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## Religion and the Rule of Law in India

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### Abstract:

*The central question this paper seeks to answer is- What are the different ways in which law regulates religion in India? What implications this have for the concept of rule of law? Religion has been regulated in India in myriad ways. The framework for regulation is provided in the Constitution itself. Not, only the right to freedom of religion is subject to public order, health and morality, the 7th Schedule of the Constitution mentions various matters pertaining to religious affairs on which the Indian state has power to legislate. The Indian Constitution thus simultaneously protects religion as well as regulates it. The extensive regulation of religion in India perhaps can be viewed as an effort to incorporate religion within the rule of law framework (though this framework is necessarily different from the liberal rule of law framework) Rule of law thus needs to be redefined not just as limiting the arbitrary power of the state but also limiting the arbitrary power of civil society. Rule of Law in India is not only a promise of rights- in this case, the right to freedom of religion, rather it also means subjection of religion to rule/ law. Thus in the Indian context law (based on "reason") regulates religion (based on "emotion").*

**Key words:** *Citizenship, Civil Society, Constitution, Laws, Religion, Regulate, Rule of Law, Secular, State*

Although the rule of law has ancient roots and may be traced back to Aristotle, the modern conception of rule of law was articulated first, in A.V.Dicey's work 'Introduction to the Study of the Law of the Constitution in the last quarter of the 19<sup>th</sup> century. According to Dicey, the expression Rule of law included three distinct though kindered conceptions. In the first place, rule of law is juxtaposed with every system of government based on the exercise by persons in authority of wide, arbitrary or discretionary powers. A man can be punished only for contravention of law and nothing else. Secondly, it entails that every man, whatever be his rank or condition is subject to the ordinary law of the realm and amenable to jurisdiction of the ordinary tribunals. Thirdly, the English Constitution is infused by the rule of law in the sense that the general principles of the constitution are the result of judicial decisions determining the rights of private persons in particular cases. (Dicey 1959)

Max Weber in his work, 'On Law in Economy and Society', established the ways in which liberalism's formal rational legal system- the rule of law- eases capitalism through increasing predictability and security. He credited the success of some western countries in part to their rational legal system. In juxtaposition to rule of law, Weber considered the legal system of Asian countries to be nothing more than a kind of arbitrary or irrational *kadi* justice where wise men supposedly determined what was best in a given situation based on their own judgment and interpretation of customary norms rather than by appeal to fixed standards or principles of general applicability. (Perenboom 2004: xiv)

The comparative legal scholar Ugo Mattei classifies three types of legal systems based on whether the primary source of social norms and order, is law, politics or philosophical and religious traditions. In a rule of professional law or rule of law system, disputes are resolved through the channel of law and the state and state actors are subject to law. In this system, law is largely secularized and independent from religion, morality and other social norms. In a rule of law political system, the separation between law and politics is absent or minimal. Legal institutions are weak and the law often does not restrict government of officials. This form of legal system is an attribute of former socialist states in transition and developing states. The third class of legal system is traditional law, or what Mattei calls the "Oriental view of the law". These systems are characterized by a lack of separation between law and religion and/ or are based on transcendental philosophy in which the individual's internal dimension and societal dimension are not separated. Under this category, Mattei puts Islamic law of countries, Indian law and Hindu law countries, and countries with "other Asian and Confucian conceptions of law." (Perenboom 2004: xv)

According to Upendra Baxi, "Rule of Law is both, and at once, government of law and of men". Baxi argues that if "men" is used inclusively as representing all human beings, the slogans may signify secularity which means that it is human power and not divine authority that makes both government and law. This however raises the question whether constitutions and laws based on religion disqualify at the threshold from being Rule of Law societies. (Baxi 2007:10)

The central question this paper seeks to answer is- What are the different ways in which law regulates religion in India? What implications this has for the concept of rule of law?

