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## Religion, Law, and Judiciary in Modern India

*Tabir Mahmood\**

### I. INTRODUCTION

Among the seven nations of South Asia forming the South Asian Association for Regional Cooperation (SAARC),<sup>1</sup> India stands out as the only country that has declared itself a secular State. In each of the remaining six nations, one or another spiritual faith has the status of the officially adopted or legally promoted religion—Buddhism in Bhutan<sup>2</sup> and Sri Lanka;<sup>3</sup> Hinduism in Nepal;<sup>4</sup> and Islam in Bangladesh,<sup>5</sup> Maldives,<sup>6</sup> and Pakistan.<sup>7</sup>

Constitutionally, India is a secular country and therefore has no State religion. However, it has developed over the years its own

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1. For more information, see the official SAARC website at <http://www.saarc-sec.org/main.php>.

2. The 2005 Bhutan Constitution describes Buddhism as the “spiritual heritage of Bhutan” and states that the *Druk Gyalpo* (Head of the State) shall “as a Buddhist” be the “symbol of unity of the Kingdom and the people of Bhutan.” BHUTAN CONST. arts. 2–3, Draft 2005.

3. SRI LANKA CONST. art. 7 (“The Republic of Sri Lanka shall give to Buddhism the foremost place and accordingly it shall be the duty of the State to protect and foster the *Buddha sasana* . . .”).

4. NEPAL CONST. art. 4 (“Nepal is a multi-ethnic, multi-lingual, democratic, independent, indivisible, sovereign, *Hindu* and constitutional monarchical kingdom.”). Article 27 requires the King to be “an adherent of Aryan Culture and the Hindu Religion.” *Id.* art. 27.

5. BANGL. CONST. art. 2-A (“The State religion of the Republic is Islam . . .”). Formerly a province of Pakistan and made a sovereign nation in 1971, Bangladesh had begun as a secular state but later amended its Constitution to adopt Islam as its State religion.

6. MALDIVES CONST. art. 1 (“The Maldives shall be a sovereign, independent, democratic republic based on the principles of Islam . . .”). The Constitution further requires all the high dignitaries of the State to be Muslim, *id.* arts. 34(a), 56(a), 66(a), 107(a), 113(a), 119(a), 134(a), and refers to *Shari'a* (Islamic religious law) to be decisive in certain State affairs. *See id.* arts. 16(2), 23(1), 43, 156.

7. PAK. CONST. art. 2 (amended 2003) (“Islam shall be the State religion of Pakistan.”). The Constitution requires that “[a]ll existing laws shall be brought in conformity with the Injunctions of Islam as laid down in the Holy Quran and Sunnah.” *Id.* arts. 227–31.

unique concept of secularism that is fundamentally different from the parallel American concept of secularism requiring complete separation of church and state, as also from the French ideal of *laïcité*.<sup>8</sup>

Despite the clear incorporation of all the basic principles of secularism into various provisions of the Constitution when originally enacted, its preamble did not then include the word secular in the short description of the country, which it called a “Sovereign Democratic Republic.” This was, of course, not an inadvertent omission but a well-calculated decision meant to avoid any misgiving that India was to adopt any of the western notions of a secular state. Twenty-five years later—by which time India’s peculiar concept of secularism had been fully established through its own judicial decisions and state practice, the preamble to the Constitution was amended to include the word “secular” (along with “socialist”) to declare India to be a “Sovereign Socialist Secular Democratic Republic.”<sup>9</sup>

This Article briefly states and explains the constitutional, statutory, and judicial framework of India’s religion-state relations, and the unique balance that is found in that framework between secularism and freedom of religion—namely that, in India, the law of the land determines the scope of religion in society; it is not religion that determines the scope of the law. Part II below explains the foundational role India’s Constitution plays in its religion-state relations. Part III briefly looks into the legislative enactments and governmental mechanisms relating to or having a bearing on religious matters. Part IV illustrates how the courts have interpreted India’s concept and principle of secularism and religious freedom.

## II. CONSTITUTIONAL FOUNDATIONS

Constitutionally, India is a secular nation, but any “wall of separation” between religion and state exists neither in law nor in practice—the two can, and often do, interact and intervene in each

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8. The French concept of *laïcité* has been described “as an essential compromise whereby religion is relegated entirely to the private sphere and has no place in public life whatsoever.” Rachael F. Goldfarb, Comment, *Taking the ‘Pulpit’ Out of the ‘Bully Pulpit’: The Establishment Clause and Presidential Appeals to Divine Authority*, 24 PENN ST. INT’L L. REV. 209, 216 (2005).

9. INDIA CONST. pmb.: amended by the Constitution (Forty-Second Amendment) Act, 1976 (enforced since Jan. 3, 1977).

other's affairs within the legally prescribed and judicially settled parameters. Indian secularism does not require a total banishment of religion from the societal or even state affairs. The only demand of secularism, as mandated by the Indian Constitution, is that the state must treat all religious creeds and their respective adherents absolutely equally and without any discrimination in all matters under its direct or indirect control.

In this Part, Section A below describes the constitutional mandates that apply to all religions, and Section B discusses the provisions that relate to certain religious communities and their faiths.

