

WHAT CAN BE LEARNED FROM THE INDIAN EXPERIENCE? CAN THERE BE A LEGITIMATE PLURALISM IN MODES OF PROTECTING RELIGIOUS FREEDOM?

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Given that my field of study and work is limited to the law and to the laws of India, I have approached the topic of discussion from the legal standpoint as prevailing in India. The language of the topic lends itself to a legal approach – the brief for the cause being ‘religious freedom vs. religious constraint’ – and India, as far as religion is concerned, in a way reflects and is a microcosm of the world macrocosm.

India, as a ‘world’ of religious diversity

India has five main faiths, namely Hinduism (which includes Sikhs, Jains and Buddhists), Islam, Christianity, Zoroastrianism and Judaism. Each faith has several sects and sub sects. Demographic studies as of April 2011 have put India’s population at 1.21 billion people.¹ Hindus represent 80.5%, Muslims 13.4% (the third-largest Muslim population in the world after Indonesia and Pakistan) and Christians 2.3% of the total population. The remainder covers smaller sects such as Sikhs, Jains, Buddhists, Zoroastrians, Bahai etc. Of its 28 States and 7 Union Territories,² two have a majority of Muslims,³ three have a majority of Christians,⁴ one has a majority of Sikhs⁵ and the rest have a majority of Hindus. To add to the complexity there are more than two thousand ethnic groups within the four main ethnic groups viz: Aryan, Mongolian, Dravidian and Tribal and 29 languages spoken (excluding dialects), most of them with different scripts. Since her independence from the British in 1947 after nearly 200 years of being a colony, India has had to face and still faces disruptions on the grounds of the four ‘isms’ – casteism, communalism, linguism and regionalism.⁶

¹ Census 2011: The Office of Registrar General & Census Commissioner of India.

² Territories administered directly by the Central Government through the President of India.

³ Jammu & Kashmir, Lakshvadeep.

⁴ Mizoram, Nagaland and Meghalaya.

⁵ Punjab.

⁶ Granville Austin, *Working a Democratic Constitution*, p. 79.

But before building the case that freedom of religion within such diversity is possible for a democratic nation, a few words need to be defined for the purpose.

The word 'Universal' used in conjunction with 'rights' may mean rights which are common to all of humanity or it may mean rights which are or should be available to each denomination and individual irrespective of any distinction including colour, caste or creed. I intend to use the phrase in the second sense so that 'universal rights' not only means moving from exclusion and ghettoisation to inclusion, from the rights of a race or nation to humanity as a whole but also the realisation of those rights by the individual. These rights such as the right to life – including the right to live with dignity, equality and the right to freedom of conscience – have been described in the Indian Constitution as 'fundamental rights'⁷ which not even Parliament can take away by any amendment of the Constitution.⁸

As far as the definition of 'religion' is concerned – in India, legally speaking, religion is certainly a matter of faith with individuals or communities – but it is not necessarily theistic. There are well known religions in India like Buddhism and Jainism which do not believe in God or in any Intelligent First Cause. A religion undoubtedly has its basis in a system of beliefs or doctrines which are regarded by those who profess that religion as conducive to their spiritual well being, but, the Courts in India have said that it would not be correct to say that religion is nothing else but such a doctrine or belief.⁹

However we define religion, historically, and even after the independence of India in 1947, communal conflict between the different faiths has, to a greater or lesser degree, existed.¹⁰ The National Integration Council's

⁷The 'fundamental rights' are dealt with in Part III and IV of the Constitution. There is a remarkable similarity with the Universal Declaration of Human Rights both having been deliberated upon almost contemporaneously. Dr Ambedkar the principal architect of the Constitution while explaining the various sources of the Constitution has said that before finally drafting the Constitution, the Members of the Drafting Committee had before them almost all the important Constitutions including the American, Canadian, South African and Australian Constitutions. See *S.P. Gupta v. Union of India*, 1981 Supp SCC 87, at p. 400.

⁸ *Kesavananda Bharati v. State of Kerala* (1973) 4 SCC 225.

⁹ *Commr., Hindu Religious Endowments v. Sri Lakshmindra Thirtha Swamiar of Sri Shirur Mutt*, 1954 SCR 1005.

