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## Traditional Values, Governmental Values, and Religious Conflict in Contemporary India

*Robert D. Baird\**

### I. INTRODUCTION

The values of the nation of India, expressed in the Preamble to the Constitution, are a modern set of values in step with the Universal Declaration of Human Rights.

WE, THE PEOPLE OF INDIA, having solemnly resolved to constitute India into a SOVEREIGN SOCIALIST SECULAR DEMOCRATIC REPUBLIC and to secure to all its citizens: JUSTICE, social, economic and political; LIBERTY of thought, expression, belief, faith and worship; EQUALITY of status and of opportunity; and to promote among them all FRATERNITY assuring the dignity of the individual and the unity and integrity of the Nation; IN OUR CONSTITUENT ASSEMBLY this twenty-sixth day of November, 1949, do HEREBY ADOPT, ENACT AND GIVE TO OURSELVES THIS CONSTITUTION.<sup>1</sup>

In making this proclamation, The Constitution of India embodies a number of values, which, while promoting the principles of human rights, oppose traditional beliefs and values that Indians have held for centuries. Sometimes these traditional beliefs and values have been articulated in doctrinal systems such as Hinduism, and sometimes they exist as the axiomatic basis of a lived life. The prevalence of these traditional beliefs has in many cases interfered with the full scale implementation of the values articulated in the Constitution.

This Article focuses on how this has occurred in the area of religious liberty. Part II of this Article provides a context of several axiomatic Indian values which are at odds with the constitutional notions of equality and religious liberty. Part III

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1. INDIA CONST. preamble (amended 1976).

## 338 BRIGHAM YOUNG UNIVERSITY LAW REVIEW [1998

discusses the Indian courts' attempts to harmonize these conflicting values. Part IV discusses the possibility of a Hindu secular state and concludes that over time the Constitution will continue to promote religious freedom.

## II. AXIOMATIC VALUES

A. *Justice: One Life or Many?*

The gulf between traditional values and governmental values, as embodied in the Indian Constitution, is nowhere more clearly seen than in the concept of "justice." The justice that finds expression in The Constitution of India is to be realized in the present life. However, *Manusmṛti*, an ancient law book held in high regard by traditional Indians, portrays justice in light of the doctrines of karma and rebirth.<sup>2</sup> Karma is the inexorable law of cause and effect that renders to each individual his or her due in the light of previous words, thoughts and deeds.<sup>3</sup> Since justice cannot be reckoned in terms of a single life, certain individuals may seem to get more or less than they deserve; throughout a series of lifetimes, however, the karmic effects of deeds are eventually fulfilled. Before the nineteenth century, Indians universally accepted these Karmic effects as axiomatic. Not until the nineteenth and twentieth centuries did Indians begin offering philosophical defenses for the doctrine of reincarnation or rebirth.

The modern idea of justice is further complicated by tradition because karma is not *always* the "inexorable law" of cause and effect which renders absolute justice to each individual. Both studies of anthropology and of ancient texts have shown that Hindus believe that some karmic substance can be passed from one person to another through the sharing of food, the passing of body fluids, or simply close proximity. For instance, Sheryl B. Daniel reports that two college roommates parted when one became ill; the student's illness was blamed on the transfer of bad karma from his roommate.<sup>4</sup> This axiom explains not only why certain forms of behavior are

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2. See generally THE LAWS OF MANU (Wendy Doniger & Brian K. Smith trans., Penguin Books, Ltd. 1991).

3. See generally KARMA: AN ANTHROPOLOGICAL INQUIRY (Charles F. Keyes & E. Valentine Daniel eds., 1983).

4. See *id.* at 29.

## 337] CONFLICT IN CONTEMPORARY INDIA 339

considered good, but is also used to explain why something happens when all other explanations seem to fail.

*B. Individuals: Equal or Unequal?*

Another traditional notion that affects a modern idea of justice is the way individuals are evaluated. The Constitution of India seeks to guarantee its provisions to all its citizens equally, and is based on the dignity of the individual. All people are to be considered equal before the law and are to be afforded equal opportunity for employment, education, and access to public facilities. Article 17 of the Constitution abolishes untouchability.<sup>5</sup>

This idea of equality contrasts starkly with the inherent inequality of persons taught by *Manusmṛti* and axiomatically held by many Indians. In *Manusmṛti*, the four-fold class system of Brahmins, Kshatriyas and Shudras have different duties to perform in society because of the different qualities with which they are born as the result of actions in previous lives. Since people are different and have different capacities, Manu held that justice must be dispersed to take such inequalities into account.<sup>6</sup> It follows, according to the laws of Manu, that if some men are lower than other men, women are lower than men.