#### *A. General Provisions*

The Constitution of India contains in its chapter on Fundamental Rights several provisions that emphasize complete legal equality of its citizens and prohibit any kind of religion-based discrimination between them. Among these provisions are the following:

“The State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India.”<sup>10</sup>

“The State shall not discriminate against any citizen on grounds only of religion, race, caste, sex, place of birth, or any of them.”<sup>11</sup>

“No citizen shall, on grounds only of religion . . . be subjected to any disability, liability, restriction or condition with regard to access to or use of various public places.”<sup>12</sup>

“No citizen shall, on grounds only of religion . . . be ineligible for, or discriminated against, in respect of any employment or office under the State.”<sup>13</sup>

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10. INDIA CONST. art. 14.

11. *Id.* art. 15, cl. 1.

12. *Id.* art. 15, cl. 2.

13. *Id.* art. 16, cl. 2. Notably, in 55 years of the post-Constitution era, the country has had three Muslim Presidents, one Sikh President, two Muslim Vice-Presidents, and three Muslim Chief Justices. At present, the Head of the State, the Head of the Government, and the Army Chief all belong to religious minorities.

Regarding the people's right to religious liberty, the Fundamental Rights chapter in the Constitution provides in general terms that:

All persons are equally entitled to "freedom of conscience and the right freely to profess, practice and propagate religion."<sup>14</sup>

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.<sup>15</sup>

The State may, however, pass laws providing for "social welfare and reform," and may also freely regulate or restrict "secular activity"—economic, financial, political, etc.—even though it may be traditionally associated with religion.<sup>16</sup>

There shall be "freedom as to payment of taxes for promotion of any particular religion"—by virtue of which no person shall be compelled to pay any taxes where the proceeds are specifically appropriated in payment of expenses for the promotion or maintenance of any particular religious denomination.<sup>17</sup>

No religious instruction is to be provided in the schools wholly maintained by State funding.<sup>18</sup> Those attending any State-recognized or State-aided school cannot be required to take part in any religious instruction or services without consent.<sup>19</sup>

"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."<sup>20</sup>

Religious minorities are free to establish and administer educational institutions of their choice,<sup>21</sup> which shall not be discriminated

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14. *Id.* art. 25, cl. 1.

15. *Id.* art. 26.

16. *Id.* art. 25, cl. 2.

17. *Id.* art. 27.

18. *Id.* art. 28, cl. 1.

19. *Id.* art. 28, cls. 1, 3.

20. *Id.* art. 29, cl. 1.

against by the State in the matter of giving aid.<sup>22</sup> But no institution maintained by the State or receiving aid from it is to deny admission to any citizen only on the ground of religion.<sup>23</sup>

The chapter on Fundamental Duties under the Constitution includes the following among the basic national obligations of all the citizens:

“to promote harmony and the spirit of common brotherhood amongst all the people of India transcending religious, linguistic and regional or sectional diversities,” and

“to value and preserve the rich heritage of our composite culture.”<sup>24</sup>

### *B. Community-Specific Provisions*

Side by side with the afore-stated general provisions relating to religious neutrality of the state and religious liberties of the people, we find within the Constitution of India a number of religion-based and religion-related provisions for particular communities. Among these are the following:

A provision in the chapter on Directive Principles of State Policy requiring legal prohibition of the slaughter of cows and calves (in an obvious recognition of the Hindu reverence for the bovine creatures).<sup>25</sup>

A provision in the chapter on Fundamental Rights saying that carrying the sacred *kirpan* (a small sword) in public places would be regarded as a “fundamental right” for the Sikhs.<sup>26</sup>

An explanatory provision in the chapter on Fundamental Rights enabling the State to legislate for removing all sorts of caste-based restrictions on entry to Hindu, Buddhist, Jain, and Sikh temples.<sup>27</sup>

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21. *Id.* art. 30, cl. 1: amended by the Constitution (Forty-Fourth Amendment) Act, 1978.

22. *Id.* art. 30, cl. 2.

23. *Id.* art. 29(2).

24. *Id.* art. 51-A, cls. (e), (f): amended by the Constitution (Forty-Second Amendment) Act, 1976.

25. *Id.* art. 48.

26. *Id.* art. 25, explanation I.

A special provision in the chapter on Finance for specified annual maintenance-allowances to be given from the State exchequer for the upkeep of Hindu temples of a certain denomination in two South Indian states—Kerala and Tamil Nadu.<sup>28</sup>

Two separate provisions in the chapter on Special Provisions providing for the protection of religious customs prevalent among the tribal communities of two Christian-dominated states of North East India—Nagaland and Mizoram.<sup>29</sup>

There is, thus, a rather curious blend of secular and religious elements within the text of the Constitution; and it is this judicious blend that defines and determines the contours of secularism to be acted upon by the state and the religious freedom to be exercised by individuals and communities in modern India.

### III. LEGISLATION & STATE PRACTICE

There is a large body of legislative enactments in India dealing with, or having a bearing on, religious matters pertaining to various faith groups. All this legislation, as well as the established state practice, fully conforms to the Constitutional dictates relating to secularism and parameters of religious freedom.

The various sections in this Part illustrate how secularism is balanced with freedom of religion under India's legislative enactments and how religious matters are controlled by state practice, both in accordance with the basic Constitutional provisions in this context.

#### *A. Religious Conversion and Renouncement*

During the British rule in India, with a view to protecting the interests of converts to the rulers' religion (viz., Christianity) a law called the Caste Disabilities Removal Act was passed in 1850.<sup>30</sup> The Act, of course, provided in general terms that:

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27. *Id.* art. 25, cl. 2(b).

28. *Id.* art. 290A: amended by the Constitution (Seventh Amendment) Act, 1956 (providing for annuities for the *Devasom* Temple Funds in Tamil Nadu and Kerala States).