¹⁰ See for example The Report of Justice V. S. Dave Commission of Inquiry into Communal Disturbance in Gujarat in July 1985 which refers to the history of communal riots in Gujarat.

2007 report, listed about a hundred communal clashes since 1947 and till 2007 there were at least 29 Commissions of Enquiry in respect of these incidents¹¹ although according to others between 2001 and 2009 alone 6,541 communal clashes occurred.¹² Despite the discrepancy, it is evident that the number of incidents of communal conflict has been very large.

The clashes have occurred not only between the major faiths but there have also been conflicts between sub-divisions of these faiths for example disputes between different sects of the Syrian Christian Church,¹³ between Sunnis and Shias,¹⁴ and between the sects of the Sikhs inter se.¹⁵ The causes of such conflicts are many. For example, while enquiring into the communal disturbance between Muslims and Hindus during December 1992 and January 1993, the Commission of Inquiry found that the political discourse which dominated the earlier decades has given way to communal discourse..., vocal Hindutva parties¹⁶ and increasing assertion of Muslim ethnic identity.¹⁷ All these reasons are ultimately based on a distrust arising from an ignorance of the 'other' and a growth of religion-based politics. Unfortunately, despite laws forbidding canvassing for votes on the ground of religion or by promoting feelings of enmity or hatred between different classes of the citizens of India on grounds of religion, race, caste, community, or language,¹⁸ democracy inevitably brings in 'vote bank politics' with political leaders taking advantage of such situations to fan fear and distrust which may strengthen their vote base but which weaken the nation. It is doubly unfortunate because India is a secular State.

Constitutional pluralism

The Constitution of India which was adopted in 1950 has in its Preamble constituted India as a 'Sovereign, Socialist, Secular and Democratic Republic'. Although the word 'secular' was borrowed from the West and was

¹¹ Report of Working Group of National Integration Council to Study Reports of the Commissions of Inquiry on Communal Riots. 2007.

¹² Communal Riots in 2010, by Asghar Ali Engineer.

¹³ Most Rev. P.M.A. Metropolitan v. Moran Mar Marthoma, 1995 Supp (4) SCC 286.

¹⁴ Gulam Abbas v. State of U.P. (1984) 1 SCC 81.

¹⁵ See: Parkash Singh Badal: Chief Minister of Punjab: S.R. Bakshi, Sita Ram Sharma p. 73 et seq.

¹⁶ Parties which advocate Hindu Fundamentalism.

¹⁷ B.N. Srikrishna Report.

¹⁸ The Representation of People Act, 1951 sections 123 (3) (3A); Section 295-A of the Indian Penal Code.

added to the Preamble only in 1976, it was always an implicit part of our Constitutional philosophy. More than 2000 years ago, Emperor Ashoka, who was a Buddhist and reigned over much of what is now India from 269 BCE to 231 BCE, in one of his edicts had advocated religious toleration based on the recognition that there is in every religion a common central truth and that differences were only in the external features, forms and ceremonies which are no part of the essence of religion.¹⁹ The same approach to all religions is reflected in the Indian Constitution.

I use the word 'secular' in describing the State in its broadest senses to mean both 'worldly as distinguished from spiritual' and 'of no particular religious affiliation'.²⁰ In the political context secularism can and has assumed different meanings in different countries, depending broadly on historical and social circumstances, the political philosophy and the felt needs of a particular country. Thus, the First Amendment to the American Constitution prohibits the making of any law 'respecting an establishment of religion, or prohibiting the free exercise thereof'. The clause against establishment of religion by law was intended to erect 'a wall of separation between Church and State'.²¹ The Australian Constitution has adopted this approach. Under the Indian Constitution however, there is no such 'wall of separation' between the State and religious institutions. In India the State is secular in that there is no official religion. India is not a theocratic State.²² In fact the State is expressly prohibited from discriminating against any citizen on the grounds only of religion, race, caste, sex, place of birth.²³ It is also against the policy of the Constitution to pay out of public funds any money for the promotion or maintenance of any particular religion or religious denomination²⁴ and no 'taxes' inclusive of all other impositions like cesses, fees, etc., can be specifically appropriated in payment of expenses for the promotion or maintenance of any particular religion or religious denomination.²⁵

However the Constitution envisages the involvement of the State in matters associated with religion and religious institutions, and even indeed with the

¹⁹ Amartya Sen, *The Argumentative Indian*, Part IV, p. 274.

