. 'Secularism in Its Place' *Journal of Asian Studies* 46: 4, pp. 747-759.
[2] Tambiah, Stanley 1998. 'The Crisis of Secularism in India' in R. Bhargava (ed.) *Secularism and Its Critics*. Delhi: Oxford University Press, pp. 418-453.
[3] Cossman, Brenda and Ratna Kapur 1999. *Secularism's Last Sigh? Hindutve and the (Mis)Rule of Law*. Delhi: Oxford University Press.

legal framework, directly recognised by – and often legislated for – by State actors. In fact, alongside uniform legislation, there exists a personal law system under which private legal matters in the areas of family, succession and inheritance law are regulated by separate bodies of law which do not apply to individuals on the basis of their citizenship, but apply to four groups defined in terms of their religious affiliation (Hindu, Muslim, Christian and Parsi). Indian citizens can opt for the 'secular option' – which applies directly in case of inter-religious marriage or marriage to a foreigner – but the striking majority of the Indian population chooses to be regulated by their respective personal laws. This phenomenon has resulted in a renegotiation of the private/public divide in religious matters dealt with by the law and has engendered a peculiar system in which the Indian State directly engages with issues pertaining to religion.

India gained independence from Britain in August 1947 after a protracted anti-colonial struggle led by the All-India National Congress. The Indian Republic emerged from the bloodshed of the Partition of the Indian subcontinent, which created the sovereign States of India and Pakistan. Partition led to approximately a million casualties and the migration of over ten million people between the two newly created States, which soon went to war against each other in 1948 over the disputed territory of Kashmir. This outcome followed from the decision to accept the demand for Pakistan – a separate country deputed to be the homeland of the Muslim population of the subcontinent. Partition also shaped Indian nationalism, the peculiarly Indian notion of secularism and the institutional treatment of the country's vast religious diversity.[4] The development of post-1947 Indian state-framed nationalism[5] and the design of Independent India's legal structures to accommodate the polity's extraordinary socio-cultural and religious diversity are inextricably intertwined as both stemmed from the fear of enduring communal violence, stark opposition to the ethnocultural nationalist discourse of Islamic Pakistan and resistance to the demands for Hindu majoritarianism advocated by the Hindu Right. India's commitment to the institutionalisation of secularism was already tangible during the life of the Constituent Assembly (1946-9); Indian constitution-makers with radically different political affiliations – from liberals to

[4] The data on India's religious composition from the 2001 Census indicate that 80.5 per cent of the total population (approximately 1.03 billion people) was Hindu, 13.4 per cent Muslim, 2.3 per cent Christian, 1.9 per cent Sikh, 0.8 per cent Buddhist, 0.4 per cent Jain, and 0.6 per cent of other denominations or persuasions. See: http://www.censusindia.gov.in/Census_Data_2001/India_at_glance/religion.aspx [Last accessed on 30/09/2012].

[5] Brubaker, Roger 1999. 'The Manichean Myth: Rethinking the Distinction between "Civic" and "Ethnic" Nationalism', in *Nation and National Identity*, Hanspeter Kriese *et al*. (eds.), pp. 55-71. Zurich: Verlag Ruegger.

Gandhians, from Marxists to the Hindu Right – rallied around secularism as a tool of nation-building to the point that the term 'secularism' became then antithetical to the term 'communalism'.[6]

India's Founding Fathers were acutely aware of the importance of religion in Indian society and its pervasive nature in people's lives. Therefore, their efforts in institutional design were aimed at devising a constitutional edifice not hostile to religion, but one which could best manage the post-Independence challenges faced by a deeply religious, utterly unequal and innerly plural society. The protection of minorities and the idea of religious tolerance played a pivotal role in designing institutions capable of guaranteeing the inclusion of all religious groups in a polity with an absolute Hindu majority of over 80 per cent of the total population. As Bose suggests, it is because of this official representation of India as secular and inclusive that the retention of Indian-controlled Kashmir as the only Muslim-majority Indian State is so important in the construction of Indian nationhood.[7] Thus, the bases for the institutional treatment of religious diversity in India are to be found in the idea of 'ameliorative secularism' propounded by Jacobsohn, who defines it as:

> A model of the secular constitution as a conceptual projection of the multifaceted character of the Indian nationhood […] the Constitution seeks an amelioration of the social conditions of people long burdened by the iniquities of religiously based hierarchies, but also embodies a vision of intergroup comity whose fulfilment necessitates cautious deliberation in the pursuit of abstract justice.[8]

This approach has been translated in institutional terms into what Bhargava has termed as a 'strategy of principled distance', which features a combination of strict intervention, non-interference and equidistance, as the case may be.[9]

In this regard, it is of pivotal importance to highlight that at the time of Independence, India retained the British colonial legal system and judicial structure almost intact. Partial reform initially took place within Hindu Law and from the mid-1980s in Islamic Law. The Indian State also attempted several bouts of legislative activity

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[6] Bajpai, Rochana 2011. *Debating Difference: Groups Rights and Liberal Democracy in India*. Delhi: Oxford University Press, pp. 94-96.
[7] Bose, Sumantra 2005. *Kashmir: Roots of Conflict, Paths to Peace*. Cambridge: Harvard University Press, p. 8.
[8] Jacobsohn, Gary Jeffrey 2003. *The Wheel of Law: Indian Secularism in Comparative Constitutional Context*. New Delhi: Oxford University Press, pp. 93-95.
[9] Bhargava, Rajeev 1998. 'What Is Secularism for?' in R. Bhargava (ed.) *Secularism and Its Critics*. Delhi: Oxford University Press, p. 520.

to curb discrimination of the basis of caste and 'Untouchability' in light of the modernist imperatives that accompanied decolonisation. It is such mix of continuity and change, preservation of historical legacies and innovation that best characterises Indian postcolonial legal developments in the matter of the institutional treatment of religion.

C. THE CONSTITUTIONAL FRAMEWORK

The Constitution of India came into force on 26 January 1950 and remains to this day the fundamental law of the land – notwithstanding the fact that it has been amended almost a hundred times since its inception. It comprises 395 Articles and Twelve Schedules. It is an entrenched, written document expressly committed to constitutional democracy.