29. *Id.* arts. 371-A, 371-G (providing protection to local religious and social practices, customary laws and procedures, and administration of civil and criminal justice involving customary-law decisions).

30. Caste Disabilities Removal Act, No. 21 of 1850, available at <http://www.helpinelaw.com/bareact/index.php?dsp=caste-dis>.

So much of any law or usage now in force in India as inflicts on any person forfeiture of rights or property, or may be held in any way to impair or affect any right of inheritance by reason of his or her renouncing, or having been excluded from the communion of, any religion, or being deprived of caste, shall cease to be enforced as law in any court.<sup>31</sup>

This Act remains in force to date in the whole of India except the state of Jammu and Kashmir.<sup>32</sup>

On the other hand, also during the British rule, some princely states outside the boundaries of what was called “British India” had enacted certain laws meant to protect the local people against the evangelic activities of the foreign Christian missionaries.<sup>33</sup>

After independence from the British rule, although Parliament has never enacted any law on this subject, several states have introduced local laws imposing restrictions on religious activities (mainly on Christian missionary activities, although no law would expressly say it) that are believed to be aimed at converting people from one religion to another.

The first among these local laws was the Orissa Freedom of Religion Act of 1967, providing that no person shall “convert or attempt to convert, either directly or otherwise, any person from one religious faith to another by the use of force or by inducement or by any fraudulent means.”<sup>34</sup>

Next came the Madhya Pradesh Freedom of Religion Act of 1968, also prohibiting conversion by “force or allurement or by fraudulent means” and requiring registration of every case of conversion with the local state authorities.<sup>35</sup> Ten years later, the Arunachal Pradesh Freedom of Indigenous Faith Act of 1978 similarly prohibited conversions by force or threats, including “threat of . . . divine displeasure or social excommunication.”<sup>36</sup> This Act also

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31. *Id.* § 1.

32. *Id.* § 2.

33. *See, e.g.*, Raigarh State Conversion Act, 1936; Sarguja State Apostasy Act, 1942; Udaipur State Anti-Conversion Act, 1946.

34. Orissa Local Act, No. 2 of 1968 (came into force on January 9, 1968).

35. Madhya Pradesh Freedom of Religion Act, No. 27 of 1968, *available at* <http://persecutionindia.tripod.com/Resources.html>.

36. Arunachal Pradesh Local Act, No. 40 of 1978, §§ 2(d), 3.



requires that every religious conversion must be duly registered with the local governmental authorities.<sup>37</sup>

In the current millennium, similar anti-conversion laws were enacted in the states of Tamil Nadu and Gujarat, but the former state repealed its law following a public outcry. The last state so far to enact an anti-conversion law is Rajasthan, where a Religious Freedom Bill was passed by the state legislature in March 2006.<sup>38</sup>

### *B. Religious Endowments in General*

During the British rule in India, three general laws were enacted one after the other to regulate the working of the endowments and trusts of a religious or charitable nature. These were the Religious Endowments Act of 1863, the Charitable Endowments Act of 1890, and the Charitable and Religious Trusts Act of 1920.<sup>39</sup>

The Religious Societies Act of 1880 was enacted during the British rule “to simplify the manner in which certain bodies of persons, associated for the purpose of maintaining religious worship, may hold property acquired for such purpose.”<sup>40</sup> Providing guidelines for the management of property held in trust by religious societies, this law was enacted mainly for the benefit of the Christians and was not applied to the Hindus, Buddhists, and Sikhs.<sup>41</sup>

Also during the British rule, the provincial legislature in the Sikh-dominated state of Punjab had enacted a law to regulate the management of the Sikh shrines (called *gurdwaras*). Known as the Sikh Gurdwaras Act of 1925, this law has remained in force after independence subject to certain amendments.<sup>42</sup>

Since the advent of independence, a large body of local legislation has grown to regulate the management and working of Hindu religious endowments and trusts. Among these local laws are

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37. *Id.* § 6.

38. Tamil Nadu Prohibition of Forcible Conversion of Religion Act, 2002 (repealed); Gujarat Freedom of Religion Act, 2003; Rajasthan Dharma Swatantrya Adhiniyam 2006 (Religious Freedom Bill, 2006). The Bill has yet to become law as the state Governor, expressing some reservations, has not assented to it as of May 23, 2006.

39. Central Acts, No. 20 of 1863; No. 6 of 1890; No. 14 of 1920, respectively.

40. Religious Societies Act, No. 1 of 1880, pmb., available at <http://www.helpline.law.com/bareact/index.php?dsp=religious-societies-act>.

41. *Id.* § 2.

42. Sikh Gurdwaras (Supplementary) Act, No. 24 of 1925; Punjab Act, No. 8 of 1925, available at <http://indiacode.nic.in/rspaging.asp?tfm=192524>.

the Bihar Hindu Religious Trusts Act of 1950, Orissa Hindu Religious Endowments Act of 1969, and Tamil Nadu Hindu Religious and Charitable Endowments Act of 1959.<sup>43</sup> No central law has yet been enacted to regulate the Hindu religious places in general.