## 1. Rule of law in India

Rule of Law in India stands normatively perceived not just as sword against state domination and violation, but also as a constant constitutional combat against historic civil society norms and practices. This results in simultaneous disempowerment and re-empowerment of the Indian State. (Baxi 2004:329) The Indian State can regulate rights to conscience and to religion on the grounds of public health and order and morality.(Baxi 2005:546) Indian Constitutional development differs in many crucial ways the rule of law genre of the American First Amendment's 'Wall of Separation' between state and religion. The first amendment to the American Constitution lays down, "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof". The Indian Constitution on the other hand obliges the Indian state specifically to reform the 'dominant'/majoritarian 'Hindu' religious traditions in a fast forward mode, while leaving the reform of 'minority' communitarian/religious traditions to slow motion miniscule change. (Baxi 2004:333)

M.P. Singh and Rekha Saxena point out that the secular state in India is essentially a "rule-of-law secular state". (Singh and Saxena 2008: 50) They argue that the modernizing elite of India in the course of freedom movement against the British Raj, developed a concept of secularism that was premised on the crystallization of: (i) a common focus of national allegiance to the nation in making, and (ii) the development of rule of law and a common citizenship. A wall of separation between the State and religion was never visualized by the modernizing elite because of the felt-need for reforms in Indian religious traditions, especially the rituals, behavior patterns and family laws that seemed offensive to modern rational sensibilities.(Singh and Saxena 2008: 48)

Garry Jeffrey Jacobson underlines three models of secular constitutional development- assimilative, visionary and ameliorative- that correspond respectively with the American, Israeli and Indian cases. The flags of these nations clearly reflect the distinct models of secularism. While on one hand the absence of any religious symbolism on the American flag accords with the view that questions of faith and piety are to be resolved more properly in private places, on the other hand the featured presence of the Star of David on the Israeli flag points to the unavoidably public nature of the religious question in Israel. (Jacobson 2003:5) The Indian flag communicates a message about the conceptualization of secular democracy that is notably different from the approaches intimated by the American and Israeli flags. Where religion is emblematically absent in the United States, it is prominently featured on the Indian flag, although in a form that can not be readily attributed with narrow sectarian interests. Ashoka's dharma-chakra (wheel on the Indian flag) represents the "balance-wheel of religion that sustains society." (Jacobson 2003:7)

The great challenge in ensuing the baffling goal of Indian secularism is bound up in what is distinctive about the Indian case, namely that critical elements of the social structure are inextricably entangled with religion in a way that renders the possibilities for any meaningful social reform unimaginable without the direct intervention of the State in the spiritual domain.(Jacobson 2003:8) Rule of Law in India is not only a promise of rights- in this case, the right to freedom of religion, rather it also means subjection of religion to rule/ law. Thus in the Indian context law (based on "reason") regulates religion (based on "emotion")

Partha Chatterjee brings to fore two contradictions of politics of secularism in India. First, despite the fact that a significant section of Indian political leaders shared the desire to separate the domains of religion and politics, the independent Indian state, for various historical reasons, had no option but to involve itself in regulation, funding, and in some cases, even in the administration of various religious institutions. Second, though sections of Indian citizens were legally identified as belonging to minority religious communities following their own personal laws and granted the right to establish and administer their own educational institutions, there was no procedure to determine who was to represent these minority communities in their dealings with the state. (Chatterjee 2004:115)

## 2. Regulation of Religion in Pre-Independence era

It is interesting to note that although the British Rule in India established a nationwide criminal legal system with a norm of formal equality before law (considered to be an essential part of rule of law), it was during the same rule that the concept of Religious Personal laws was introduced into the Indian legal lexicon. Menon points out that the colonial government consulted with self-styled community leaders and organized vastly heterogeneous family and property arrangements within the ambit of four religious personal laws- Hindu, Muslim, Christian and Parsi. (Menon 2012:24)

The regulation of religion in India began during British rule. The practice of Sati was regulated by the British government through successive orders passed in 1813, 1815 and 1817. The main reason behind these regulations was to make sure that unwilling women were not forced to commit sati and to that end, a policeman had to be present at the performance. Later on, the practice was abolished and made a criminal act by an act in 1829. This pattern of legislatively modifying various practices that were initially regarded religious continued in the name of humanitarian considerations, public policy, demand by the public etc. For, example, the Caste Disabilities Removal Act, 1850; the Hindu Widows Remarriage Act, 1856; the Native Converts Marriage Act, 1928; the Child Marriage Restraint Act, 1929; all modified practices that were considered to be an integral part of their religion by the local populations.(Parasher 2008: 151) Apart from these acts, which can be said to be part of social reform legislations, there were other laws whose sole purpose was to regulate activities of religious associations. Two central Acts of the pre-independence era relating to religious endowments and trusts remain in force in most parts of the country: (i) Religious Endowments Act 1863; and (ii) Charitable and Religious Trusts Act 1920.(Harshadarai 2010:85) Thus it can be said that Postcolonial India not only inherited colonial regime's civil administration, army, police and various repressive security acts it also inherited regulative acts pertaining to religious affairs and the regime of Religious Personal Laws.