The Constitution of India guarantees in Part III extensive and justiciable Fundamental Rights (Articles 12-35). A number of Rights deal specifically with matters pertaining to religion and they will be discussed in detail in the following section. The application of Fundamental Rights in India is not always confined to actions of the State as defined under Article 12 (vertical application), but in more limited circumstances a breach of Fundamental Rights by non-State actors also gives rise to a cause of action against non-State actors (horizontal application), mostly under Article 21 (Right to Life) and when the constitutional text makes certain Fundamental Rights expressly applicable to non-State actions or the Article is not expressly confined to State actions.[10]

The Constitution contains in Part IV extensive Directive Principles of State Policy (Articles 36-51), which are not enforceable in a court of law, but are of fundamental importance in giving direction to the governance of the country (Article 37). For instance, Article 44 prescribes that the State shall endeavour to secure a Uniform Civil Code applicable throughout India, thus there is an implied commitment on the part of the State to repeal the various personal laws operating in post-independent India, which are based on the affiliation to a particular religious community (Hindu, Muslim, Parsi, and Christian) and devise a uniform secular law regulating family, inheritance and succession matters. The Supreme Court also established that the Constitution prescribes

[10] Singh, Mahendra 2010. *V.N. Shukla's Constitution of India*. Lucknow: Eastern Book Company, p. 24.

a harmony between Fundamental Rights and Direct Principles,[11] and that the Directive Principles should be used to aid the interpretation of Fundamental Rights.[12]

Article 13 specifies that laws in derogation to Fundamental Rights shall be void. Article 32 confers the right to move to the Supreme Court 'by appropriate proceedings' to enforce the Fundamental Rights enshrined in Part III. The Supreme Court[13] is empowered to issue directions or orders or writs, including writs in the nature of *habeas corpus* (to order the release of a person detained unlawfully), *mandamus* (to order a public authority to perform its duty), prohibition (to prohibit a lower court from proceeding on a case), *quo warranto* (to order a person to vacate a wrongfully assumed office) and *certiorari* (to order the removal a proceeding from a lower court and bring it before itself), for the enforcement of Fundamental Rights.[14] Article 226 grants Indian High Courts the same powers of the Supreme Court under Article 32, making the Higher Judiciary the guardian of the Constitution and the protector of Fundamental Rights. To safeguard the independence of the judiciary from undue executive influence, the appointment procedure for Supreme Court judges under Article 124(2) and for High Court judges under Article 217 has been interpreted by the Supreme Court in the following manner: the judges of the Higher Courts are appointed by a warrant of the President of India who must act on the recommendation of a collegium comprising the Chief Justice and the four seniormost judges of the Supreme Court. The Court itself overruled its earlier decision in which the President of India was given primacy in the appointment process.[15] The Supreme Court's interpretation of the constitutional provision pertaining to judicial appointments to the Higher Courts in the first *Judges Case* (1981) was confirmed in two later decisions in 1993 and 1998.[16]

Since the late 1960s Indian Courts adopted a more activist stance and a shift from parliamentary to judicial supremacy progressively took place. Judicial review of legislation in India evolved through tensions between Parliament and the Supreme Court

[11] *Minerva Mills Ltd v Union of India* AIR 1980 SC 1789
[12] *Bandhua Mukti Morcha v Union of India* AIR 1984 SC 802
[13] The Supreme Court also features jurisdiction as provided for by statute. Importantly, Article 141 makes the law declared by the Supreme Court to be binding on all courts, but not on the Supreme Court itself, who may overrule its previous decisions, while Article 142 makes any order passed by the Supreme Court enforceable throughout the territory of India.
[14] These provisions are limited by Article 359, which allows during emergency rule for the suspension of any of the Fundamental Rights guaranteed in Part III – except Article 20 (Lawful Punishment for Criminal Offences, Rule against Double Jeopardy, and Protection against Self-Incrimination) and Article 21 (Right to Life and Personal Liberty) – including the Right to Constitutional Remedies.
[15] *S.P. Gupta v Union of India* AIR 1981 SC 149
[16] *Supreme Court Advocates-On-Record Association (SCAORA)* v *Union of India* AIR 1994 SC 268; *Special Reference No. 1 of 1998* AIR 1999 SC 1

over property rights and the Indian Congress government's programme of land redistribution.[17] Judicial review in India resulted in a *de facto* limitation of the doctrine of parliamentary sovereignty, especially with the establishment of the basic structure doctrine in the 1973 *Kesavananda Bharati* case.[18] This doctrine limits the power of Parliament to amend the Constitution and empowers the Supreme Court to strike down legislation – even a constitutional amendment – if that violates the basic structure of the Constitution. The basic structure is understood as formed by the following principles enunciated by Chief Justice Sikri in his opinion in the *Kesavananda Bharati* judgement: supremacy of the Constitution; republican and democratic form of Government; secular character of the Constitution; separation of powers; and federal character of the Constitution.[19] Following the development of judicial review of legislation since the late 1960s with the *Golakh Nath* and *Kesavananda Bharati* decisions, the Indian Supreme Court progressively acquired power and legitimacy as protector of Fundamental Rights. In the two years of emergency rule (1975-1977) under Indira Gandhi the position and credibility of the Court was, however, considerably weakened, especially following the *Shukla* judgement.[20] In the late 1970s India's apex court was determined to redeem itself from the dark days of the Emergency and a new generation of judges substituted on the bench the old guard, whose majority had been trained during colonial times.

It was at this point that India's most well-known judicial contribution to world jurisprudence was created: Public Interest Litigation (PIL). The Supreme Court revolutionised its approach to Fundamental Rights by relaxing the rules concerning *locus standi*. The Court ruled that in the judicial interpretation of the expression 'by appropriate proceedings' contained in Article 32(1) 'our approach must be guided not by any verbal or formalistic canons of construction, but by the paramount object and purpose for which this Article has been enacted as a Fundamental Right in the Constitution […] It is clear on the plain language of clause (1) of Article 32 that whenever there is a violation of a Fundamental Right, any one can move to the Supreme Court for enforcement of such Fundamental Right'.[21] Progressively PIL became a new kind of constitutional litigation *tout court* which abandoned the adversarial system as the Court could then initiate proceedings *suo motu* or entertain the petition of any individual acting out of public concern. This form of judicial activism produced a vast array of case-law ranging from

[17] *Golakh Nath v. State of Punjab* AIR 1967 SC 1643
[18] *Kesavananda Bharati v. State of Kerala* AIR 1973 SC 1461
[19] *Kesavananda Bharati v. State of Kerala* AIR 1973 SC 1535
[20] *ADM Jabalpur v Shivkanta Shukla* AIR 1976 SC 1207
[21] *Bandhua Mukti Morcha v Union of India* AIR 1984 SC 806

issues of bonded labour to environmental protection.[22] A great number of PIL cases pertaining religious rights have been filed in the Supreme Court; for instance in 1997 the Ahmedabad Women's Action Group (AWAG) brought a constitutional challenge under PIL against a number of personal law provisions deemed discriminatory against women. The Supreme Court did not however get embroiled in the political controversy and declined to exercise its jurisdiction on the matter stating that is was for the Legislature to lay down the policy the State should pursue.[23]