For regulating the management of the Muslim religious endowments (called *wakfs*) a brief central law known as the Wakf Act of 1923 was enacted during the British rule.<sup>44</sup> After independence, several states including Delhi, Bihar, West Bengal, Uttar Pradesh, and Jammu and Kashmir, enacted local laws for regulating the *wakfs* located in their respective territories.<sup>45</sup> Then, in 1954, Parliament enacted the first central law on the subject, called the Wakf Act, which was replaced four decades later with the new comprehensive Wakf Act of 1995 now in force.<sup>46</sup>

### *C. Particular Shrines*

Several legislative enactments—both central and local—impose state surveillance on the management of particular shrines belonging to various religious communities. The Bodh Gaya Temple Act of 1949, relating to the largest Buddhist shrine in India, provides for the “upkeep and repair” of “the great temple built by the site of the Mahabodhi Tree near the village of Bodh Gaya” in Bihar State.<sup>47</sup>

There are similar special laws for several Hindu shrines situated in different parts of the country, including the famous Nathwara Temple of Rajasthan, the Jagannath Temple of Orissa, and the Mahabaleshwar Temple of Madhya Pradesh.<sup>48</sup>

43. Bihar Local Act, No. 1 of 1951; Orissa Local Act, No. 2 of 1970; Tamil Nadu Local Act, No. 22 of 1959, respectively.

44. Mussalman Wakf Act, No. 42 of 1923; India Code (1923), *available at* <http://indiacode.nic.in/rspaging.asp?tfm=192342>.

45. Delhi Wakf Act, 1943 (repealed); Bihar Wakf Act, 1947 (repealed); UP Muslim Wakfs Act, 1936 (replaced in 1960); West Bengal Wakf Act, 1935; Jammu and Kashmir Wakf Act, 1978.

46. Wakf Act, No. 43 of 1995 (replacing Wakf Act, No. 29, of 1954), *available at* <http://www.mp.nic.in/bcwelfare/Annex-13.pdf>.

47. Bodh Gaya Temple Act, 1949, No. 17 of 1949, *available at* [http://www.mahabodhi.com/en/b-gaya\\_tempact.htm](http://www.mahabodhi.com/en/b-gaya_tempact.htm).

48. Rajasthan Local Act, No. 13 of 1959; Orissa Local Act, No. 2 of 1955; Madhya Pradesh Act, No. 3 of 1953.

The only special law for a Muslim shrine is the Dargah Khwaja Saheb Act of 1955, relating to the Dargah of Khwaja Moinuddin Chishti at Ajmer in Rajasthan.<sup>49</sup>

#### *D. Protection of Religious Places in General*

Two central Acts enacted in the recent past relate to the protection of religious places in general. The first of these, the Religious Institutions (Prevention of Misuse) Act of 1988, makes it an offence to use religious sites to harbor an accused or convicted criminal, or for any political purpose.<sup>50</sup>

The second statute, the Places of Worship (Special Provisions) Act of 1991, prohibits forcible conversion of any place of worship of any religious denomination into a place of worship of a different religious denomination, and requires preservation of the religious character of all places of worship—except the disputed mosque site in Ayodhya—as they existed on August 15, 1947, the date of India's independence.<sup>51</sup>

The first of these laws was enacted with a view of curbing the Sikh insurgency in Punjab, which was at its height in the 1980s, while the second law was meant to prevent the occurrence of communal incidents like the one in which an old mosque in the holy city of Ayodhya was forcibly demolished and converted into a makeshift Hindu temple in an act of mob frenzy.

#### *E. Foreign Pilgrimages*

Parliamentary legislation regulates arrangements for the Muslims of India to participate in the great *Haj* pilgrimage annually taking place in the holy city of Makkah in Saudi Arabia to which Muslims throng from all parts of the world. During the British rule, local "Haj committees" were set up in the three major port cities of India to organize the *Haj* pilgrimage in accordance with the Port Haj Committees Act of 1936. After independence this law was replaced with a new Haj Committee Act enacted in 1959.<sup>52</sup>

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49. Durgah Khawaja Saheb Act, No. 36 of 1955

50. Religious Institutions (Prevention of Misuse) Act, No. 41 of 1988.

51. Places of Worship (Special Provision) Act, No. 42 of 1991, available at <http://www.helpline.law.com/bareact/index.php?dsp=place-worship>.

52. Haj Committee Act, No. 51 of 1959 (currently under revision), available at <http://indiacode.nic.in/rspaging.asp?tfm=195951>.

The Indian government similarly organizes the annual Hindu pilgrimage to the holy Mansarovar site, situated outside India in and around Tibet. Delegated legislation exists for it in the form of executive regulations.

Both the *Haj* and the Mansarovar pilgrimages are subsidized by the state and are managed by separate special departments in the Union Ministry for External Affairs.

#### *F. Religious Laws of Family Relations*

Side by side with the secular laws of marital relations and property,<sup>53</sup> India has retained the system of religion-based and community-specific “personal laws,” offering individuals a choice between their respective personal laws and the parallel secular laws. The personal laws applicable to various communities have been codified and reformed to varying extents. Given below is an account of the religious elements found in the codified personal laws currently in force.

##### *1. Personal laws of the Christians and Parsis*

In 1866, during the British rule in India, the Native Converts’ Marriage Dissolution Act was enacted and enabled married Indians converting to Christianity to seek divorce from their non-converting spouses who might have deserted them on account of the change of religion.<sup>54</sup>

In 1869, the British rulers enacted for the Christians an Indian Divorce Act, and three years later a Christian Marriage Act, both based on ecclesiastical law.<sup>55</sup> Both these Acts have remained in force in independent India but have been subjected to certain amendments.<sup>56</sup> The Indian Succession Act of 1865, enacted mainly

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53. For examples of statutes that contain the law for civil marriages and matters connected therewith, see Special Marriage Act, No. 43 of 1954, *available at* <http://indiacode.nic.in/rspaging.asp?tfnm=195443>; Foreign Marriage Act, No. 33 of 1969, *available at* <http://indiacode.nic.in/rspaging.asp?tfnm=196933>.