*C. Purity and Impurity*

Another axiomatic notion that conflicts with a modern idea of justice is that certain activities or associations render one pure or impure.<sup>7</sup> Purity (*suddha*) refers to the most desired state of being, and with reference to the human body it is the ideal condition. Impurity (*asuddha*), on the other hand, should be avoided. The quality of purity or impurity can be attributed to animate beings, inanimate objects, or places with which one comes in contact everyday. Purity is a desired state because in that state good fortune is more likely to follow. However,

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5. See INDIA CONST. art. 17 (amended 1976). According to the doctrine of untouchability, some Indians were to be avoided from birth because of their family occupations, such as sweepers and those who remove "night soil." Although the abolishment of untouchability affords access to public facilities for all Indians, the struggle against discrimination and social ostracization continues.

6. See generally THE LAWS OF MANU, *supra* note 2.

7. See MARY DOUGLAS, PURITY AND DANGER 124-27 (1996).

impurity places one in a position where negative results can occur.

Since discharges of the body are impure, women are particularly susceptible to the state of impurity. Menstruating women should be kept out of the kitchen, and birthing, while a joyous occasion, renders both the mother and the newborn impure. People whose occupations put them in contact with death (attendants at cremation grounds, butchers, and leather workers), as well as sweepers, are impure and contact with them should be avoided by higher class persons lest such contact result in their impurity as well. This axiomatic concept of purity lurks behind the conflict surrounding temple entry legislation.<sup>8</sup>

#### D. *Ahimsa* or Noninjury

Although not so widespread as to be axiomatic, the doctrine of noninjury (*ahimsa*) has been widely dispersed throughout modern India. Although the Indian epics, the *Ramayana*<sup>9</sup> and *Mahabharata*,<sup>10</sup> both center around the *kshatriya*, or warrior, and demonstrate that the Indian tradition is not pacifistic, the importance placed on *ahimsa* or nonviolence by Gandhi has worked its way into the consciousness of many Indians. For Gandhi, *ahimsa* is the foundation of human progress. Nonviolent resistance means that one must be prepared to suffer at the hands of another without retaliation or violent defense. *Ahimsa* begins with nonviolence in thought which eliminates thinking ill of others or wishing them evil. It continues with nonviolence in words. Someone practicing *ahimsa* will not speak words that cause pain to others and truth will be spoken in gentle language. *Ahimsa* finally results in deeds which do not inflict physical injury or death on another.

The practice of vegetarianism reinforces the doctrine of *ahimsa*. For Gandhi, it is permissible to eat flesh from an animal killed by another carnivorous animal or to use the hides of fallen cattle. But to kill cows or other cattle to fulfill the

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8. See *infra* Part III.A.

9. The epic of the story of the god Rama and his wife Sita.

10. A long epic, three and a half times as long as the Christian Bible of which the well-known *Bhagavadgita* is a small part.

desire for meat, or because they are “worthless” and no longer fill some other human need, is unacceptable. *Ahimsa* as applied to cattle led to the formation of *gosodams* or “reservations” where cattle who no longer breed, give milk or carry cargo can live out their lives and die a natural death. Although Indian society may not be governed by the notion of *ahimsa*, it is one principle by which many Indians order their lives.

#### *E. A Logical Issue*

The polarities that exist in the axiomatic values so far discussed create a further logical problem when The Constitution of India guarantees freedom of religion for all citizens. Articles 25 and 26 of The Constitution of India state:

25 . . . .

(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, practice 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.

26 . . . 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

## 342 BRIGHAM YOUNG UNIVERSITY LAW REVIEW [1998

(d) to administer such property in accordance with law.<sup>11</sup>

To the extent to which one assumes that people are unequal and that contact with some people is polluting, an insoluble logical conflict emerges when the constitution guarantees “the right freely to profess, practice and propagate religion.”<sup>12</sup> The Constitution of India implicitly acknowledges this conflict when it makes such freedoms subject to “public order, morality and health” and makes the exemptions in sub-article (2) for economic regulation as well as social welfare legislation and opening Hindu temples to all classes of Hindus.<sup>13</sup> These conflicts now lead to further discussion regarding several specific issues relating to traditional values, governmental values, and the conflict over religious freedom.

### III. HARMONIZING TRADITIONAL AND GOVERNMENTAL VALUES

#### A. *Temple Entry and Pollution*

The dispute over temple entry involved the issue of purity and impurity. It was not uncommon for upper class Hindus to restrict temple entry so as to keep untouchables out of the temple. In *Sri Venkataramana Devaru v. State of Mysore*,<sup>14</sup> the Gowda Saraswath Brahman sect contended that the Madras Temple Entry Authorization Act (1947), which opened their temple dedicated to Sri Venkataramana to all Hindus, violated Article 26(b) of the Constitution.<sup>15</sup> They argued that who was entitled to participate in temple worship was a matter of “religion” and therefore protected from governmental interference by the Constitution.