In addition to the extensive guarantees contained in the Fundamental Rights section of the Constitution, India is a signatory to a number of international conventions devoted to the protection of human rights. India adopts a dualist approach in the implementation of international law at domestic level; thus, international treaties do not automatically become part of Indian national law, but legislation passed by Parliament under Article 253 is needed to enforce the international obligations contracted by the executive. Thus, in the absence of domestic legislation incorporating international obligations into the national legal system, international legal instruments are in principle unenforceable by Indian courts. However, Article 51 of the Constitution prescribes respect for the international obligations to which India is party to. Article 51 is part of the Directive Principles of State Policy – hence non justiciable – but through the case-law the principle that Indian domestic statutory provisions ought to be interpreted consistently with international obligations progressively became the norm. This results from a *prima facie* presumption that Parliament would not act in breach of International Law. As a result, Indian courts may construe the Constitution itself or statutory provisions pre-dating any contraction of international obligations so as to render them consistent with such international law instruments to which India is party to.[24] Thus, the

[22] See for instance: *Dr. Upendra Baxi v. State of U.P.* (1984) 4 SCC 104 on the inhuman conditions of detention in the Agra Protective Home for Women; *People's Union for Democratic Rights v. Union of India* AIR 1982 SC 1473 on child labour; *Bhandua Mukti Morcha v. Union of India* AIR 1984 SC 802 on bonded labour; *Olga Tellis v Bombay Municipal Corporation* AIR 1986 SC 180 on the rights of Bombay slum dwellers; *M.C. Mehta v. Union of India* AIR 1987 SC 1086 on the disastrous Shriram pesticide plant gas leak in Bhopal, Madhya Pradesh; *M.C. Mehta v. Union of India* AIR 1988 SC 1115 on the pollution of the Ganga river; *People United for a Better Living in Calcutta v. State of W.B.* AIR 1993 Cal. 215 on the preservation of Calcutta's wetlands; *Vellore Citizens Welfare Forum v. Union of India* AIR 1996 SC 2715 on the pollution caused by tanneries' discharge in Tamil Nadu; *M.C. Mehta* v. *Union of India* AIR 1997 SC 734 on protecting the Taj Mahal from pollution; *Vishaka v. State of Rajasthan* AIR 1997 SC 3011 on sexual harassment in the workplace; *M.C. Mehta* v. *Union of India* AIR 2002 SC 1696 on public transports in Delhi to run solely on natural gas.

[23] Ahmedabad Women's Action Group (AWAG) v. Union of India, A.I.R. 1997 S.C. 3614.

[24] Main International Legal Instruments to which India is party to: *Universal Declaration of Human Rights*; *International Covenant on Economic, Social and Cultural Rights* (1979); *International Covenant on Civil and Political Rights* (1979); *International Convention on Elimination of All Forms of Racial Discrimination* (1968); *Convention on Rights of the Child* (1992); *Convention on Elimination*

Indian judiciary has played a critical role in the domestic implementation of international law instruments, especially in the areas of human rights and environmental law, fostering harmonisation between domestic and international legal norms.[25] It is in light of these extensive constitutional guarantees, legal procedures and institutional mechanisms that the protection of religious rights in India ought to be considered, without losing sight of the severe limitations imposed by security laws in conflict areas throughout independent Indian history.

D. KEY CONSTITUTIONAL PROVISIONS, STATUTES AND CASE-LAW

The protection of religious rights in India is enshrined both in the Constitution and a number of statutory provisions, interpreted by the country's Higher Judiciary.

1. Secularism

Secularism is a fundamental principle of India's legal system and is set out in the Preamble of the Constitution, which states that India is a 'Sovereign Socialist Secular Democratic Republic'.[26] As Bajpai explains, the principle of secularism was interpreted, first, as 'disestablishment', i.e. the Constitution makes no reference to God and institutes no official religion.[27] Second, it was understood as 'non-sectarianism' in the sense that the State did not afford preferential treatment to any religion. Third, it was taken to mean 'exclusion of religion from politics', for instance, by barring separate electorates on the basis of religious affiliation as it occurred during colonial times especially along the Hindu-Muslim divide. In fact, India's Founding Fathers in the early years of Independence strived to institutionalise a framework in which religion was not to be the

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of all Forms of Discrimination Against Women (1981); *Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment* (1997); *International Covenant on Suppression and Punishment of the Crime of Apartheid* (1977); *Convention on the Prevention and Punishment on the Crime on Genocide* (1959); *Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity* (1971); *Slavery Convention* (1927); *Protocol amending the Slavery Convention* (1926); *Supplementary Convention on the Evolution of Slavery, Slave Trade and Institutions and Practice similar to Slavery* (1960); *Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others* (1953); *Convention on the Nationality of the Married Women* (1957); *Convention on the Political Rights of the Women* (1961). Available at: http://mha.nic.in/uniquepage.asp?Id_Pk=235 [Accessed on 05/10/2012]

[25] Sunil Kumar Agarwhal 'Implementation of International Law in India: Role of Judiciary'. Available at: http://oppenheimer.mcgill.ca/IMG/pdf/SK_Agarwal.pdf [Accessed on 05/10/2012]

[26] Significantly the adjectives 'socialist' and 'secular' were absent in the promulgated original text of the Constitution and were inserted in 1976 by the *42nd Amendment Act* during Indira Gandhi's Emergency. However, as illustrated above, the secular nature of the Indian State was made clear already during the debates of the Constituent Assembly.

[27] Bajpai, Rochana 2011. *Debating Difference: Groups Rights and Liberal Democracy in India*. Delhi: Oxford University Press, pp. 100-2.

basis for identity politics. Notwithstanding the fact that the Constitution did not expressly define the State as secular, secularism was of fundamental constitutional importance as recognised by Chief Justice Sikri when he singled it out as one of the five pillars of the 'basic structure' of the Indian Constitution already in 1973 in his opinion in the *Kesavananda Bharati* case.[28] The reasons behind Indira Gandhi's decision to include 'secularism' in the Preamble during the Emergency remain, however, unclear.