54. Converts’ Marriage Dissolution Act, No. 21 of 1866, *available at* <http://www.indialawinfo.com/bareacts/convert.html>.

55. Indian Divorce Act, No. 4 of 1869, *available at* <http://indiacode.nic.in/rspaging.asp?tfnm=186904>; Indian Christian Marriage Act, No. 15 of 1872, *available at* <http://indiacode.nic.in/rspaging.asp?tfnm=187215>.

56. *See* Marriage Laws (Amendment) Act, No. 49 of 2001, *available at* <http://indiacode.nic.in/rspaging.asp?tfnm=200149>; Indian Divorce (Amendment) Act, No. 51 of

for the Christians, was later incorporated as one of the chapters into the Indian Succession Act of 1925, which remains applicable to the Christians in independent India.<sup>57</sup>

The British rulers had enacted an inheritance law for the tiny Parsi Zoroastrian community of India. Known as the Parsi Succession Act of 1865, this law was also later incorporated as a special chapter into the Indian Succession Act of 1925, which is still in force. The old Parsi Marriage and Divorce Act, also enacted in 1865, was replaced in 1936 by a new Act.<sup>58</sup> Both the special chapter on inheritance for the Parsis under the Indian Succession Act of 1925 and the Parsi Marriage and Divorce Act of 1936 were retained in force after independence but have now been subjected to some amendments.<sup>59</sup>

## 2. *Personal laws of the Hindus, Buddhists, Jains, and Sikhs*

In 1955–56 Parliament enacted four religion-based personal laws applicable to the Hindus, Buddhists, Jains, and Sikhs—viz., the Hindu Marriage Act of 1955, and the Hindu Succession Act, the Hindu Adoption and Maintenance Act, and the Hindu Minority and Guardianship Act, all three enacted in 1956.<sup>60</sup> It was only for the sake of brevity that the word “Hindu”—denoting the largest of the four communities to be governed by these laws—was used in the titles of these Acts; this certainly had no reflection on the independent religious status of the other three communities. Side by side with their provisions commonly applicable to the four communities, these Acts in fact protected quite a few of their different customs and usages.

Under the Hindu Marriage Act 1955, both parties to a marriage must be Hindu, Buddhist, Jain, or Sikh, and conversion by either

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2001, *available at* <http://indiacode.nic.in/rspaging.asp?tfm=200151>.

57. Indian Succession Act, No. 39 of 1925, pt. V, ch. 2, *available at* <http://indiacode.nic.in/rspaging.asp?tfm=192539>.

58. *Id.*; Parsi Marriage and Divorce Act, No. 3 of 1936, *available at* <http://indiacode.nic.in/rspaging.asp?tfm=193603>.

59. Indian Succession (Amendment) Act, No. 26 of 2002, *available at* <http://indiacode.nic.in/rspaging.asp?tfm=200226>.

60. Central Acts, No. 25 of 1955; Central Acts, Nos. 30, 32, 78 of 1956, *available at* <http://www.helpinelaw.com/bareact/index>. A comprehensive study of the four Acts and their up-to-date judicial interpretations is found in TAHIR MAHMOOD, *STUDIES IN HINDU LAW* (1998).

spouse from any of these to any other religion after marriage would be a ground for divorce available to the spouse who retains his or her faith.<sup>61</sup>

Conversion to any religion other than Hinduism, Buddhism, Jainism, or Sikhism is seen as a civil offense also under each of the other three Hindu-law enactments of 1956, resulting in loss of succession, guardianship, maintenance, and adoption rights. Thus, parents ceasing to be Hindu, Buddhist, Jain, or Sikh lose guardianship of their minor children,<sup>62</sup> while convert wives and children are deprived of their right to be provided maintenance by their husbands and parents, respectively.<sup>63</sup>

While only a Hindu, Buddhist, Jain, or Sikh child can be adopted; abandoned children and those of unknown parentage are presumed to belong to any one of these religions so as to facilitate their adoption.<sup>64</sup> If a Hindu converts to Christianity or Islam, children born to him or her after his or her conversion cannot inherit from any of their Hindu relatives unless they reconvert to Hinduism before the opening of succession.<sup>65</sup>

### *3. Personal law of the Muslims*

The Muslim Personal Law (*Shariat*) Application Act of 1937 directs the civil courts to apply Muslim religious law to Muslims in all matters relating to family relations, property, and succession.<sup>66</sup>

The Dissolution of Muslim Marriages Act of 1939 specifies the grounds on which a woman married under Muslim law can seek a judicial divorce,<sup>67</sup> including obstruction by a husband of his wife's religious practices.<sup>68</sup> Contrary to the provision of Hindu marriage law of 1955, which recognizes post-marriage conversion by a spouse

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61. Hindu Marriage Act 1955, No. 25 of 1955, §§ 5, 13(1)(ii).

62. Hindu Minority and Guardianship Act, No. 32 of 1956, § 6(c).

63. Hindu Adoption and Maintenance Act, No. 78 of 1956, §§ 18(3), 24.

64. *Id.* §§ 2(bb), 10(i).

65. Hindu Succession Act, No. 30 of 1956, § 26.

66. Central Act, No. 26 of 1937. Full texts and comprehensive studies of this and the other legislative enactments meant for the Muslims are found in TAHIR MAHMOOD, *STATUTE-LAW RELATING TO MUSLIMS IN INDIA: A STUDY IN ISLAMIC AND CONSTITUTIONAL PERSPECTIVES* (1995).