Conceding that “religion” includes practices as well as beliefs, the Supreme Court proceeded to determine whether exclusion of a person from a temple was a matter of “religion” according to “Hindu ceremonial law.”<sup>16</sup> The Court observed that along with the growth of temple worship there also grew up a

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11. INDIA CONST. arts. 25, 26 (amended 1976).

12. *Id.* art. 25.

13. *See id.*

14. XXI S.C.J. 382 (1958).

15. *See* INDIA CONST. art. 26(b) (amended 1976) (stating that “every religious denomination . . . shall have the right . . . to manage its own affairs in matters of religion”).

16. *Sri Venkataramana Devaru*, XXI S.C.J., at 389.

## 337] CONFLICT IN CONTEMPORARY INDIA 343

body of literature called *Agamas* which offered instructions on temple construction, the placing of the deities, and degrees of participation. On one such text, the Court commented, “[i]n the *Nirvachanapaddathi* it is said that *Sivadwijas* should worship in the *Garbhagriham*, *Brahmins* from the ante chamber or *Sabah Mantabham*, *Kshatriyas*, *Vyasis* (sic) and *Sudras* from the *Mahamantabham*, and the castes yet lower in scale should content themselves with the sight of the *Gopurum*.”<sup>17</sup> The court also noted that in a 1908 case, *Sankarakinga Nadam v. Raja Rajeswara Dorai*,<sup>18</sup> the Privy Council held that trustees who agreed to admit persons into the temple whom *Agamas* did not permit were guilty of breach of trust. The India Supreme Court could not avoid the conclusion that the matter of temple entry was a matter located within the sphere of “religion.” The Court ruled that “under the ceremonial law pertaining to temples, who are entitled to enter into them for worship and where they are entitled to stand and worship and how the worship is to be conducted are all matters of religion.”<sup>19</sup>

But the issue did not end there. As the court recognized, Article 25(2)(b) provides that nothing in the Article should prevent the State from making a law “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.”<sup>20</sup>

The Court recounted the position of “Hindu social reformers” whose work culminated in Article 17 of the Constitution, which abolished “untouchability.” Some Indians had been denied access to roads and public institutions “purely on grounds of birth” and the Court asserted that this was not defensible on “any sound democratic principle.”<sup>21</sup> Not only do the traditional values and the constitutional values logically contradict, but also that contradiction was built into the Constitution itself. The Court concluded that these two constitutional principles, Article 26(b) and 25(2)(b), conflicted. Moreover, they were also of equal authority. Appeal was made

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17. *Id.* at 390. This meant that the lowest castes should be content to view the temple from the street.

18. I.L.R. 31 (Madras) (1908).

19. *Sri Venkataramana Devaru*, XXI S.C.J., at 390.

20. INDIA CONST. art. 25(2)(b) (amended 1976).

21. *Sri Venkataramana Devaru*, XXI S.C.J., at 391.



to the “rule of harmonious construction” whereby two conflicting provisions are interpreted so as to give effect to both. In an attempt to accommodate both provisions, the Court opened the temple to all classes of Hindus, while preserving the right of the denomination to exclude the general public from certain specific religious services. The Court felt it had given effect to both provisions since, even after the limited exclusions, “what is left to the public of the right of worship is something substantial and not merely the husk of it.”<sup>22</sup> While low caste Hindus—those who had previously been excluded from temple worship and were to “content themselves with the sight of the Gopurum”—were permitted entry and thereby given an expanded range of religious expression, traditional faith was constricted and had to be reformulated in light of this Supreme Court judgment. The struggle over the traditional axiom of purity and pollution had to be compromised, for pollution would take place even with limited access by low caste persons.

*B. Uniform Civil Code and the Equality of Citizenship*

Both Hindus and Muslims have traditionally held that family law was part of their religion and not a secular matter. At the time of independence, family law—matters pertaining to marriage, divorce, and inheritance—were exceedingly diverse throughout India. Not only were there differences between Muslims and Hindus, but also there was great diversity among Hindus as well as among Muslims. In addition, Christians, Jews and Parsis followed different laws in such areas. On the assumption that a secular state law must not discriminate on the basis of religious identification, Article 44 states: “The state shall endeavor to secure for the citizens a uniform civil code throughout the territory of India.”<sup>23</sup>

Article 44 is in the section of the Constitution titled “Directive Principles of State Policies,” which means that it should be taken seriously as a guiding principle for Parliament. However, Parliament’s failure to enact such legislation is not justiciable in court. Both Muslim and Hindu communities have resisted the implementation of this article on the grounds that

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22. *Id.* at 396.