With regard to the judicial interpretation of secularism, the Supreme Court found itself entangled in difficult political controversies with the rise of *Hindutva* and various bouts of communal violence. The meaning of secularism and its constitutional significance were elucidated in the 1994 *Bommai* case, in which the Supreme Court upheld the validity of the declaration of Presidential Rule in four States and the suspension of their respective Hindu Right State Governments under Article 356 following the destruction of the Babri mosque in Ayodhya in 1992 and the ensuing communal riots.[29] The Supreme Court confirmed that secularism forms part of the basic structure of the Constitution; it also held that 'in matters of State, religion has no place. No political party can simultaneously be a religious party. Politics and religion cannot be mixed. Any State Government which pursues unsecular policies or unsecular course of action acts contrary to the constitutional mandate and renders itself amenable to action under Article 356.'

It is striking to compare the outcome of the *Bommai* case with the *Ayodhya* decision in which the Supreme Court upheld the constitutional validity of the Acquisition of Certain Area at Ayodhya Act 1993, enacted to manage the land upon which the Babri mosque stood before being demolished by a Hindu mob on the basis that the site was the birthplace of Hindu God Ram. The Supreme Court held that the Act did not violate the constitutional principle of secularism.[30]

The ambivalence of the Supreme Court in dealing with questions of communalism is evident in the batch of *Hindutva* cases, in which the 1987 election of twelve Hindu Right politicians to the State Legislature of Maharashtra was challenged as violative of S.123(3) of the Representation of the People Act 1951, which prohibits the use of religion in electoral propaganda.[31] The Supreme Court upheld the elections of some politicians, while it invalidated the election of others; however, this set of cases are

[28] *Kesavananda Bharati v. State of Kerala* AIR 1973 SC 1535
[29] *S.R. Bommai v Union of India* AIR 1994 SC 1918
[30] *Ismail Faruqui v Union of India* (1994) 6 SCC 361
[31] *Manohar Joshi v Nitin Bhaurao Patel* AIR 1996 SC 796

significant in that the Court interpreted the notion of *Hindutva* as secular and not associated with Hinduism, but with 'the way of life of the Indian people'.[32]

2. Freedom of Religion

Part III of the Constitution on Fundamental Rights contains extensive guarantees protecting religious rights. Articles 25-28 of the Constitution form the basis for the protection of religious rights. The analysis of the aforementioned constitutional provisions and of the leading cases pertaining to the protection of religious rights reveals a complex and nuanced approach to the institutional management of India's religious diversity, of the politicisation of identity on religious basis and of the competing claims that emerge in such a plural society.

2.1 – Freedom of Religion and the Individual

Article 25 guarantees to all persons the 'freedom of conscience and free profession, practice and propagation of religion' and the right is not confined to Indian citizens.

25. Freedom of conscience and free profession, practice and propagation of religion—

(1) Subject to public order, morality and health and to the other provisions of this Part, all persons are equally entitled to freedom of conscience and the right freely to profess, practise and propagate religion.

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

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

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

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 (2), the reference to Hindus shall be construed as including a reference to persons professing the Sikh, Jaina or Buddhist religion, and the reference to Hindu religious institutions shall be construed accordingly.

[32] Ibid. p. 1129-1130

India's Supreme Court has defined the right to 'profess a religion' as the right to declare one's religious beliefs in a free and open manner.[33] The right to 'practise' one's religion, instead, has seen a long string of Supreme Court's decisions. As highlighted by Singh, the Supreme Court interpreted the Constitution to offer protection only to the 'rituals and observances, ceremonies and modes of worship considered by a religion to be its integral and essential part'; the Supreme Court subsequently interpreted 'integral and essential' on an *ad hoc* basis in respect of a particular religion.[34] For instance in the notorious Ayodhya decision, the Supreme Court held that 'a mosque is not an essential part of the practice of the religion of Islam and *namaz* (prayer) by Muslims can be offered anywhere, even in the open'.[35] Similarly, the Supreme Court ruled that public performance of the *Tandava* dance does not constitute an essential practice of the Ananda Marga,[36] and that gifts for a charitable purpose do not form an essential part of the Christian religion.[37] The Supreme Court also went as far as distinguishing religion from philosophy in adjudicating that the teachings of Sri Aurobindo did fall within the latter categorisation and hence did not enjoy the protection offered by Articles 25 and 26 of the Constitution.[38]

With regard to the question of religious conversion in India, the Supreme Court interpreted the right to 'propagate' one's religion in Article 25 as the right to 'propagate' one's religion only by divulging its tenets, not as the right to convert another person's to one's own religion, because actively seeking to convert another person would impinge on the 'freedom of conscience' of that person guaranteed by the same Article.[39] The explicit limitations to religious freedom contained in Article 25(1) 'subject to public order, morality and health' provide the State with constitutional basis to restrict freedom of religion. Sub-clause (2), instead, has been interpreted by Jacobsohn (2003: 93) as instrumental to accommodate the State's provision for 'social welfare and reform'. The link to Article 17 (Abolition of 'Untouchability') and the desire to reform caste-based discrimination can be evinced from Article 25(2)(b), which provides for the reform of Hindu religious institutions of a public character. Significantly, Explanation II defines 'Hindus' as including 'persons professing the Sikh, Jain or Buddhist religion'.

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[33] *Punjabrao v D.P. Meshram* AIR 1965 SC 1179
[34] Singh, Mahendra 2010. *V.N. Shukla's Constitution of India*. Lucknow: Eastern Book Company, p. 240.
[35] *Ismail Faruqui v Union of India* (1994) 6 SCC 361
[36] *Acharya Jagdishwarand Avandhuta v Commander of Police* AIR 1984 SC 51; *Commander of Police v Acharya Jagdishwarand Avandhuta* AIR 2004 SC 2984
[37] *John Vallamotton v Union of India* AIR 2003 SC 2902
[38] *S.P. Mittal v Union of India* AIR 1983 SC 1
[39] *Rev. Stanislaus v State of M.P.* AIR 1977 SC 908

2.2 – Rights of Religious Groups

Article 26 establishes the constitutional rights of religious denominations.

26. Freedom to manage religious affairs—Subject to public order, morality and health, every religious denomination or any section thereof shall have the right—
(*a*) to establish and maintain institutions for religious and charitable purposes;
(*b*) to manage its own affairs in matters of religion;
(*c*) to own and acquire movable and immovable property; and
(*d*) to administer such property in accordance with law.