### 3. Provisions Concerning Religion and Religious Affairs in the Constitution

Article 15 of the Constitution of India prohibits discrimination on grounds of religion and Article 16 prohibits discrimination specifically in terms of public employment. But Clause 5 of Article 16 states that a law may require that the incumbent of a religious or denominational office, or member of such a committee, must be a person of the concerned religion. The practice of 'untouchability' stands abolished and its practice in any form is strictly forbidden -Article (17).

Article 23(2) prohibits discrimination on the grounds of religion by the state in imposing compulsory service on citizens for public purposes.

The Constitution of India goes beyond the tenets of liberal constitutionalism and grants right to freedom of religion to both individuals and groups. The following Articles of the Constitution grant right to freedom of religion to individuals:

Article 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."

Article 27- "No person shall be compelled to pay any taxes the proceeds of which are specifically appropriated in payment of expenses for the promotion or maintenance of any particular religious denomination."

The following Articles of the Indian Constitution provide right to religious freedom as a group right:

Article 26- "Subject to public order, morality and health, every religious denomination or any section thereof shall have the right-

- to establish and maintain institutions for religious and charitable purposes
- to manage its own affairs in matters of religion;
- to own and acquire movable and immovable property; and
- to administer such property in accordance with law."

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

Article 30(1)- "All minorities, whether based on religion or language, shall have the right to establish and administer educational institutions of their choice."

Apart from the right to freedom of religion, there are other provisions in the Constitution which regulate religion and religious affairs. Article 51A (e) states- "It shall be the duty of every citizen of India to promote harmony and the spirit of common brotherhood amongst all the people of India transcending religious, linguistic and regional or sectional diversities..."

Schedule VIII of the Constitution of India mentions various religious matters noted below and grants powers to the Union and the State governments or either of them to legislate on these matters.

- Pilgrimage outside India - Union List, entry 20;
- Pilgrimage within India - State List, entry 7;
- Burials & burial grounds, cremations & cremation grounds- State List, entry 10;
- Family relations, succession & all other personal-law matters -Concurrent List, entry5;
- Charities, charitable institutions & endowments – Concurrent List; entry 28;
- Religious endowments & religious institutions – Concurrent List, entry 28.

Article 325 of the Indian Constitution states that "... no person shall be ineligible for inclusion in any such roll or claim to be included in any special electoral roll for any such constituency on grounds only of religion, race, caste, sex or any of them."

The Constitution of India also contains certain provisions relating to certain practices of specific communities. These are:

Article 48 prohibits the slaughter of cows and calves (who are revered by the Hindu religion)

Article 25(2)b provides for throwing open of Hindu religious institutions of a public character to all classes and sections of Hindus. Explanation I of Article 25 provides that "The wearing and carrying of kirpans shall be deemed to be include in the profession of the Sikh religion."

Some special provisions for the Anglo-Indian community are also provided in the following articles of the constitution -Articles 331, 333, 336 and 337.

Also interesting to note is Article 290A of the Constitution which was inserted by seventh amendment in 1956. This article makes a provision for the grant of 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 .(Ibid.:38)

### 4. Regulation of Religion in various Laws

Chapter VIII of the Indian Penal Code deals with offences against public tranquility and lays down penalties for the following offences:

- Promoting enmity between different groups on grounds of religion, race, place of birth, residence, language, etc. and doing acts prejudicial to maintenance of harmony offence committed in place of worship, etc.- Article 153-A
- Imputations, assertions prejudicial to national integration -Section 153-B.

Chapter XV of the Indian Penal Code is deals with punishments for 'Offenses against Religion.' It declares following acts to be an offence:

- Injuring or defiling a place of worship with an intention to insult the religion of any class - Section 295.
- Deliberate and malicious act intended to outrage religious feelings of any class by insulting its religion or religious beliefs -Section 295-A.
- Disturbing a religious assembly - Section 296.
- Trespassing on burial places, etc.- Section 297.
- Uttering words, etc., with deliberate intent to wound the religious feelings of any person- Section 298

In Chapter XXII of the Indian Penal Code which deals with 'criminal intimidation, suit and annoyance', Section 505 provides penalties for the following offences:

- "Whoever makes, publishes or circulates any statement, rumour or report with intent to incite or which is likely to incite one community to commit an offence against another community." - Section 505(1) (c)
- Statements creating or promoting enmity, hatred or ill-will between classes 505(2).
- Offence committed under subsection (ii) in a place of worship, etc. - Section 505(3).