23. INDIA CONST. art. 44 (amended 1976).

## 337] CONFLICT IN CONTEMPORARY INDIA 345

family law falls outside the realm of the secular, and hence outside the authority of the secular state. Since it is a matter of religion, it should be left to the involved religious communities to decide the legal provisions for polygamy, monogamy, divorce, and inheritance.

Between 1955 and 1956, Parliament passed a series of family law bills—the Hindu Marriage Bill, Hindu Succession Bill, Hindu Minority and Guardianship Bill, and Hindu Adoption and Maintenance Bill—frequently referred to as the “Hindu Code Bill.”<sup>24</sup> These four bills provide uniformity in family matters to legally classed “Hindus”; they also modernize the Hindu code, not on the basis of sacred texts, but on the basis of rationality, modernity, social needs, and even world opinion. While Hindus previously practiced polygamy, currently, only monogamy is permitted. And, although traditionally marriage was for eternity, divorce is now part of the Hindu legal landscape. These provisions were passed amidst heated debate and many Hindus felt that their religion was under siege. Supporters of such changes saw them as the first step toward a uniform civil code. Now that Hindu law is uniform, the argument has been made that at a later date Muslim law could be brought into the circle of uniformity as well.

This uniformity has not yet taken place. Many members of the majority community, particularly the Bharátiya Janata Party (BJP), the right-wing political party most actively involved, feel that Muslims have been exempted from something that was imposed upon unwilling Hindus by secularists (in their view “pseudo-secularists”). The majority argues that it is not secularism if Muslims are exempted on the basis of religious affiliation. Muslims, on the other hand, continue to believe that family law is part of Islamic religion, and any suggestion that it should be “changed,” “reformed,” or “modernized,” is an attack on their faith by the “majority” community.

This attitude on the part of Muslims was brought to the fore in the aftermath of the Shah Bano case.<sup>25</sup> Although the case

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24. See J. DUNCAN M. DERRETT, *INTRODUCTION TO MODERN HINDU LAW* 559-644 (1963).

25. See generally *THE SHAH BANO CONTROVERSY* (Asghar Ali Engineer ed.,

## 346 BRIGHAM YOUNG UNIVERSITY LAW REVIEW [1998

became public in 1985, its roots go back to 1978 when Shah Bano, a Muslim woman, was divorced by her husband after 44 years of marriage. As required by Muslim law, he returned Rs. 3000 which had been her marriage settlement (*mehr*) from her family. Rather than accept this settlement, Shah Bano sued her former husband for maintenance under the Criminal Procedure Code. As a result, the court awarded her Rs. 180 per month. Her husband appealed to the Supreme Court, arguing that as a Muslim he had to obey the *Shariat*, which requires only that he pay her maintenance (*iddat*) for three months. The Court held that under Article 125 of the Criminal Procedure Code a husband was required to pay maintenance to a wife without means of support.<sup>26</sup> The judgement, in effect, made the Criminal Procedure Code applicable to Muslims and also gave it priority over Muslim personal law in this matter.

A Muslim writer indicated that the agitation following the decision was "the biggest ever launched by Muslims, post-independence."<sup>27</sup> The Muslim community was most incensed by two aspects of the decision. First, the Chief Justice of the Indian Supreme Court disparaged Islamic law and the status of women in Islam, and held that the Court's interpretation was in keeping with the *Shariat*. In the eyes of many Muslims the Supreme Court had taken upon itself the task of interpreting Islamic law. Many of the clergy contended that it was inappropriate for a secular court to interpret religious law. Second, the Chief Justice urged Parliament to move ahead with a uniform civil code which would remove the deficiencies of Muslim law. This appeal that the country move toward a uniform civil code seemed threatening to the continued practice of Muslim law in areas of succession, inheritance, marriage, and divorce.

While the Indian government was initially supportive of the Shah Bano judgment, Muslims succeeded in pressuring the government to pass the Muslim Women's (Protection of Rights on Divorce) Bill of 1986, exempting Muslim women from Article 125 of the Criminal Procedure Code, the article under which

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1987).

26. For a good reference volume of the Criminal Procedure Code, see CRIMINAL MAJOR ACTS (R.P. Kataria ed., Allaha bad: Orient Law House 1991).

27. Mohm, Ahmed Khan v. Shah Bano Begum, A.I.R. 1985 S.C. 945.

Shah Bano was previously awarded maintenance. The Bill was opposed by women's groups who saw it as a step back for women, and by militant Hindus who once again saw Muslims being specially treated.