While Article 25 provides guarantees for individuals, Article 26 establishes the constitutional rights of religious groups. In this way, a distinction is drawn between individual and collective freedom of religion.[40] The Supreme Court held that three conditions ought to be satisfied for a religious denomination to be recognised as such in constitutional terms: common faith, common organisation and designation by distinctive name.[41] It is important to note that the guarantees under Article 26 are extended also to a section of any given denomination.[42] Indian Courts have interpreted the expression 'religious matters' in light of the judicial doctrine that distinguishes essential from not essential practices of any given religion.[43]

Potential clashes between Articles 25 and 26 ought to be highlighted. Article 26(b) grants the right to any religious denomination to 'manage its own affairs in matters of religion'; this clause is engaged in cases concerning temple entry and the exclusion of members of the public from worshipping on the basis of caste and/or 'Untouchability'. As Singh explains, Article 26(b) must yield to the overriding non-discriminatory provision enshrined in Article 25(2)(b), but the right that 'during certain ceremonies and on special occasions it is only members of a certain community that have the right to take part therein and that on those occasions all other persons would be excluded'.[44]

A similar conflict may arise in the interpretation of Article 17 (Abolition of 'Untouchability') in relation to Article 26(b). Singh explains that: 'there is a fundamental distinction between excluding persons from temples open for the purpose of worship to the Hindu public in general on the ground that they belong to the excluded communities

[40] Jacobsohn, Gary Jeffrey 2003. *The Wheel of Law: Indian Secularism in Comparative Constitutional Context*. New Delhi: Oxford University Press, p. 92.
[41] *S.P. Mittal v Union of India* AIR 1983 SC 1
[42] *Commander H.R.E. v Sri Lakshmindra Thirtha Swamiar of Sri Shirur Mutt* AIR 1954 SC 282
[43] *Syedna Taher Saifuddin Saheb v State of Bombay* AIR 1962 SC 853
[44] Singh, Mahendra 2010. *V.N. Shukla's Constitution of India*. Lucknow: Eastern Book Company, p. 248.

and excluding persons from denominational temples on the ground that they are not objects within the benefit of the foundation.[45] The former will be covered by Article 17 and the latter protected by Article 26'.[46] Thus, the issue of temple entry has been skilfully negotiated by Indian courts by interpreting in conjunction different constitutional provisions under Articles 17, 25 and 26 in order to devise a legal framework capable of distinguishing various factual situations in which both the religious rights of the individual and of denominations are respected. Additionally, both Articles 25 and 26 are subject to limitations pertaining to 'public order, morality and health', which have been interpreted purposively to cover issues ranging from inciting hatred amongst people professing different religions[47] to noise pollution.[48]

2.3 – Religion and Taxation

Article 27 prohibits the State from levying taxes deputed to financially support any particular religion or religious denomination.

27. Freedom as to payment of taxes for promotion of any particular religion—No person shall be compelled to pay any taxes, the proceeds of which are specifically appropriated in payment of expenses for the promotion or maintenance of any particular religion or religious denomination.

Article 27 was inserted ultimately to protect secularism and shield the State from allegation of supporting any particular religion. The case-law draws a distinction between 'taxes' and 'fees' in the application of Article 27: 'fees' do not fall within the prohibition of Article 27. Such payment to be classified as a fee must, first, be paid in consideration for some special services/work for the benefit of the payee; and, second, 'fees' are only levied for that specific consideration and ought not to merge with general State revenues.[49]

2.4 – Religion and Education

Article 28 regulates religious instruction only in educational institutions entirely supported by State funds.

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[45] Ibid. p. 114.
[46] *Venkataramana Devaru v State of Mysore* AIR 1958 SC 255
[47] *Subhash Desai v Sharad J. Rao* AIR 1994 SC 2277
[48] *Church of God (Full Gospel) in India v Majestic Colony Welfare Association* (2000) 7 SCC 282; *Noise Pollution (V) In re* (2005) 5 SCC 733
[49] *Jagannath Ramanuj Das v State of Orissa* AIR 1954 SC 400

28. Freedom as to attendance at religious instruction or religious worship in certain educational institutions—

(1) No religious instruction shall be provided in any educational institution wholly maintained out of State funds.

(2) Nothing in clause (1) shall apply to an educational institution which is administered by the State but has been established under any endowment or trust which requires that religious instruction shall be imparted in such institution.

(3) No person attending any educational institution recognised by the State or receiving aid out of State funds shall be required to take part in any religious instruction that may be imparted in such institution or to attend any religious worship that may be conducted in such institution or in any premises attached thereto unless such person or, if such person is a minor, his guardian has given his consent thereto.

Article 28 prohibits religious instruction in any educational institutions wholly maintained out of State funds, but not in educational institutions recognised or managed by the Sate but set up by a trust or endowment requiring religious instruction to be imparted. In the latter kind of institutions participation in religious instruction is strictly voluntary.

Article 29 provides a constitutional guarantee against discrimination solely based on religion in the admission to educational institution supported by State funds.

29. Protection of interests of minorities—(1) Any section of the citizens residing in the territory of India or any part thereof having a distinct language, script or culture of its own shall have the right to conserve the same.

(2) No citizen shall be denied admission into any educational institution maintained by the State or receiving aid out of State funds on grounds only of religion, race, caste, language or any of them.

Article 29(2), Cultural and Educational Rights, forbids the exclusion from admission to any wholly or partly State-funded educational institution on grounds only of religion, race, caste, language or any of them.[50] Importantly, Article 29(2) gives horizontal application to the right it enshrines and bestows such right upon individuals on the basis of their citizenship rather than their communal affiliation.[51]

[50] Singh, Mahendra 2010. *V.N. Shukla's Constitution of India*. Lucknow: Eastern Book Company, p. 259.
[51] *State of Madrasa v Srt Champakam* AIR 1951 SC 226

From the analysis of the Fundamental Rights pertaining to religion it is clear that the strategy adopted by Indian State-actors to institutionally manage religious diversity alternates a strict exclusion of religion from politics and firm 'colour-blind' anti-discrimination policies, with more or less direct interference in religious matters and positive discrimination measures under the Right to Equality discussed below. Such approach combines a pragmatic attitude towards India's social realities and the importance of religion within the polity, with an aspirational reformism aimed at eradicating certain social evils associated with religion and communalism. The ultimate goal of this approach is to cement the basis of the Indian nation by creating a common 'legal' benchmark for all the different communities, without alienating them through excessive State interference in purely private matters. In fact, the provisions pertaining to the protection of religious rights contained in the Directive Principles of State Policy are in line with the approach illustrated above. Article 38 provides that 'the State shall strive to promote the welfare of the people by securing and protecting as effectively as it may a social order in which justice – social, economic and political – shall inform all the institutions of the national life'. Equality is pivotal to the conception of justice espoused by the Indian Constitution; it is equality amongst individuals and also amongst groups.

3. Right to Equality

The Indian Constitution contains extensive guarantees pertaining to equality of treatment and non-discrimination. Religion is both an identity marker in respect of which individuals ought not to be discriminated against and a basis for collective entitlements.