²⁰ *Black's Law Dictionary*.

²¹ Per Jefferson, 'Reynolds v. United States' (1878) 98 US 145 at p. 164.

²² At present the President of India is a Hindu, the Vice-President is Muslim, the leader of the party in power is Christian and the Prime Minister is Sikh.

²³ Article 15(1).

²⁴ *Commr., Hindu Religious Endowments v. Sri Lakshmindra Thirtha Swamiar of Sri Shirur Mutt*, 1954 SCR 1005.

²⁵ Article 27 of the Constitution.

practice, profession and propagation of religion in its most limited and distilled meaning. Like other secular Governments, the Indian Constitution guarantees freedom of conscience and the right freely to profess, practice and propagate religion²⁶ to every individual so that he/she may hold any beliefs he/she likes.²⁷ Every person is free in the matter of his relation to his Creator, if he believes in one, and to worship God according to the dictates of his conscience. A person is not liable to answer for the verity of his religious views, and he cannot be questioned as to his religious beliefs by the State or by any other person. However actions in pursuance of those beliefs may be subjected to restrictions in the interest of the community at large namely to preserve public order, morality and health and the Fundamental Rights of others, as may be determined by common consent, that is to say, by a competent legislature. The right to worship or practice according to the tenets of a religion is also unfettered so long as it does not come into conflict with any restraints imposed by the State in the interest of public order, etc. and is not violative of the criminal laws of the country. Thus, though an individual's religious beliefs are entirely his/her own and freedom to hold those beliefs is absolute, the right to act in exercise of an individual's religious beliefs is not unrestrained.

It is also the fundamental right of a religious denomination or its representative to administer its properties in accordance with law. The law therefore must leave the right of administration to the religious denomination itself subject to such restrictions and regulations as it might choose to impose. A law which takes away the right of administration from the hands of a religious denomination altogether and vests it in any other authority would amount to a violation of the guaranteed right.²⁸ Religious minorities have the additional right to establish and administer educational institutions of their choice²⁹ although Courts have construed the right to administer as not being absolute; there could be regulatory measures for ensuring educational standards and maintaining excellence.³⁰

But the Constitution also recognises the validity of laws relating to management of religious and denominational institutions³¹ and contemplates

²⁶ Article 25(1).

²⁷ *Syedna Taher Saifuddin Saheb v. State of Bombay*, 1962 Supp (2) SCR 496; *Sri Adi Visheshwara of Kashi Vishwanath Temple v. State of U.P.* (1997) 4 SCC 606; *M.P. Gopalakrishnan Nair v. State of Kerala* (2005) 11 SCC 45.

²⁸ Clause (d) of Article 26.

²⁹ Article 30(1).

³⁰ *T.M.A. Pai Foundation v. State of Karnataka* (2002) 8 SCC 481, at p. 588.

³¹ Article 16(5).

the State itself managing educational institutions in which religious instructions are to be imparted.³² The State is empowered to make any law 'regulating or restricting any economic, financial, political or other secular activity which may be associated with religious practice'³³ but is limited to the regulation of aspects which are not an integral part of a religion and again only in the interest of public order, morality, health and the fundamental rights of others. Here the word 'secular' is used in the sense of activities which do not form an integral part of a religion or what Ashoka described as 'the essence of religion'.³⁴

A religion may not only lay down a code of ethical rules for its followers to accept, it might prescribe rituals and observances, ceremonies and modes of worship which are regarded as integral parts of religion, and these forms and observances might extend even to matters of food and dress. A religious denomination or organization enjoys complete autonomy in the matter of deciding as to what rites and ceremonies are essential according to the tenets of the religion they hold.³⁵ What the Constitutional provision contemplates is not regulation by the State of religious practices as such, the freedom of which is guaranteed by the Constitution, but regulation in the interest of public order, health and morality only of those activities which are economic, commercial or political in their character though they are associated with religious practices and also, as I have said earlier, those activities which are not essential or integral to the religion. It was on such humanitarian grounds, and for the purpose of social reform, that so called religious practices of Hindus like child marriage, immolating a widow at the pyre of her deceased husband, or of dedicating a virgin girl of tender years to a God to function as a devadasi,³⁶ or of ostracising a person from all social contacts and religious communion on account of his having eaten forbidden food, were stopped by legislation.