67. Central Act, No. 8 of 1939, available at <http://www.helplinlaw.com/bareact/index.php?dsp=disso-mus-marri>.

68. *Id.* § 2(viii)(e).

to an alien religion as a ground for divorce, this Act declares that the renunciation of Islam by a woman married under Muslim law would not *ipso facto* dissolve her marriage.<sup>69</sup>

The Muslim Women (Protection of Rights on Divorce) Act of 1986 has codified the traditional Islamic law on divorced women's rights to dower, maintenance, and marital properties to be speedily implemented by the lower criminal courts.<sup>70</sup>

### *G. Misuse of Religion for Electoral Gains*

In the domain of public law, the Representation of the People Act of 1951 prohibits the use of religion and religious symbols with a view to promoting one's candidacy for a public election or for adversely affecting the election of another such candidate.<sup>71</sup> Making an appeal to vote or refrain from voting for any person on the ground of his religion, race, caste, community, or language, as well as the use of or appeal to religious symbols for the furtherance of the prospects of one's election or for prejudicially affecting the election of any candidate, is a "corrupt practice" under this law resulting in the vitiation of the election and possible criminal punishment.<sup>72</sup>

### *H. Offenses against Religion*

Chapter 15 of the Indian Penal Code is dedicated entirely to punishments for offenses relating to religion.<sup>73</sup> In many cases, the punishments for these offenses are quite severe. Section 295 states:

Whoever destroys, damages or defiles any place of worship, or any object held sacred by any class of persons with the intention of thereby insulting the religion of any class of persons . . . shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.<sup>74</sup>

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69. *Id.* § 4.

70. *See* Representation of the People Act, No. 25 of 1951, pmbl., *available at* <http://www.helpinelaw.com/bareact/index.php?dsp=m-women>.

71. *See* Representation of the People Act, No. 43 of 1951, § 123(3), *available at* <http://indiacode.nic.in/fullact1.asp?tfnm=195143>.

72. *Id.* §§ 123, 125.

73. INDIA PEN. CODE §§ 295-98 (1860).

74. *Id.* § 295.

When such acts are done deliberately or maliciously, the prison sentence may be increased to three years.<sup>75</sup>

It is also a crime under the Indian Penal Code to disturb a religious assembly.<sup>76</sup> Though such a crime does not merit the same punishment as defiling a place of worship, it carries a sentence of up to one year in prison, fines, or both.<sup>77</sup> One year in prison may also be sentenced upon any person who trespasses into a place of worship or burial site with the intention of “wounding the feelings of any person” or of “insulting the religion of any person.”<sup>78</sup>

Finally, under the Indian Penal Code, it is a crime punishable by up to one year in prison if anyone “utters any word or makes any sound in the hearing of that person or makes any gesture in the sight of that person or places any object in the sight of that person” with the deliberate intent of wounding the religious feelings of that person.<sup>79</sup>

The law reports of India abound with judicial decisions interpreting the various provisions of the Indian Penal Code relating to offenses against religion.

### *I. Commissions for Religious Minorities*

The religious minorities in India have the protection of a number of national and state-level commissions, both statutory and non-statutory, that were established to oversee the enforcement of their constitutional and legal rights. The first such national-level commission, now known as the National Commission for Minorities (NCM), was set up by a Union Cabinet Resolution in January 1978. Fourteen years later it was given a statutory status and judicial powers by the National Commission for Minorities Act 1992.<sup>80</sup>

Two more commissions of a quasi-judicial nature have been set up for the minorities in recent years. One of these—the three-

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75. *Id.* § 295A.

76. *Id.* § 296.

77. *Id.*

78. *Id.* § 297.

79. *Id.* § 298.

80. Central Act, No. 19 of 1992, available at <http://parliamentofindia.nic.in/lb/bills/1992/1992-18.htm>. The author of the present article, Tahir Mahmood, had chaired this Commission for three years during 1996–99. A detailed critical account of the history and working of this Commission is found in TAHIR MAHMOOD, *MINORITIES COMMISSION: MINOR ROLE IN MAJOR AFFAIRS* (2001).



member National Commission for Minority Educational Institutions (NCMEI)—has come into existence under an Act of 2005, and looks after the implementation of Article 30 of the Constitution of India relating to the educational rights of the minorities.<sup>81</sup> Very recently the one-year old statute of the Commission has been amended to extend the sphere of its activities.<sup>82</sup>

The second quasi-judicial Commission, set up in 2005 by a Cabinet Resolution, is the five-member National Commission for Religious and Linguistic Minorities (NCRLM). This Commission was charged with the responsibility of suggesting the criteria for identifying educationally and economically backward sections among the minorities, and recommending measures for their uplift, along with the constitutional, legislative, and administrative steps that may be necessary for implementing its recommendations.<sup>83</sup> Later, when the statutory provision relating to “Scheduled Castes”—select caste-based groups picked up under a constitutional provision for preferential treatment in educational and employment opportunities, and under which only a Hindu, Buddhist, or Sikh can be a member—was challenged for its legal validity before the Supreme Court of India, the government referred this contentious issue to the NCRLM.

#### IV. JUDICIAL RULINGS AND ATTITUDES

All the constitutional provisions and legislative enactments relating to religion and religious rights and freedoms have been applied and interpreted in various ways by the higher courts in the country. Read together, these judicial decisions define the role of religion in state affairs and the role of the state in religious affairs, in addition to laying down the contours of religious rights and freedoms of the individuals and communities.