14. Equality before law.—The State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India.

15. Prohibition of discrimination on grounds of religion, race, caste, sex or place of birth—

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

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

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

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

(3) Nothing in this article shall prevent the State from making any special provision for women and children.

(4) Nothing in this article or in clause (2) of Article 29 shall prevent the State from making any special provision for the advancement of any socially and educationally backward classes of citizens or for the Scheduled Castes and the Scheduled Tribes.

(5) Nothing in this article or in sub-clause (g) of clause (1) of Article 19 shall prevent the State from making any special provision, by law, for the advancement of any socially and educationally backward classes of citizens or for the Scheduled Castes or the Scheduled Tribes in so far as such special provisions relate to their admission to educational institutions including private educational institutions, whether aided or unaided by the State, other than the minority educational institutions referred to in clause (1) of Article 30.

Article 15 prohibits discrimination of Indian citizens by the State on grounds only of religion, race, caste, sex or place of birth; it acts as an important corollary to Article 14, which establishes equality before the law of all persons, not just citizens. Discrimination in this context implies a sense of prejudice.[52] The removal of prejudice is pivotal to Independent India's process of nation-building; the creation of a modern polity required undermining the politicisation of inter-religious communal identities and the removal of forms of intra-religious discrimination – such as 'Untouchability'. As a result, Article 15(1) applies directly to State actors and it is on its basis that, for instance, the Supreme Court invalidated an Act of the Legislature of Uttar Pradesh creating separate electorates for different religious communities.[53] Article 15(2) prohibits entry refusal into shops, public restaurants, hotels and public entertainment and denial of usage of wells, tanks, bathing ghats, etc. maintained wholly/partly by State funds or for the usage of the general public. Significantly, Article 15(2) does not specify that its guarantees against discrimination are restricted to State-actions and its horizontal application clearly aims at removing disabilities based on the Hindu caste system.

The formulation of the Right to Equality includes positive discrimination measures for *Dalits* (former 'Untouchables') only after the *1st Amendment* of the

[52] Singh, Mahendra 2010. *V.N. Shukla's Constitution of India*. Lucknow: Eastern Book Company, p. 82.
[53] *Nain Sukh Das v State of U.P.* AIR 1953 SC 384

Constitution in 1951 when the Congress government sought to overturn the Supreme Court decision in the *State of Madrasa v Srt Champakam* on reservations in student admission to state-run medical colleges.[54] As a result, the Nehru government reasserted parliamentary sovereignty and inserted Sub-clause (4) in Article 15 spelling out that 'nothing [...] shall prevent the State from making any special provisions for the advancement of any socially and educationally backward classes of citizens or for the Scheduled Castes or Scheduled Tribes'. The expression 'Scheduled Castes' exclusively indicates *Dalits*. With regard to the third category of people identified by Sub-clause (4) – Other Backward Classes (OBC) – a more precise definition is only arrived at in the early 1990s following the government's decision to implement the findings of the Mandal Commission on OBC. In a lengthy case on OBC quotas, the Supreme Court held that caste is not a criterion to identify OBC and that the OBC category can include religious minorities such as Muslims and Christians.[55] As a result, religious affiliation may form the basis for the identification of social groups entitled to positive discrimination measures in education and public service employment. The notion of equality in the Indian Constitution under Articles 14 to 18 contains both a negative and positive connotation. Negative equality requires the enforcement on the part of the State of a strictly non-discriminatory approach by which individuals are entitled to be protected from exclusion from public educational institutions and public employment only on the basis of religion.[56] Conversely, positive equality mandates positive discrimination and State action in order to secure the inclusion into the public sphere of individuals and groups belonging to different religions through reservations for Scheduled Castes and OBC.[57]

4. Discrimination in Employment

Article 16 secures to Indian citizens equality of opportunity in matters of public employment and forbids discrimination on a number of grounds including religion; significantly this constitutional guarantees extends only to employment or office under the State. Singh clarifies that 'there is no constitutional prohibition against private persons or bodies employing people on grounds prohibited by Article 16(2).[58]

[54] *State of Madrasa v Srt Champakam* AIR 1951 SC 226
[55] *Indra Sawhney v Union of India* AIR 1993 SC 477
[56] *B. Venkataramana v State of Madras* AIR 1951 SC 229
[57] *State of Madrasa v Srt Champakam* AIR 1951 SC 226; *Indra Sawhney v Union of India* AIR 1993 SC 477
[58] Singh, Mahendra 2010. *V.N. Shukla's Constitution of India*. Lucknow: Eastern Book Company, p. 107.

16. Equality of opportunity in matters of public employment—

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

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

(3) Nothing in this article shall prevent Parliament from making any law prescribing, in regard to a class or classes of employment or appointment to an office under the Government of, or any local or other authority within, a State or Union territory, any requirement as to residence within that State or Union territory prior to such employment or appointment.

(4) Nothing in this article shall prevent the State from making any provision for the reservation of appointments or posts in favour of any backward class of citizens which, in the opinion of the State, is not adequately represented in the services under the State.

(4A) Nothing in this article shall prevent the State from making any provision for reservation in matters of promotion, with consequential seniority, to any class or classes of posts in the services under the State in favour of the Scheduled Castes and the Scheduled Tribes which, in the opinion of the State, are not adequately represented in the services under the State.

Article 16(2) prohibiting discrimination ought to be read in conjunction with Articles 16(4) and 16(4A), which grant to the State the right to pass legislation for positive discrimination measures for the benefit of specified classes of Indian citizens. The Supreme Court interpreted these provisions as early as 1951 in the *Venkataramana v State of Madras* case, where the State of Madras had allocated public sector jobs on the basis of fixed quotas to various communities, some of which did not fall under the constitutional definition of 'Backward' in Article 16(4). The Court held that the allocation of posts to Hindus, Muslims and Christians violated Article 16(2) and was therefore unconstitutional.[59] In a similar case a number of teachers employed in State schools in Jammu & Kashmir were promoted on the basis that 50 per cent of the promotions were reserved to Muslims as they represent a 'Backward Class' in the State within the meaning of Article 16(4). The Supreme Court allowed the petition, did not recognise all the

[59] *Venkataramana v State of Madras* AIR 1951 SC 229

Muslims of Jammu & Kashmir as a 'Backward Class' and held that the discrimination measure based solely on religion violated Article 16(2).[60]

With regard to employment discrimination in the private sector, India has neither a constitutional ban nor a comprehensive statutory framework dealing with such issue. The Constitution concentrates on States actions and reservations in public employment and education, while the statutory framework contains different Acts dealing with separate issues, such as discrimination on the basis of gender and disability. Significantly, there are no specific provisions that deal with discrimination on the basis of religion (other than 'Untouchability') in the private sector.