*C. Cow Slaughter and Religious Sentiment*

Cow slaughter has also become a point of contention between Muslims and Hindus. Partly because of the principle of *ahimsa*, the cow has assumed a sacred place in the hearts of many Hindus. Many Hindus who are not vegetarians will nevertheless avoid eating beef or causing injury to a cow. Thus, religious sentiment combined with an attempt at economic argument sought to place a constitutional article prohibiting cow slaughter among the fundamental rights. Although this failed, Article 48 was included, as was the provision for a uniform civil code, among the "Directive Principles of State Policy." Article 48 states: "The State shall endeavor to organize 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."<sup>28</sup>

The economic burden of cows on their owners did not escape the Muslim representatives' attention. Although several attempts to pass legislation prohibiting the slaughter of cows throughout India have failed, several states (Bihar, Uttar Pradesh, Madhya Pradesh, Delhi, Rajasthan) have indeed passed legislation which fulfills this article. These acts prompted legal action by Muslims who have no such prohibition against eating beef, who had the custom of sacrificing a cow on Bakr Id Day, and who are usually the community's butchers by trade. They contended that the practice of sacrificing a cow on Bakr Id Day was mandated in the *Qur'an* and their inability to do so interfered with their religion. The Supreme Court, however, determined that these laws did not infringe on the religious rights of Muslims.<sup>29</sup> The Court noted that the *Qur'an* merely mandated "prayer and sacrifice" and that a second authoritative text permitted the sacrifice of a cow, or a camel, sheep or goat, if the former option was an economic burden.

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28. INDIA CONST. art. 48 (amended 1976).

29. See *M. H. Qureshi v. State of Bihar*, XXI S.C.J. 985 (1959).

## 348 BRIGHAM YOUNG UNIVERSITY LAW REVIEW [1998

Nevertheless, the Court held that, since there was an option, the sacrifice of a cow was not essential and the economic difficulties were not its concern.<sup>30</sup> Additionally, the Muslim butchers argued that such laws threatened their livelihood, but since they still had the option of butchering goats and sheep, this contention was also rejected.

In an attempt to assess the economic issue and thus place the issue of cow slaughter on a secular basis, the Court went into a lengthy discussion detailing the number of cows in India, the amount of milk produced, and other related information.<sup>31</sup> In the end, the Court held that buffaloes that were no longer useful (i.e., could not give milk, breed, or be used for draught purposes) could be butchered. However, the judgment was different for the cow. One witness even went so far as to argue that there was no such thing as a useless cow since any cow could continue to produce dung. The fact that buffaloes produce larger quantities of dung apparently did not enter his thinking.

That the concern over the slaughter of cows is not economic, but religious, is clear. Religious sentiments played a great part in the deliberations over the inclusion of Article 48 in the Constitution. With that in mind, the decision of the Court seems proper. The Court pointed out that it is not as if Muslims are required to eat beef. On the other hand, beef is an inexpensive source of protein. Muslims seem to have a point in asking why they should give up something to which they presently have a right simply because it is against someone else's religious sentiments.

Other cases that did not reach the Supreme Court dealt with charges that Muslims had "wounded the religious sentiment" of Hindus because they slaughtered a cow within full view of their Hindu neighbors.<sup>32</sup> In cases like *Dulla v. State*<sup>33</sup> the High Court considered the penalties that courts commonly imposed on those people who were turned into the authorities on suspicion of slaughtering cows to be unreasonable. The Court concluded in *Dulla* and cases like it

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30. *See id.* at 985-86.

31. *See id.* at 993.

32. *See e.g.*, *Parasram Ji v. Imtiaz*, A.I.R. 1962 (Allahabad) 22; *Dulla v. State*, A.I.R. 1958 (Allahabad) 198.

33. A.I.R. 1958 (Allahabad) 198.

## 337] CONFLICT IN CONTEMPORARY INDIA 349

that these penalties were led by the lower courts' emotional reaction to the slaughter of cows.<sup>34</sup>

In May 1956, the police investigated a report of one Phulu of the village of Saidpur. Arriving at noon they found three men, including Phulu, in an inner courtyard cutting the carcass of a cow into large pieces, while the other three men were cutting the large pieces into smaller ones. All six were found guilty by the Magistrate and given eighteen-month sentences. The six appealed to the Sessions Judge of Budaund and the conviction was upheld.<sup>35</sup> The defendants then appealed the conviction to the High Court. The appeal was not based on any argument that the Uttar Pradesh Prevention of Cow Slaughter Act<sup>36</sup> was unconstitutional, but rather that (1) the order of the Magistrate was mistaken in law and contrary to common sense; (2) that the order was against the weight of evidence; and (3) that the sentence was excessive.<sup>37</sup> The Court emphasized that neither lower court gave adequate reasons for these extreme sentences, nor was this an isolated instance. Indeed, the Court expressed concern as it stated in *Dulla*: "This Court is getting concerned at the punishment which subordinate Courts have been thoughtlessly inflicting on persons found guilty of a breach of the Cow Slaughter Act, and has been reducing the imprisonment to the period already undergone."<sup>38</sup>

The lower courts imposed more severe penalties than might have been warranted because the judges' religious sentiments had been offended. This particular High Court not only commented on this and reduced the sentence in question, but also instructed other courts as to what might be a reasonable penalty for such an offense.<sup>39</sup>

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34. See *id.* at 204. For more information on these cases along with a more detailed examination of the Indian courts' treatment of cow slaughter, see ROBERT D. BAIRD, *Cow Slaughter and the New "Great Tradition,"* in *ESSAYS IN THE HISTORY OF RELIGIONS* 201-23 (1991).