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81. Set up under the National Commission for Minority Educational Institutions Act, No. 2 of 2005, pmbl., *available at* [http://www.commonlii.org/in/legis/num\\_act/ncfmeia2004640/](http://www.commonlii.org/in/legis/num_act/ncfmeia2004640/).

82. National Commission for Minority Educational Institutions Commission (Amendment) Act, 2006.

83. The author of the present article, Tahir Mahmood, has been a member of this Commission as “an Expert in Constitution and Law” (as per its composition notified by the government) since its inception in March 2005. The Commission is expected to submit its report by the end of 2006.

The judiciary in India has been actively involved in adjudicating religious affairs. In the process of reviewing these affairs, it has resolved many religious disputes between the people and the state on one hand, and between various communities, sects, and groups on the other. Among the major judicial rulings on religion and religious matters, those listed below in the nine sections of this Part deserve a special notice.

#### *A. The Concept of Hindutva*

Certain political parties who give the Hindu religion a central place in their ideology and programs have been using the vernacular term "*Hindutva*," claiming that it has "national" and "patriotic" connotations and is not just an equivalent of "Hinduism." From the late 1980s through the early 1990s, some politicians sought a judicial pronouncement on the legal permissibility of using *Hindutva* in political speeches.<sup>84</sup>

In December, 1995, the Supreme Court of India pronounced seven judgments together making some pronouncements on the concept of *Hindutva* and the legal validity of its use in elections. The main thrust of these judgments was that the Hindu religion was indeed not merely one of the religions of India but was identifiable with the "culture and heritage of India, the Indian social ethos and the way of life of the people in the subcontinent."

As India's top legal minds criticized these judgments for their apparent effect of giving a free hand to votaries of communal politics, disposing of a review petition, the court quickly issued a clarification of its earlier judgments, stating it did not mean for its ruling to have such an effect and that it had no intention of diluting the constitutional principle of secularism.<sup>85</sup>

#### *B. Status of Some Religious Groups*

In a very recent case the Supreme Court has decided that the Jains—although mentioned in the Constitution and also enumerated in the Census Reports of India as an independent religious community—are not a religious minority, as their religion, in the opinion of the court, is merely "a reformist movement amongst

84. 5 RELIGION AND LAW REVIEW 5 (Tahir Mahmood ed., 1996).

85. *Id.* at 239–42.

Hindus.”<sup>86</sup>

In an earlier case the Kerala High Court ruled that the Ahmadi Qadianis—although they recognize another prophet living long after the age of Prophet Muhammad, generally regarded by the Muslims as the Last Prophet—was part and parcel of the Muslim community.<sup>87</sup>

### *C. Right to Convert Others*

In *Stainislaus v. Madhya Pradesh & Ors*,<sup>88</sup> considering the constitutional validity of the anti-conversion laws of Orissa and Madhya Pradesh,<sup>89</sup> the Supreme Court held that the right to propagate religion, guaranteed by Article 25 of the Constitution, should be interpreted as “not the right to convert another person to one’s own religion, but to transmit or spread one’s religion by an exposition of its tenets.”

### *D. Singing the National Anthem*

India’s National Anthem—a Bengali-language song composed by the late Rabindra Nath Tagore—is believed by some people to be in conflict with monotheistic religious beliefs. A group of school students in the state of Kerala belonging to the Jehovah’s Witnesses used to stand up in respect when the National Anthem was sung in their morning assembly, but did not participate in singing the anthem. The school took disciplinary action against them, which the students challenged in court. The Supreme Court decided that the National Anthem of India is to be duly respected by all but need not necessarily be sung by those objecting to it on religious grounds.<sup>90</sup>

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86. Bal Patil v. Union of India, (2005) 6 S.C.C. 690, available at [http://esamskriti.com/html/inside.asp?cat=740&subcat=739&cname=sc\\_judgment\\_jains\\_not\\_minority](http://esamskriti.com/html/inside.asp?cat=740&subcat=739&cname=sc_judgment_jains_not_minority).

87. Shihabuddin Koya v. Ahammed Koya, A.I.R. 1971 Ker 206. In Pakistan, the Constitution includes the Qadianis among the “non-Muslims” as defined by the Constitution. PAK. CONST. art. 260(3), cl (b).

88. (1977) 2 S.C.R. 611.

89. See *supra* notes 34–35 and accompanying text.

90. Bijoe Emmanuel v. State of Kerala, A.I.R. 1987 S.C. 748, ¶ 1.

*E. Ascertaining Essential Religious Practices*

In several cases, the courts have assumed and exercised the power to ascertain if a religious practice followed by any community is indeed an “essential practice” of its religion, holding that only such “essential” practices are entitled to protection under Article 25 of the Constitution that guarantees freedom of both belief and practice of religion. In a recent case, the Supreme Court held that offering prayers in a mosque is not necessarily an “essential practice” in Islam.<sup>91</sup> The ruling was given in a case in which the Muslims had challenged, on religious grounds, the validity of a law enacted for state acquisition of the land on which had stood the mosque in Ayodhya that had been demolished in a communal frenzy.<sup>92</sup> In another case, the Supreme Court held that the so-called “*tandav*” dance (worshippers dancing with human skulls in their hands) is not an essential practice of the Anandmargi Hindu faith, notwithstanding the contrary claim of religious leaders of the community.<sup>93</sup>

*F. Teaching Vedic Astrology*

In a 2004 ruling, the Supreme Court decided that Vedic astrology—although associated with the Hindu religion—could be lawfully taught in the State institutions of higher learning. The University Grants Commission (UGC), which is charged with introducing courses and curriculums into public universities and providing funding for new courses, decided to introduce “*jyotir vigyan*” (the science of astrology) as a course of study in several Indian universities.