The code of Criminal Procedure (CrPC) 1973, which has replaced the old CrPC of 1898, lays down procedural details for the offences against religion laid in it in various Sections of Indian Penal Code - CrPC, First Schedule. These provisions of the CrPC have made all the offences against religion under the IPC as cognizable and non-bailable. (Ibid.:58)

The Army Act 1950 makes a provision (Section 64) for conviction by court martial and punishment of persons governed by the Act if they commit any of the following offences:

- Defiling any place of worship,
- Insulting religion, or
- Wounding religious feelings of any person -

A similar provision is there in Section 66 of Air Force Act 1950. (Ibid.:59)

The Representation of the People Act 1951 which deals with the conduct of elections, disqualifies (Section 8) a person guilty of the following offences relating to religion may be disqualified for a period of six years:

- Representation of the People Act 1951, Section 125 (using religion for electoral gain);
- Indian Penal Code, Sections 153-A and 505 (offences against religion);
- Religious Institutions (Prevention of Misuse) Act 1988 (misusing shrines for unlawful activities); and
- Places of Worship (Special Provisions) Act 1991 (distorting nature of particular of shrines). (Ibid.:47)

The Representation of the People Act 1951 also prohibits use of religion and religious symbols with a view to promoting an aspirant's candidacy for a public election or for adversely affecting the election of another such candidate in the following sections- 123(2), 123(3), 123(3A), 123(3B) Section 125 lays down punishment for these offences up to maximum of 3 years or with fine or with both.

Section 100 of the Act empowers the High Courts to declare the election of a winning candidate to be void if he commits, inter alia, a 'corrupt practice'. (Harshadrai 2010:48)

-Extraordinary Laws- An association which has for its object any 'activity' punishable under Sections 153-A and 153-B of the IPC, or which encourages or aids people to undertake such an activity, was declared to be an 'unlawful association' under the Unlawful Activities (Prevention) Act 1967. (Ibid.:54)

TADA made a specific reference to 'threatening harmony between communities' as an act of terror. Due to widespread allegations of its targeted use against religious minorities, POTA removed 'threatening harmony between communities' from the ambit of 'terrorist activities'. (Singh 2007:62) But as Ujjwal Kumar Singh points out that far from being a safeguard, the removal actually led to deflection of attention from the communal activities of Hindu fundamentalist organizations and the Act continued to be used selectively against the Muslim community. (Ibid.)

## 5. Laws pertaining specifically to Religion

Anti- Conversion Laws- Since independence several States have passed laws imposing restrictions on religious activities (mainly of Christian missionaries, although no law would explicitly say so) believed to be aimed at converting people from one to another religion. (Harshadrai 2010:51) The central legislature has not till now enacted any law directly dealing with change of religion or its effects. Several Private Members' Bills have been moved in the legislature for this purpose but have remained unsuccessful.

The first among the anti-conversion laws enacted in a State was the Orissa Freedom of Religion Act 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.' (Ibid.)

The second law of this kind, in chronological order, was the Madhya Pradesh Freedom of Religion Act (*Dharma Swatantra Adhinyam*) 1968, also prohibiting conversion by 'force or allurement or by fraudulent means' and requiring, additionally, compulsory registration of every case of conversion with the State authorities.' (Ibid.:52)

The Arunachal Pradesh Freedom of Indigenous Faith Act came into force in 1978, Like the earlier laws, it also prohibits conversions by force or threats, including 'threat of divine displeasure or social excommunication'. The Arunachal Pradesh Act also makes it mandatory for every religious to be registered with the local governmental authorities. (Ibid.53)

Since 2004, a number of other States, have passed anti-conversion laws. Among these are the following:

- Gujarat Freedom of Religion Act 2003;
- Chhatisgarh Freedom of Religion Act 2003;
- Rajasthan Freedom of Religion Act 2005;
- Himachal Pradesh Freedom of Religion 2006 (Ibid.)