³² Article 28(2).

³³ Article 25(2)(a).

³⁴ *Supra*.

³⁵ Article 26(b).

³⁶ Literally 'maid-servant of God'. The devadasi system is a custom by which a girl is 'married' to God to redeem a promise made for fulfillment of a prayer. The girl was normally forced into prostitution by temple authorities. The practice is said to be still prevalent in some states despite its abolition in 1988 [see in this connection *Trafficking in Women and Children in India*, National Human Rights Commission Report (2005) p. 225.

The role of the judiciary

Very often when a right to practice is regulated by the State, members of that particular religion have questioned such regulation before the higher courts.³⁷ The courts therefore shoulder the burden of finally determining whether a particular activity is an essential religious practice or not and whether in making the regulation or law the State has overstepped its constitutional limitations. The decision may present difficulties because sometimes practices, religious and secular, are inextricably mixed up, and 'what is religion to one is superstition to another'. But the Courts have decided what constitutes the essential part of a religion primarily after ascertaining and with reference to the doctrines of that religion itself, irrespective of the religion in question. A few recent examples will suffice.

As is well known Hindu society in India has traditionally a rigidly hierarchical caste system. Although discrimination on any basis is Constitutionally prohibited, nevertheless discrimination by the so called 'higher castes' against the so called 'lower castes' continues to persist. For example, worship in a temple in the state of Kerala was traditionally performed by Brahmins, which is the priestly class and considered the highest amongst the four castes.³⁸ The appointment by the State of a non-Brahmin to perform the ritual worship in the temple was challenged on the ground that the appointment not only violated a long-followed mandatory custom and usage of having only a particular sub-sect of Brahmins for such jobs but that the appointment denied the right of the worshippers to practise and profess their religion in accordance with its tenets and manage their religious affairs. The Supreme Court rejected the claim and upheld the appointment saying:

Any custom or usage irrespective of even any proof of their existence in pre-constitutional days cannot be countenanced as a source of law to claim any rights when it is found to violate human rights, dignity, social equality and the specific mandate of the Constitution and law made by Parliament.³⁹

The same reasoning was adopted by the court when it held that polygamy is not an integral part of Hindu religion⁴⁰ and that though the personal law of Muslims permitted having as many as four wives, having more than one wife

³⁷ Syedna Taher Saifuddin Saheb v. State of Bombay, 1962 Supp (2) SCR 496.

³⁸ The Brahmins or the priestly class; the kshatriyas or the soldier class; the Vaisyas or trader class and the Sudras or the untouchables.

³⁹ N. Adithayan v. Travancore Devaswom Board (2002) 8 SCC 106.

⁴⁰ State of Bombay v. Narasu Appa Mali: AIR 1952 Bom 84.

is not a part of the religion.⁴¹ It has also been held that the sacrifice of a cow for earning religious merit on Bakr-Id, an Islamic festival, is not a part of religious requirement for a Muslim⁴² and that the performance of ‘Tandava’⁴³ dance in processions in public streets or in public places was not an essential religious rite of a Hindu sect called Ananda Margis.⁴⁴ Similarly it has also been held that no community or sect of that community can claim a right to add to noise pollution on the ground of religion whether by beating of drums or reciting of prayers by use of microphones and loudspeakers so as to disturb the peace or tranquility of the neighbourhood.⁴⁵ In practice therefore courts ensure that the State’s involvement is limited to matters which are not intrinsic to that religion and that the regulation of practices is not only for the purposes of public order etc. but operates impartially and without discrimination.

The issue of conversions has been more controversial. Individuals have been guaranteed the fundamental right to propagate his/her religion, subject to the same limitations aforesaid, that is, public order, health and morality.

Several States have enacted legislation to prevent conversion by force, fraud or allurements making such conversion a punishable offence. Such statutes are constitutionally valid because forcible conversions impinge on the ‘freedom of conscience’ guaranteed to all the citizens of the country alike. In a decision which has been very heavily criticized both by scholars⁴⁶ and the media across the country, the Supreme Court has construed the word ‘propagate’ very narrowly. According to the Court the right to propagate was not a right to convert another person to one’s own religion, but only to transmit or spread one’s religion by an exposition of its tenets.⁴⁷ The justification for the opposition to this view would need more time and space than the present occasion will allow, but I may briefly indicate what, in my opinion, may have led the court to such a restrictive interpretation of the right to propagate religion.