The UGC decision was challenged by various university professors and other interested parties seeking to prevent the state from funding courses in astrology.<sup>94</sup> The Supreme Court sided with the UGC and held that there was no infringement of state secularism by allowing astrology to be taught in the universities.<sup>95</sup>

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91. *Ismail Faruqui v. Union of India*, A.I.R. 1995 S.C. 605.

92. *Acquisition of Certain Area at Ayodhya Act*, No. 33 of 1993, available at <http://www.helpinelaw.com/bareact/index.php?dsp=ayodhya>.

93. *Acharya Jagdishwaranand Avadhuta v. Comm’r of Police*, A.I.R. 1984 S.C. 51, ¶ 17.

94. *Bhargava v. Univ. Grants Comm’n*, (2004) 6 S.C.C. 661, ¶ 2.

95. *Id.* ¶ 1.

*G. Residential Colonies for Particular Communities*

In a recent case involving the Parsi Zoroastrian community, the Supreme Court held that a particular religious community can lawfully build and maintain a residential colony restricted to its own members.<sup>96</sup>

*H. Protecting the Sacred Cow*

Notwithstanding the citizen's constitutionally assured fundamental right to adopt and carry on any profession or trade of their choice,<sup>97</sup> in order to respect the religious sensitivities of the Hindus, the slaughtering of the cows and other bovines can be prohibited even for religious purposes and on non-Hindu religious occasions. The Supreme Court of India has upheld this legal position in several cases, including one decided in 2005.<sup>98</sup>

*I. Sanctity of Scriptures*

Several judicial decisions have established the rule that religious scriptures and holy books shall not be subjected to judicial construction to test the conformity of their tenets with the principles and provisions of the Indian Constitution and legislation.

In a 1979 case, it was disputed whether certain individuals belonging to the Hindu "lower castes" had been legitimately ordained. The lower court opined that some of the rules for eligibility to be so ordained were no longer valid as they contradicted fundamental rights guaranteed in the Indian Constitution. The Supreme Court criticized this approach, stating that those constitutional rights did not touch upon the "personal laws" of the parties. The Court assertively said that in interpreting Hindu religious law, courts were not to introduce their "own concepts of

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96. *Zoroastrian Coop. Hous. Soc'y Ltd. v. Dist. Registrar Coop. Soc'y*, (2005) 5 S.C.C. 632.

97. INDIA CONST. art. 19(1), cl. (f).

98. *State of Gujarat v. Mirzapur Moti Kureshi Kassab Jamat*, (2005) 8 S.C.C. 534, available at [http://legalpundits.indiatimes.com/caselaws/data/supreme\\_court/2005/2005\\_Oct.asp](http://legalpundits.indiatimes.com/caselaws/data/supreme_court/2005/2005_Oct.asp). The earlier leading cases on this subject decided by the Supreme Court are *Mohd. Hanif Qureshi v. State of Bihar*, A.I.R. 1958 S.C. 731, and *State of West Bengal v. Asbutosh Lahiri*, A.I.R 1995 S.C. 464.

modern times,” but are to enforce the law “as derived from recognized and authoritative sources of Hindu law.”<sup>99</sup>

A 1986 petition asked the Calcutta High Court to determine the validity of the Holy Qur’an on the touchstone of the Indian Penal Code.<sup>100</sup> Rejecting the petition, the court observed that like the Holy Vedas and the Bible, the Qur’an too was above judicial scrutiny and could not be “examined” to check its conformity with the modern laws of the country.

#### IV. CONCLUSION

There was a time in Indian history when religion provided, regulated, and fully controlled the legal and judicial system of the country. Today the situation is the other way round. In the secular India of our times, it is the law of the land that determines the scope of religion in the society, and it is the judiciary that determines what the laws relating to the scope of religion say, mean, and require.

However even today, religious values and traditions continue to have a strong influence on Indian society. This religious aspect remains duly reflected in the Constitution and the quickly growing body of national laws. It has also not remained outside the ambit of judicial activism generally witnessed in India.

The practice and interpretation of secularism in India have from the very beginning been, and remain, sensitive to and reconciled with the ground realities. This sensitivity and reconciliation make India’s religion-state relations both unique and fascinating. A study of India’s particular models of secularism and religious liberty reveals an appreciable balance of religious and secular interests.

Judicial decisions of the higher courts in religious cases of various nature and kinds generally reflect an attitude of objectivity and impartiality. There have been some aberrations, few and far between, at times pointing to the presence of committed judges or those influenced by particular religio-political ideologies. Such aberrations can of course be, and have often been, freely criticized by conscientious objectors and legal critics.<sup>101</sup>

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99. Krishna Singh v. Mathura Ahir, A.I.R. 1980 S.C. 707, ¶ 7.

100. Chandanmal Chopra v. West Bengal, (1986) 92 C.R.L.J. 182.

101. For further readings containing this author’s observance of and personal experiences with the influence of religion on the society and law in India, see 1–9 RELIGION & LAW REVIEW (Tahir Mahmood ed., 1992–2000), and TAHIR MAHMOOD, AMID GODS AND LORDS: MY LIFE WITH THE VOTARIES OF RELIGION AND LAW (2005).