All these laws prohibit conversion by force, inducement or undue influence and prescribe penalties in the form of imprisonment or fine. Some of them also require compulsory registration of every case of conversion with the official agencies. The Himachal Pradesh Act of 2006 requires prior notice of an intended conversion to state authorities one month in advance, followed by penalties in case of non-compliance. (Ibid.)

Religious Places Construction, Use and Preservation Laws- Several States have passed laws for regulating construction of religious places and buildings of a public character and control use of public places for religious purposes. In Rajasthan, the

Religious Buildings and Places Act 1954 has been enacted to regulate the construction of public religious buildings and restrict the use of public places for religious purposes. In Madhya Pradesh, the Public Religious Buildings and Places Regulation Act 1984 was enacted 'to regulate the construction of public religious buildings and restrict the use of public places for religious purposes'. The West Bengal Religious Buildings and Places Act 1985 has been enacted to prevent construction or use of public places or disputed lands for religious purposes. The State of Punjab has passed a similar law called Religious Premises and (Eviction and Recovery) Act 1997. In UP, Regulation of Public Religious Buildings and Places Bill 2000 proposed to enact more stringent restrictions on the construction, renovation and use of religious places. The Bill eventually lapsed due to opposition from various quarters. All these state laws require prior permission of local authorities for the construction of a new religious place and also for the conversion of a private religious place into a public religious place. They also impose penalties for the violation of their provisions.(Ibid.:81)

Section 236 of New Delhi Municipal Council Act 1994 also contains a similar provision to control and regulate conversion of non-religious places into places of public worship.(Ibid.:82)

The Religious Institutions (Prevention of Misuse) Act of 1988 declares it an offence to use religious sites to harbour an accused or convicted criminal, or for any other political purpose. This law was enacted with a view to curbing what was called 'Insurgency' in the State of Punjab which was at its height in 1980s.(Ibid.)

The Places of Worship (Special Provisions) Act 1991 was enacted to prohibit 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 as they existed on the day of Independence i.e. 15<sup>th</sup> August 1947. (Ibid.:82)The Act excludes from its ambit the Babri Masjid of Ayodhya which is claimed by some people to have been built on the site where Lord Rama was born millions of years ago and therefore described as *Rama Janmbhoomi*.(Ibid.:83)

Laws relating to management of shrines and pilgrimages of different religious communities have been enacted from time to time both by the central and the state legislatures. There are separate laws to regulate temples, Muslim wakfs, Sikh gurdwaras and Christian churches.(Ibid.:86)

There are also some shrine-specific laws relating to particular religious places belonging to various communities which include the famous shrines of Sri Jagannath (Orissa), Nathdwara (Rajasthan), Mahabaleshwar(Maharashtra), Kashi Vishnath (UP), Sri Venkateshwara (Andhra Pradesh), Mata Vaishno Devi (Jammu & Kashmir), Bodh Gaya (Bihar), Ajmer Dargah (Rajasthan) and St Andrew's Church (Tamil Nadu). Also interesting to note is that there also exist special laws and administrative regulations for the control and management of community-specific pilgrimages, domestic and foreign, including the Mansarovar Yatra of the Hindus, and the Muslim pilgrimage of Haj.(Ibid.)

Communal Riots (Prevention, Control and Rehabilitation of Victims) Bill has been under the central government's consideration since 2005. The Bill proposes preventive measures for communal riots, strict penalties for those promoting such riots, and measures for those who suffer from such an event. This bill lapsed and its revised version was presented again in 2011, this version also lapsed and another revised version presented in 2013, which has been approved by the Cabinet. While this Bill has not yet been passed by the Parliament, something of this kind already operates in Orissa. In Orissa, Prevention of Dangerous Activities of Communal Offenders Act was enforced in 1993. The expression 'communal offenders' is defined in this Act as follows:

"Communal offender" means a person who, either by himself or as a member of or as a leader of a gang or an organization, commits or attempts to commit or abets or incites the commission of an offence punishable under Section 153-A or 153-B of the Indian Penal Code of 1860 or under Chapter XV of the said Code (Sections 295-98) or under subsection (2) of Section 505 thereof - Section 2(b)."(Ibid.:60)

This Act grants the power to the State government to order preventive detention of any communal offender so defined for a period up to one year.(Ibid.)