Philosophy in India is essentially spiritual.⁴⁸ Ancient Indian philosophy assumed, broadly, three forms: the believers in *Advaita*, meaning non-dual

⁴¹ Javed v. State of Haryana, (2003) 8 SCC 369, at p. 379.

⁴² State of W.B. v. Ashutosh Lahiri: (1995) 1 SCC 189.

⁴³ The ‘Tandava’ dance symbolizes the cosmic cycles of creation and destruction.

⁴⁴ Commissioner of Police v. Acharya Jagadishwarananda Avadhuta (2004) 12 SCC 809.

⁴⁵ Church of God (Full Gospel) in India v. K.K.R. Majestic Colony Welfare Assn. (2000) 7 SCC 282; Om Birangana Religious Society v. State (1995-96) 100 CWN 617 (Cal).

⁴⁶ H.M. Seervai, *Constitutional Law of India* (4th edn), p. 1287.

⁴⁷ Rev. Stainislaus v. State of M.P. (1977) 1 SCC 677.

⁴⁸ S. Radhakrishnan, *Indian Philosophy*, Vol. I p. 24.

or 'not two' in which oneness is a fundamental quality of everything and everything is one non-dual consciousness; *Visistha advaita* which posits qualified non-duality or modified monism where every thing existing is 'nothing more than a mere flux of becoming' representing different degrees of 'intermediate reality', the degree being measured by the distance from the 'integral reality';⁴⁹ and *Dvaita* or dualism/theism in which there is a separation between the believer and the object of belief. These three systems covered innumerable sub-systems. Individuals were free to choose their philosophy as each system or sub-system was seen as a different but equally valid method of seeking to reach the ultimate truth. Those who prescribed to this philosophy, generically termed as 'Vedanta', were called Hindus by the Persians because they lived next to the river which in Sanskrit was known as 'Sindhu', which they called the 'Hindu' and which we now know as the Indus. The Vedanta as applied to the various customs and creeds of India was called 'Hinduism'.⁵⁰ One was therefore born a Hindu believing in one god, many or none⁵¹ and the concept of conversion was alien. The differences of application of belief, their overt manifestations over time and subsequent historical events which identified a belief with political and economic power, led to a hardening of attitudes asserted through different forms and ceremonials and the perception of Hinduism as one religion. These in turn lead to rigid sectarianism and a change in attitude to 'the other' – from acceptance of difference to mere tolerance and from tolerance to an assertion of superiority of belief which in turn led to hostility in thought and militant expressions of intolerance.

The Indian Constitution was drafted by members of the Constituent assembly who were not only regionally representative but of all major faiths.⁵² It was their vision of a unified India which led them not only to provide for the individual's right to religious freedom and the freedom of conscience but an equal respect for all religions.⁵³ In such a context the right to convert which proceeds on the basis of the validity of a particular faith and repudiation of others, does not rest easily with those who are re-

⁴⁹ *Ibid.* at p. 40.

⁵⁰ Swami Vivekananda as quoted by Marie Louise Burke in *Swami Vivekananda in the West: New Discoveries*, Part II p. 377. For judicial interpretation of the word 'Hindu' see *M.P. Gopalakrishnan Nair v. State of Kerala* (2005) 11 SCC 45, at p. 58.

⁵¹ Mehru Jaffer, *The Book of Moinuddin Chishti*, p. 90.

⁵² See: Basu's *Commentaries on the Constitution of India*, 6th edn., Vol. A, p. 5.

⁵³ See *Bal Patil v. Union of India* (2005) 6 SCC 690, at page 704: 'The States will treat all religions and religious groups equally and with equal respect without in any manner interfering with their individual rights of religion, faith and worship'.

ponsible for the governance of the country particularly when communal passions have been raised on the ground that some one has been ‘forcibly’ converted to another religion.⁵⁴

A common civil code

The Constitution envisages homogeneity to be brought about in respect of all aspects of Civil Law applicable to all Indians and Article 44 says that ‘the State shall endeavour to secure for the citizens a uniform civil code throughout the territory of India’.⁵⁵ Nevertheless, the State’s right of regulation has not been exercised in respect of personal laws of religious communities relating to marriage, divorce, adoption and inheritance or succession although laws relating to marriage, inheritance and adoption can hardly be said to be part an intrinsic part of religion however sacred the source may be believed to be. The reluctance of the State is not a question of constitutional power but political expediency.