35. See *Dulla*, A.I.R. 1958 (Allahabad) 198.

36. U.P. Act No.1 of 1965.

37. See *Dulla*, A.I.R. 1958 (Allahabad) 198.

38. *Id.*

39. See *id.* at 204.

350 BRIGHAM YOUNG UNIVERSITY LAW REVIEW [1998

*D. The Propagation of Religion and Religious Freedom*

## 337] CONFLICT IN CONTEMPORARY INDIA 351

The nature of the freedom to propagate one's religion has been controversial in India for some time. Both Muslims and Christians have commonly considered propagation as an essential part of their religious faith. Hindus have been less inclined in this direction historically, although in recent history the Arya Samaj has made a concerted effort at *shuddi* which involved an attempt to convert persons back to Hinduism.<sup>40</sup> The question of whether or not to include such a provision in the Constitution was thoroughly debated in the Constituent Assembly.

Several ideologies are at work here, along with a psychological fear. Ideologically, those Hindus who hold that all religions are essentially the same see no point in allowing people to change their faiths. In the Constituent Assembly, even Tajamul Husain, a Muslim, expressed this sentiment.<sup>41</sup> He agreed that people should have the right freely to profess and practice religion. But since, in his view, religion is personal matter between an individual and his Creator, and each individual will achieve salvation within his or her own religion, he argued that there is no point to propagation. Husain concluded: "[India] is a secular State, and a secular State should not have anything to do with religion. So I would request you to leave me alone, to practice and profess my religion privately."<sup>42</sup>

Although Lokanath Misra, a Hindu speaker, does not feel propagation should be ruled out, he is not in favor of protecting it as a fundamental right which would encourage it. He voices a frequently expressed fear that propagation will swell the numbers of other religions at the expense of Hinduism and thereby pave the way for the annihilation of Hindu culture and the Hindu way of life.<sup>43</sup> Each of these arguments assumes that propagation will lead to conversions from one religion to another.

Husain and Misra favor outlawing propagation, but there are others who argue that it should be protected. Pandit Lakshmi Kanta Maitra, another Hindu speaker, argued that a

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40. See BOJENDRA NATH BANERJEE, RELIGIOUS CONVERSIONS IN INDIA 262 (1982).

41. See 7 CONSTITUENT ASSEMBLY DEBATES 818 (1948).

42. *Id.*

43. See *id.* at 824.



## 352 BRIGHAM YOUNG UNIVERSITY LAW REVIEW [1998

secular state should not discriminate on the basis of religion.<sup>44</sup> Furthermore, he reasoned, we live in an irreligious age, and if we are to restore values it is important to be able to propagate them. He concluded, "Propagation does not necessarily mean seeking converts by force of arms, by the sword or by coercion. But why should obstacles stand in the way if by exposition, illustration and persuasion you could convey your own religious faith to others? I do not see any harm in it."<sup>45</sup>

The view that all religions are basically the same was used by L. Krishnaswami Bharati, another Hindu speaker, to argue for freedom to propagate. Since all religions worship the same God under different names, there can be no harm in propagation.<sup>46</sup> K. M. Munshi, another Hindu speaker, argued that whatever advantages the Christian community might have had under the British, there will be no such advantage under a secular state in which everyone is treated equally regardless of their religion.<sup>47</sup> He saw it as unlikely that any community could gain a political advantage through propagation.

In the present set-up that we are now creating under this

Constitution, this is a secular State. There is no particular advantage to a member of one community over another, nor is there any political advantage by increasing one's fold. In those circumstances the word "propagate" cannot possibly have dangerous implications, which some of the members think that it has.<sup>48</sup>

When it became apparent that the right to propagate would be protected, several attempts were made to limit it by making it illegal to convert someone under eighteen years of age or to convert someone through coercion or undue influence. None of these made it into the Constitution, and, since independence, attempts to pass national laws that would restrict propagation and conversion have all failed as well.

Three states, Orissa, Madhya Pradesh, and Arunachal Pradesh, however, have passed bills that restrict the propagation of religion. The Orissa Freedom of Religion Act of

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44. *See id.* at 833.