## 6. Personal Laws

In India, there is plurality of laws in the area of family relations. These laws are usually referred to as Religious Personal Laws (RPLs) and generally in the matters of marriage, divorce, children and succession, various religious communities are governed by their respective RPLs.(Parasher 2008:147) The concept of personal laws has important implications for 'rule of law'. Rule of law implies 'equality before law', can this be stretched to equality before differentiated laws (different laws governing different communities). This also leads to a further question- Does rule of law require a common citizenship or is it compatible with differentiated citizenship?

## 7. Judicial Regulation of Religion

Hobbes put forth an argument that a sovereign could, in order to make contending religious doctrines congruent with the purposes of the state, acquire authority over the interpretation of religion. The sovereign was to be given the task of not only promulgating public purposes, but also preaching a form of religion that was compatible with those purposes. (Mehta 2008: 143)Pratap Bhanu Mehta argues that the Indian justices have taken this Hobbesian mandate seriously. They have not only set the content of public purposes but have also appropriated for themselves the task of interpreting religious doctrines. This has enabled the judiciary to perform two functions simultaneously: protect religion and regulate it.(Ibid.)

Indian courts have faced the crucial question: what practice is entitled to constitutional protection under the freedom of religion clauses. (Ibid.:321)In the very first case dealing with this matter, *Commissioner of Hindu Religious Endowments, Madras v. Sri Lakshmindra Tirtha Swaminar, 1954*, which popularly known as the *Shirur Math* case, the Supreme Court pointed out that the Constitution not only guarantees freedom of religious belief but also freedom of practice. Mehta points out that this case has

provided the first formulation of a staple of Indian jurisprudence on religion: the essential practices test. This means that in order to establish that a policy or law violates the freedom of religion, it has to be shown that the policy in question violates an essential practice of religion. (Ibid.:322)

The courts seem committed to the idea of religion which is cleansed of superstition. *Shastri Yagnapurashdasji v. Muldas Bhundaras Vaisya*, 1966 also known as the *Sastang* case, gives a snapshot into the court's modus operandi. The petitioners in this case claimed that temple-entry legislation, passed in Bombay in 1947 with the objective of throwing open Hindu temples to untouchables, did not apply to them, because they were not Hindus. The court declared the Satsangis to be Hindus on the ground that the teachings of the sect are identical with Hinduism properly understood. (Ibid.:324)

Interestingly, Indian judges have engaged in extensive scriptural exegesis, as if they were the source of law and legitimacy. (Ibid.:326) The act of interpreting religious texts serves a dual purpose: on the one hand the courts are able to demonstrate that the authority of their rulings is derived from both modern constitutional provisions and structurally sanctioned foundations; on the other hand the courts provide internal reasons to the religious communities and demonstrate that there is little in the content of social reform efforts that is a threat to their religion, as understood in its essentials. (Ibid.:327)

The constitutional validity of the anti-conversion laws of Orissa and Madhya Pradesh was put under challenge in the Supreme Court in *Stainislaus v State of Madhya Pradesh* (1977) but the court upheld the validity of laws, pointing that the rights to propagate religion guaranteed by Article 25 of the Constitution does not mean the right to convert others to one's own religion:

It has to be remembered that Article 25(1) guarantees freedom of conscience to every citizen, and not 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 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. (Ibid.:333)

The Supreme Court interpreted the freedom of clause simply as the right not to be targeted; conversion by another is objectionable because it differs with some notion of what is the proper way for important changes to be come about in an individual's life. (Ibid.334)

In *Hindutva* cases, ( *Manohar Joshi v Nitin Bhaurao Patil*, *Ramesh Yeshwant Prabhoo v Shri Prabhakar Kunte*, *Bal Thackray v PK Kunte* (1996), Justice JS Verma observed that the terms '*Hindu*' and '*Hindutva*' have more than a mere religious connotation and did not, therefore, by themselves fall within the scope of 'corrupt practice' as envisaged by the election law of 1951. Many cases regarding Article 30 of the Indian Constitution dealing with educational institutions set up by the minority have been brought into the courts. (Harshadarai 2010:47) In *St Stephen's College v University of Delhi* (1992) 1 SCC 558 the Supreme Court held that minority intake in minority institutions should be limited to 50 percent in the interest of national integration. It is pertinent to note that there is no law or judicial decision to ensure a reasonable presence of children from the minority communities in the educational institutions established and run by the majority community (e.g., the chain of Sana tan Dharma and Hindu Colleges). (Ibid.:37)

## 8. Conclusion

Religion has been regulated in India in myriad ways. The framework for regulation is provided in the Constitution itself. Not only the right to freedom of religion is subject to public order, health and morality, the 7th Schedule of the Constitution mentions various matters pertaining to religious affairs on which the Indian state has power to legislate. The Indian Constitution thus simultaneously protects religion as well as regulates it. Despite the misconception that personal laws have the sanction of the Constitution by the virtue of Article 25 of the Constitution Entry 5 of the Concurrent List in 7th Schedule of the Constitution grants the power to both Parliament and State Legislatures to make laws with respect to all matters in respect of which parties in judicial proceedings were immediately before the commencement of the constitution subject to their personal law.