To a large extent uniformity in civil law has already been brought about within the different faiths. The British sought to introduce uniformity in civil laws as a measure of administrative convenience, and succeeded to a large extent. Thus there was The Muslim Law (Shariat) Application Act, 1937, the Parsi Marriage and Divorce Act, 1936, the Christian Marriage Act, 1872 and the Indian Divorce Act, 1869. The Shariat Act removed the differences between the different sects of Muslims such as the Khojas and Cutchi Memons of Gujarat and the Malsan Muslims with regard inter alia to inheritance. Under strict Hanafi Law, there was no provision enabling a Muslim woman to obtain a decree dissolving her marriage on the failure of the husband to maintain her or on his deserting her or maltreating her and it was the absence of such a provision entailing (according to the Legislature) ‘unspeakable misery in innumerable Muslim women’ that was responsible for the Dissolution of the Muslims Marriages Act, 1939.⁵⁶ The

⁵⁴ For example in 2008 communal clashes between Hindus and Christians erupted in the Kandhamal District of the State of Orissa. Although the immediate cause for friction was the removal of Christmas decorations put up at a place used by Hindus to worship, the real cause was the resentment of a radical Hindu group, to the increasing number of tribals in the district becoming Christians. This escalated when an 80-year-old priest and three others belonging to the radical group were killed. The Hindus concluded, (wrongly as it transpired later on investigation) that the killers were the local Christians. Incited by political leaders, mobs of Hindus set fire to many Christian settlements killing many of the residents and causing several hundreds of others to flee their homes.

⁵⁵ Article 44.

⁵⁶ *Jorden Diengdeh v. S.S. Chopra* (1985) 3 SCC 62, at p. 71.

Christian Marriage Act similarly applies equally to the various sects of all Christians. After Independence, this process of uniformity in personal laws was continued. Till the 1950s Hindus in different regions and belonging to different sects had different personal laws and practices. These were brought under one umbrella by the Hindu Code Bills which made the various personal laws uniformly applicable to all Hindus. For example, new concepts such as monogamy, divorce and inheritance by females were introduced despite vociferous opposition by the Hindu Marriage Act, 1955 and the Hindu Succession Act, 1956 respectively. Therefore at present, the laws relating to succession, marriages, and adoption are governed by the personal laws of the different faiths. All other aspects of personal Civil Law are covered by statutes which apply to all Indians irrespective of their faith.

For the framers of the Constitution a uniform civil code meant a shared identity and a deletion of differences in secular matters leading to national integration. Civil Rights activists support the uniform civil code because they expect a more equal society where the vulnerable, oppressed and marginalized members are given their rightful place. Besides, the difference in personal laws has at times been exploited to serve dubious purposes. This is particularly noticeable in relation to marriage and divorce⁵⁷ where ‘conversion’ is resorted to marry more than one wife or avail of grounds for divorce which are not available under one personal law but available in another.

Unfortunately the effort to secure a uniform civil code has taken on a communal hue. It is resisted by the minority religious communities as it is seen as an attempt by Hindu Fundamentalists to take away their cultural identity and survival. The distrust is heightened by the insistence of the Hindu Fundamentalists on a uniform code to eliminate so called ‘special privileges’ to ‘pampered minorities’. However ‘[t]he purpose of law in plural societies is not the progressive assimilation of the minorities in the majoritarian milieu. This would not solve the problem; but would vainly seek to dissolve it’.⁵⁸ As I see it uniformity in personal laws does not mean the imposition of any particular personal law of a particular faith but the adoption of ‘best practices’ so to speak, of the different personal laws based on universally acceptable norms.

Courts have on various occasions urged the adoption of a uniform civil code and have, through a process of interpretation, been able to achieve

⁵⁷ Lily Thomas v. Union of India (2000) 6 SCC 224; Sarla Mudgal v. Union of India, (1995) 3 SCC 635.