5. 'Untouchability'

Article 17 of the Constitution abolishes 'Untouchability' and forbids its practice in any form. It provides the constitutional basis for the criminalisation of discrimination on the ground on 'Untouchability'.

17. **Abolition of Untouchability**—"Untouchability" is abolished and its practice in any form is forbidden. The enforcement of any disability rising out of "Untouchability" shall be an offence punishable in accordance with law.

Article 17 is the only constitutional provision pertaining to equality that binds both the public and private sectors. This highlights the reformist commitment of the Indian constitution-makers to the eradication of the social evil of discrimination on the basis of 'Untouchability'. Article 17 forms the constitutional basis of a cause of action for discrimination against *Dalit*, of judicial review of discriminatory legislation, and the criminalisation of the practice of 'Untouchability'. It is useful to read Article 15 and Article 16 in conjunction with Article 17 with specific reference to positive discrimination measures for Scheduled Castes as discussed above.

The interventionist and reformist approach of the Indian State towards religion is well attested in the criminal law field by the Untouchability (Offences) Act 1955 – renamed in 1976 as the Protection of Civil Rights Act 1955 – and the later Prevention of Atrocities Act 1989. The rationale of these Acts is to discourage, penalise and ultimately eradicate discriminatory behaviour towards *Dalit*. Mendelsohn and Vicziany argue that the main effect of this legislation was to contribute to the de-legitimation of the practice

[60] *Triloki Nath v State of Jammu & Kashmir* AIR 1967 SC 1283

of 'Untouchability', but only in the areas where State control is more substantial.[61] *Dalit* political efforts have also concentrated on certain issues such as the treatment of *Dalit* women and the way in which *Dalit* have been addressed, rather than sharing common spaces such as temples and wells with upper castes. For instance, the access to water has been largely sidestepped by creating separate water facilities for *Dalit*: 'provided one has convenient access to water, it seems not so vital to insist on using a well where again one will feel unwelcome'.[62]

6. Personal Laws and the Uniform Civil Code

The most significant area of law in India dealing specifically with religion is the personal law system. India's personal law system regulates the domains of family, inheritance and succession law separately for four communities defined on the basis of religion: Hindus (including also Sikhs, Buddhists and Jains); Muslims; Parsi and Christians. Indian citizens are also afforded the opportunity to opt for a secular legal framework under the Special Marriage Act 1954. At Independence, India's constitution-makers envisioned the supersession of the various personal laws in favour of a secular Uniform Civil Code.

44. Uniform Civil Code for the citizens—The State shall endeavour to secure for the citizens a uniform civil code throughout the territory of India.

Article 44 is part of the Constitution's Directive Principles of State Policy and as such it is not justiciable. This provision is indicative of the desire of India's Founding Fathers to attain legal equality and national unity by means of legal uniformity. The programmatic nature of the DPPS provision is confirmed by Article 372, which guarantees the continuance into force of existing laws, including the personal law system.

The history of personal laws in India arches back to Mughal times and the early colonial period. At the time of the Constituent Assembly Indian reformists, including Nehru, wished to establish a modern uniform legal system, but they were unable to pass a Uniform Civil Code overriding the country's various personal laws. Hence, they resigned themselves to enshrining the ideal of legal uniformity in the DPSP. As a result, the strategy of the Indian state was to reform the law of the majority of the population, Hindu Law, while opting for a policy of non-interference in Islamic Law and leaving the Muslim community, the second biggest religious group in Independent India, regulated

[61] Mendelsohn, Oliver and Marika Vicziany 1994. 'The Untouchables' in O. Mendelsohn and U. Baxi (eds.) *The Rights of Subordinated People*. Delhi: Oxford University Press, p. 107.
[62] Ibid. p. 107.

under largely uncodified *shariat* law. As a result, the Nehru government passed in the early 1950s the Hindu Code Bills: The Hindu Marriage Act 1955; the Hindu Succession Act 1956; the Hindu Minority and Guardianship Act 1956; and the Hindu Adoptions and Maintenance Act 1956.[63]

Two areas of family law in India are of particular importance in understanding the interplay of religious law and State reformist intervention. First, the issue of the legal validity of marriage: so far, the validity in the eyes of the law of a matrimonial union is not to be found in the formal process of registration with State authorities (unless contracted under the secular Special Marriage Act 1954), but in the correct ritual solemnisation of the marriage under S.7 HMA 1955 and uncodified *shariat* provisions. Indian reformists have endeavoured to alter this balance between religion and State and, as a result, the Compulsory Registration of Marriages Bill 2006 – a piece of uniform legislation – was introduced in Parliament, but at the time of writing is still pending. If passed, the Bill would make the legal validity of a marriage contracted under personal laws entirely dependent on the procedural criteria of registration with State authorities; hence, non-compliance would render the marriage void *ab initio*.

Second, the issue of post-divorce maintenance has been progressively streamlined across the various personal laws. In traditional Islamic Law women are generally entitled to post-divorce maintenance only in the *iddat* period of three menstrual cycles. The most important case on this issue was the 1985 *Shah Bano* decision in which a divorced old Muslim woman won her legal battle to obtain the entitlement to maintenance extending beyond the *iddat* period from her former husband. The husband's appeal was dismissed by the Supreme Court in a path-breaking judgement, which denied any conflict between Muslim Personal Law and the provisions of Indian general law contained in Ss. 125 and 127 of the Criminal Procedure Code 1973 entitling to post-divorce maintenance a 'divorced wife' that cannot support herself.[64] Moreover, the Supreme Court made it very clear that S. 125 – being part of Indian general law – would in any case override Muslim Personal Law, were there any conflict between the two. The Supreme Court also reiterated the necessity of bypassing the various personal laws and framing a Uniform Civil Code for the entire territory of India in conformity with Article 44. The fact that the Supreme Court bench that decided the *Shah Bano* case was composed by five Hindu judges, together with growing Hindu nationalism, fuelled a

[63] Williams, Rina Verma 2006. *Postcolonial Politics and Personal Laws. Colonial Legal Legacies and the Indian State*. New Delhi: Oxford University Press, p. 106.
[64] *Mohd. Ahmed Khan v Shah Bano Begum* AIR 1985 SC 945

series of protests on the part of the Indian Muslim community demanding the regulation of such matters to remain under the purview of their personal law. The issue of streamlining personal laws and creating a sort of uniformity of norms across the laws applying to the various religious communities has been a recurrent theme in Indian adjudication as the relationship between State-made law and religious norms has always been a most intractable matter.