45. *Id.*

46. *See id.* at 834.

47. *See id.* at 837.

48. *Id.*

## 337] CONFLICT IN CONTEMPORARY INDIA 353

1967 sees the attempt to convert as involving “an act to undermine another faith.”<sup>49</sup> This Act assumes that the attempt to convert often involves force, fraud, and material inducements. The result is “various maladjustments in social life” which give rise to “problems of law and order.”<sup>50</sup> In light of such circumstances, to place certain constrictions on propagation in order to convert is not a restriction on freedom of religion. Rather, it is seen as a protection of religious freedom for those whose faith is being undermined. Particularly vulnerable were minors, women, and members of a scheduled caste; penalties were thus more severe for persons who violated the provisions of the bill in this regard.

The Madhya Pradesh Dharma Swatantrya Adhiniyam<sup>51</sup> questioned the sincerity of many conversions and, again in the interest of public order, prohibited conversions by “force or allurement or by fraudulent means.”<sup>52</sup> This bill required the registration of conversions with the District Magistrate.

The Arunachal Pradesh Freedom of Indigenous Faith Bill of 1978, or simply the Freedom of Religion Act as it was renamed, focused on “indigenous faiths, including such named ‘communities’ as ‘Buddhism,’ ‘Vaishnavism,’ and Nature Worship.”<sup>53</sup> This Act prohibited propagation through shows of force or threats which were interpreted to include the “threat of . . . divine displeasure or social excommunication.”<sup>54</sup> This Act also required the registration of conversions. These restrictions and their intention is seen by Neufeldt as follows:

Conversion from indigenous faith is not only to be discouraged, but, as far as possible, prevented. Indigenous faith and nationalism are in some respects seen as synonymous. While conversions from indigenous faith are not welcome, no such attitude to conversions back to indigenous faith is expressed. The content of sermons, exhortations, or religious literature can be deemed to be unlawful if these include references to

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49. C.I.S. Part VI (1968), The Orissa Freedom of Religion Act of the Legislature or the State of Orissa, Orissa, 11 Jan. 1968.

50. *Id.*

51. An act passed by the Madhya Pradesh Legislature in 1968.

52. Madhya Pradesh Dharma Swatantrya Adhiniyam (XXVII of 1968), in R. NARAYANASWAMY, 1977 THE YEARLY DIGEST OF INDIAN AND SELECT ENGLISH CASES 2091.

53. See BANERJEE, *supra* note 40, at 262.

54. *Id.*

## 354 BRIGHAM YOUNG UNIVERSITY LAW REVIEW [1998

divine displeasure. Presumably this would apply only to sermons, exhortations, and literature in the context of non-indigenous faith . . . Presumably it could be used in the other direction.<sup>55</sup>

These state bills did not go without challenge. Reverend Stanislaus of Raipur challenged the Madhya Pradesh Act by refusing to register conversions.<sup>56</sup> The High Court upheld the Act by stating that freedom of religion must be guaranteed to all, even those who are subject to conversions by “force, fraud, or allurement.”<sup>57</sup> When the Orissa Freedom of Religion Act was challenged in the High Court of Orissa, the decision went in the opposite direction on grounds that the definition of “inducement” was too broad and that only Parliament had the power to enact such legislation.<sup>58</sup>

The Supreme Court heard both of these cases together and ruled in favor of the Acts.<sup>59</sup> A distinction was made between the right to propagate and the right to convert. The former was allowed while the latter was seen as not part of the fundamental rights. Referring to Article 25(1), Chief Justice Ray, writing for the Court, held:

What the Article grants is 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. It has to be remembered that Article 25(1) guarantees “freedom of conscious to every citizen, and not merely to the followers of one particular religion and that, in turn, postulates that there is no fundamental right to convert another person to one's own religion because if a person purposely undertakes the conversion of another person to his religion, as distinguished from his effort to transmit or spread the tenets of his religion, that would impinge on the “freedom of conscience” guaranteed to all the citizens of the country alike.<sup>60</sup>

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55. Ronald W. Neufeldt, *To Convert or Not to Convert: Legal and Political Dimensions of Conversion in Independent India*, in RELIGION AND LAW IN INDEPENDENT INDIA 323-24 (Robert D. Baird ed., 1993).

56. *See* Rev. Stanilaus v. M. P., A.I.R. 1977 S.C. 909.

57. *Id.* at 910.

58. *See id.*

59. *See id.* at 908.

60. *Id.* at 911.

This distinction between conversion and propagation simply for "the edification of others" was previously stated in *Ratilal v. State of Bombay*,<sup>61</sup> which was appealed to as a precedent. Whatever else might be said about these bills and their treatment by the Supreme Court, they at least present a constriction upon religion as constitutionally understood.