⁵⁸ ‘Law in a Pluralist Society’ by M.N.Venkatachaliah, J.

uniformity in personal laws but to a very limited extent.⁵⁹ It is ultimately the State which is charged with the duty of securing a uniform civil code for the citizens of the country and piecemeal attempts of courts to bridge the gap between personal laws cannot take the place of a common Civil Code. Justice to all is a far more satisfactory way of dispensing justice than justice from case to case. It is also doubtful that the goal of uniformity can be left to ideas and interpretations of judges where varying attitudes may dictate the outcome.

The framers of the Constitution did not define such concepts like ‘equality’, ‘liberty’ or ‘freedom’. They did not lay down what constitutes ‘public order, morality and health’ subject to which a person is entitled to freedom of conscience and the right to profess, practice and propagate any religion. It was primarily left to the judiciary to develop the jurisprudence and to give content to the concepts through a process of interpretation and application. Therefore, the judiciary has an important role to play in the implementation of secularism. Indeed, the concepts of communal harmony and secularism have, by and large, been well protected by the courts. For example they have on occasion directed that a case arising out of communal conflict be transferred from one State to another because of the bitterness of local communal feeling and the tenseness of the atmosphere and because public confidence in the fairness of a trial held in such an atmosphere would be seriously undermined.⁶⁰ They have upheld orders restraining a person known to incite communal clashes from entering and from participating in any function in a district.⁶¹ The death penalty was awarded to a person who had killed a woman in a communal clash saying:

In our country where the Constitution guarantees to all individuals freedom of religious faith, thought, belief and expression and where no particular religion is accorded a superior status and none subjected to hostile discrimination the commission of offences motivated only by the fact that the victim professes a different religious faith cannot be treated with leniency.⁶²

However Judges need great wisdom and restraint in wielding their great judicial power otherwise judges can and sometimes, though rarely, have transformed their own predilections and biases into principles.

⁵⁹ For example the right of a Muslim woman to maintenance on divorce: *Danial Latifi v. Union of India* (2001) 7 SCC 740.

⁶⁰ *G.X. Francis v. Banke Bihari Singh*, AIR 1958 SC 309, 310.

⁶¹ *State of Karnataka v. Praveen Bhai Thogadia (Dr)*, (2004) 4 SCC 684.

⁶² *Dharma Rama Bhagare v. State of Maharashtra* (1973) 1 SCC 537, at p. 543.

Conclusion

Religious pluralism is provided and protected in the Indian Constitution. Although the laws may be applicable to all Indians, implementation is necessarily localized. Fundamental to the legal concept of religious freedom is that the task of superintending the operation of law rests with an impartial and independent judiciary. In any event the mere force of law cannot change attitudes nor can the law alone hope to wipe out in a few years a few centuries of cultural and religious exclusiveness still practiced by fundamentalists in all religious groups. Mahatma Gandhi said ‘I have come to the conclusion that, if it is proper and necessary to discover an underlying unity among all religions, a master key is needed. The master key is that of truth and non-violence’. This is not to say that strong and preventive action should not be taken against individuals or group of persons who either by speech or action seek to inflame communal feelings. As suggested ‘the importance of religious identity has to be separated from its relevance in the political context’⁶³ not only through an equitable enforcement of the law but also through education. To this end several universities have set up Centres or Departments dealing with Social Exclusion and Inclusive Policy Studies. Education has already led, marginally perhaps but palpably, towards a classless and more tolerant society. Finally a vibrant democracy has been a socially leveling factor. Without claiming that the pluralistic approach to religious freedom as envisaged in the Indian Constitution is the perfect template for every country, I can at least conclude that it has worked for India. An eminent historian has said that during the brief years that Indians have held the reins of government they have governed themselves successfully... ‘The Constitution... [has] met India’s needs. The inadequacies in fulfilling its promise should be assigned to those working it and to conditions and circumstances that have defied greater economic and social reform...’. The country has achieved greatly against greater odds.⁶⁴

⁶³ Amartya Sen, Secularism and its Discontents, *The Argumentative Indian*, p. 307 [published by Penguin Books: p. 307].

⁶⁴ Granville Austin, *Working a Democratic Constitution*, Chapter 31, p. 633, 665.