Following the *Shah Bano* decision,[65] the Gandhi government passed the Muslim Women (Protection of Rights on Divorce) Act 1986, which has been progressively interpreted by the courts to extend the post-divorce maintenance provisions for Muslim women beyond the *iddat* period, hence creating the same legal obligation on the divorced parties across the various personal laws.[66] The 1986 Act was constitutionally challenged a number of times, however the petitions were kept pending by the Supreme Court for several years. In the meantime, the majority of the decisions at High Court-level promoted the concept that a divorced Muslim husband is liable for his former wife's financial support.[67] In 2001, the Supreme Court heard the *Danial Latifi* case and interpreted for the first time the controversial S. 3(1)(a) of the 1986 Act. The apex court confirmed the interpretation offered by the Kerala High Court in *Ali v Sufaira* establishing the right of divorced Muslim women to maintenance post-*iddat* period.[68] It is now generally accepted in India that a divorced husband is liable for maintaining his children and former wife, irrespective of which personal law applies to him, as clearly stated in the *Geeta Gladstone* decision on a Christian divorce: 'every Indian citizen is bound to maintain his wife and children. This is a tradition of the society'.[69]

7. Criminal Law

Criminal Law in India is regulated through uniform legislation since colonial times, when the most important statute was introduced: the Indian Penal Code 1860. The IPC contains an extensive section (Chapter XV) on Offences Relating to Religion, which identifies five offences: injuring or defiling place of worship with intent to insult the religion of any class (Section 295); deliberate and malicious acts intended to outrage religious feelings of any class by insulting its religion or religious beliefs (Section 295A); Disturbing religious assembly (Section 296); Trespassing on burial places (Section 297);

[65] *Mohd. Ahmed Khan v. Shah Bano Begum* AIR 1985 SC 945
[66] Menski, Werner 2001. *Modern Indian Family Law*. Richmond: Curzon, pp. 239-294.
[67] *Ali v Sufaira* 1988 (2) KLT 94; *Ahammed v Aysha* 1990 (1) KLT 172
[68] *Danial Latifi v Union of India* AIR 2001 SC 3958
[69] *Gladstone v Geeta Gladstone* 2002 (2) KLT SN 126 (Case No. 155)

and uttering, words, etc., with deliberate intent to wound the religious feelings of any person (Section 298). The scope of Chapter XV during colonial times was to cordon, control and sanction all behavior potentially inciting to communal violence. Very little changed after Independence, when the IPC was kept in force and Chapter XV barely amended. It is striking to compare the trajectory of the same Chapter of the Penal Code in the neighboring jurisdiction of Pakistan, where a series of amendments in the 1980s transformed a useful criminal law instrument devised to protect various religions into the notorious 'blasphemy laws' used to entrench the primacy of Islam and to criminalize the country's religious minorities.

In India, the constitutional validity of Section 295A of the IPC 1860 was constitutionally challenged as violative of the fundamental right to freedom of speech and expression conferred by Article 19(1)(a) of the Constitution. The Supreme Court upheld the constitutional validity of Section 295A because it was absurd to suggest that insult to religion as an offence could have no bearing on public order since the provisions of Articles 25 and 26 of the Constitution, while guaranteeing freedom of religion, expressly made it subject to public order.[70]

8. Cow Protection

The cow is Hinduism's sacred animal and thus it has been accorded special status and protection within India's constitutional framework and legal system.

48. Organisation of agriculture and animal husbandry—The State shall endeavour to organise agriculture and animal husbandry on modern and scientific lines and shall, in particular, take steps for preserving and improving the breeds, and prohibiting the slaughter, of cows and calves and other milch and draught cattle.

Article 48 is part of the Constitution's Directive Principles of State Policy and as such it is not justiciable. It provides for special protection of cows and other bovine specimens. Article 48 exemplifies the tension between the protection of religious norms and their reform in modernist terms, especially in the part concerning animal husbandry with its special reference to the preservation of cows, calves and milch and draught cattle. The protection of Hinduism's sacred animal is couched in the modernist language of science and effectively implies a ban on cow slaughter. The extension of such ban is defined by the Supreme Court as State-level legislation prohibiting cow slaughter has been

[70] *Ramji Lal Modi v State of U.P.* AIR 1957 SC 620

interpreted by the Supreme Court in light of Article 48 in a number of cases.[71] The Court ruled in 1958 that the protection of cows under Article 48 does not extend to cattle that is no longer milch or draught cattle, but the Court also held that cow slaughtering was an 'optional' Muslim practice and not an essential one.[72] Over forty years later the Supreme Court overruled itself and upheld the validity of an Act that imposes a complete ban on cow slaughter in Gujarat. [73] The Supreme Court later clarified in a different judgement that Article 48 did not impose a total ban on bovine cattle slaughter and that bovine cattle may be slaughtered after they cease to breed or yield milk on grounds of public policy, rather than on grounds of protecting religious rights.[74]

E. CONCLUSIONS

This overview has sought to illustrate India's 'strategy of principled distance' towards the various religions present in the country; such a strategy adopted by Indian State actors – including the courts – combines a degree of strict intervention, non-interference and equidistance, with an aim of securing justice to Indian citizens. To conclude, the protection of religious rights in India since Independence in 1947 has been articulated through a sophisticated institutional framework informed by a *sui generis* notion of secularism inextricably intertwined with the imperative of preserving national unity. As a result, different strategies have been deployed, ranging from strict non-intervention to a selective one, hence leading at times to ambiguous and contradictory outcomes. It seems that the comment made by Cossman and Kapur about the Supreme Court's *Hindutva* decisions appropriately illustrates such tensions also in other areas of law investing the question of religious rights and their protection: 'the decision was thus a contradictory one, in which the Hindu Right was both condemned and condoned. It is, moreover, the contradictory nature of the inroads made by the Hindu Right that continues to make law and legal discourse an important site of contestation in the struggle for Indian secularism'.[75]

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[71] Singh, Mahendra 2010. *V.N. Shukla's Constitution of India*. Lucknow: Eastern Book Company, pp. 358-9.
[72] *Mohammad Hanif Quareshi v State of Bihar* AIR 1958 SC 731
[73] *State of Gujarat v Mirzapur Moti Kureishi Kassab Jamat* (2005) 8 SCC 534
[74] *Akhil Bharat Goseva Sangh (3) v State of A.P.* (2006) 4 SCC 162
[75] Cossman, Brenda and Ratna Kapur 1999. *Secularism's Last Sigh? Hindutve and the (Mis)Rule of Law*. Delhi: Oxford University Press, p. 138.