Marc Galanter pointed out that there are different modes of regulating and shaping religion. Liberals favour external regulation in which the state promulgates its public purposes: it defines the areas where these standards will prevail and leaves it up to religion to accommodate itself to these standards. But another mode of regulating religion can be more internal in which the state might try to define what the proper practice of a particular religion requires. It could go even further and argue that the public secular practices are themselves the best expression of particular religious doctrines or are at least consistent with it. The Indian legislatures and courts have done much more of the latter than the former. (Mehta 2008:320)

The various laws of the land such as Indian Penal Code, Representation of People's Act, 1951, Army Act, Air Force Act, Extraordinary Laws such as UAPA, TADA contains several provisions which either regulates religious speech and activities of religious associations or provide protection to religious sentiments.

Also, there are specific laws pertaining to specific matters relating to religion such as the Anti-Conversion Laws passed by various state legislatures, several states have enacted laws to regulate construction of religious places and buildings of a public character and control use of public places for religious purposes, there are laws relating to management of shrines and pilgrimages of different religious communities which have been enacted from time to time by the central and the state legislatures.

The two important legislations passed by the central government to regulate religious affairs are The Religious Institutions (Prevention of Misuse) Act of 1988 which makes it an offence to use religious sites to harbour an accused or convicted criminal, or for any political purpose and The Places of Worship (Special Provisions) Act 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 as they existed on 15th August 1947.

Apart from these laws, there are Religious Personal Laws (RPLs) and generally in the matters of marriage, divorce, children and succession, various religious communities are governed by their respective RPLs. The concept of personal laws has important

implications for 'rule of law'. Rule of law implies 'equality before law', can this be stretched to equality before differentiated laws (different laws governing different communities). This also leads to a further question- Does rule of law requires a common citizenship or is it compatible with differentiated citizenship?

Apart from the legislatures, the Indian courts have played a prominent role in regulating religion. Indian justices have not only set the content of public purposes, they have also has taken appropriated for themselves the task of interpreting religious doctrines. This has enabled them to perform two functions simultaneously: protect religion and regulate it.

Upendra Baxi says, "Rule of law is always and everywhere a terrain of people's struggles to make power accountable, governance just and state ethical."(Baxi 2004:327)Perhaps it can be reformulated as that Rule of Law is a terrain of state power to make civil society accountable, religion just and people ethical.

It is difficult to sustain Ugo Mattei's distinction between rule of law system and Oriental view of the law. Though on a cursory look, it may appear that laws (more specifically, personal laws) derive their authority from religion, but we should not overlook the fact that it is the state authorities (both courts and legislatures) that define what is religion. Similarly Max Weber's distinction between rational legal system (western) and irrational legal system (Asian) can not account for the peculiarity of religion-law (state) interaction in the Indian context. Weber believed that in Asian Countries, it is wise men who allegedly determined what was best in a given situation based on their own judgment and interpretation of customary norms rather than by appeal to fixed standards or principles of general applicability. Perhaps Weber thought wise men to be those deriving their authority from religion. But in Indian context, it is justices (not deriving authority from religion, but rather from the Constitution) who engage in interpretation of religious doctrines in a manner compatible with the public purpose of the state.

The extensive regulation of religion in India perhaps can be viewed as an effort to incorporate religion within the rule of law framework (though this framework is necessarily different from the liberal rule of law framework) Rule of law thus needs to be redefined not just as limiting the arbitrary power of the state but also limiting the arbitrary power of civil society. Rule of Law in India is not only a promise of rights- in this case, the right to freedom of religion, rather it also means subjection of religion to rule/ law. Thus in the Indian context law (based on "reason") regulates religion (based on "emotion").

stitution which not only guarantees freedom of religious belief but also freedom of free practice of religion,

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