Even though the Supreme Court presumably spoke definitively in 1977, the issue continues to generate controversy. A recent issue of *India Abroad* reported that an eighty-eight-year-old priest and a fifty-year-old nun had been sentenced and incarcerated for violating the Madhya Pradesh Bill by failing to register religious conversions.<sup>62</sup> Father L. Bridget and Sister Vridhi Ekka failed to report the conversion of ninety-four Oraon tribespeople in 1988. They were sentenced to six months in jail and a fine of Rs. 500. They were granted bail and given 30 days to appeal. The news report states:

After examining the converted tribes people, the judge said on

January 22 that the accused missionaries had not coerced or lured their followers, but they could not escape punishment because they did not inform the district chief of the change of religion within seven days as required under the law.<sup>63</sup>

#### IV. CONCLUSION: A "HINDU" SECULAR STATE

The Constitution of India makes a clear distinction between the separate realms of "religion" and the "secular." Although the category "secular state" has served a wide range of interests since the Constituent Assembly, its constitutional meaning, as interpreted by the courts, has defined the Indian secular state as embodying a distinction between these two realms irrespective of the religious community to which persons may belong. And, it has certainly never identified the Indian State with any particular religious tradition. But coupled with this has also come Parliament's reluctance to implement the uniform civil code or otherwise interfere with a minority religion. In general, Parliament stands ready to revise the

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61. A.I.R. 1954 S.C. 391.

62. See *INDIA ABROAD*, Feb. 2, 1996, at 46.

63. *Id.*

## 356 BRIGHAM YOUNG UNIVERSITY LAW REVIEW [1998

family laws of minorities (Muslims, Christians, Parsis) as they have done for Hindus, if that community comes forward and requests it. This has led to some changes in Parsi law, but neither Muslims nor Christians have made such a request.

It is the perception of some Hindus, as educated and led by the BJP, that in accommodating minorities, the Indian Government has ignored the values and wishes of the majority community which comprises some eighty percent of the population. The BJP, as a militant Hindu party, further holds that what has been called "secularism" since the founding of the constitution is really a "pseudo-secularism" since it favors the minorities. Their solution is to develop a secular state which is also a Hindu state. That would be a truly secular state since it would represent more fully the vast majority of Indians. And, since Hinduism is a tolerant and peaceful religion, minorities would have nothing to fear.

This position has been suggested from time to time since independence. Gandhi had promoted the establishment of a Ramraj. By this, he argued he was not proposing a Hindu state, but was making room for the moral values embodied in the Indian tradition. Radhakrishnan held that the moral base for the Indian secular state was "religion of the Spirit" (*Vedanta*).<sup>64</sup> This would still be a secular state since it was not the promulgation of any particular religion, but rather religion itself which is the essence of those particular religions. Lokanath Misra, as early as the Constituent Assembly, argued that it was the propagation of religion brought by Muslims to India that had led to the undesirable partition into India and Pakistan. If Muslims had never come, India would have been a perfectly secular state, and a Hindu one at that.<sup>65</sup>

The call for Hindutva,<sup>66</sup> or a "Hindu Secular State," on the part of the BJP is seen by Muslims as a militant call for their ultimate destruction. They see their personal laws and way of

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64. See generally ROBERT N. MINOR, RADHAKRISHNAN: A RELIGIOUS BIOGRAPHY (1987).

65. See 7 CONSTITUENT ASSEMBLY DEBATES 822 (1948).

66. Some Hindu groups have argued for a stronger Hindu influence in India's social and political life. A "Hindu Secular State" has been urged. The term Hindutva was coined, closely resembling "Hinduism" and was used by right-wing parties in search of political gain. For a full discussion of the legal judgments on this, see 5 RELIGION AND LAW REVIEW (Tahir Mahmud ed., 1996).

## 337] CONFLICT IN CONTEMPORARY INDIA 357

life threatened. Indians have, since the Constituent Assembly, uniformly held that India is and shall be a “secular state.”<sup>67</sup> The content of that secular state has been hotly debated, never more vigorously than in the present.

The Constitution of India is, on the whole, a modern human rights oriented document which promises justice based on equality to each of India’s citizens in the present lifetime. As it seeks implementation it encounters traditional values which oppose it. Occasionally traditional values win out over modernity—as in the case of cow slaughter and constrictions on the freedom to propagate religion. The Indian government and court system will continue to support the implementation of modern values, but in the face of traditional values they will be sometimes forced to settle for compromise or a progress slower than reformers would like.

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67. See ROBERT D. BAIRD, *“Secular State” and The Indian Constitution*, in *ESSAYS IN THE HISTORY OF RELIGIONS* 141-69 (1991).