

HINSA VIRODHAK SANGH V. MIRZAPUR MODI KURESH JAMAT:
A CRITIQUE OF THE STATE ENFORCEMENT OF TOLERATION

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This paper criticizes the Hinsa Virodhak Judgment for attempting to enforce religious toleration among the various communities and sects in India by upholding the constitutional validity of some local resolutions pertaining to the closure of slaughter houses during a Jain festival in Ahmedabad. It argues against intervention of the agencies of the state in regulating and disciplining inter community interactions on the pretext of enforcing toleration for its adverse consequences on the private enjoyment of rights by persons, citizens and groups which is so crucial for the survival and flourishing of the plural Indian collectivity. It is important for the state to keep away from the private beliefs, practices and avocations of the people unless they pose a greater law and order problem for society at large. The paper tries to present tolerance as an intrinsic value decoupled from its majoritarian underpinnings as the unique guiding principle for Indian civilization which ought not be enforced by issuing legal fiats.

A recent decision of the Supreme Court in *Hinsa Virodhak Sangh v. Mirzapur Modi Kuresh Jamat*¹ (hereinafter ‘Hinsa Virodhak’) saw the constitutional validity of some resolutions of the Ahmedabad Municipal Corporation pertaining to the closure of slaughter houses for nine days of a Jain festival being upheld as a reasonable restriction under Article 19(6)

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¹ A.I.R. 2008 S.C. 1892.

of the Constitution given the need for promotion of respect and recognition of beliefs and practices of another without interference. Justice Markandey Katju may have been guided by the earnest desire to promote the spirit of religious toleration among various communities and sects in the country in arriving at this conclusion. This paper seeks to establish that the intervention of the agencies of the state in disciplining and regulating inter community interactions on the pretext of enforcing toleration is likely to pose a threat to the private endangering the plural ethos of the Indian collectivity. This is more so the case when policy decisions increasingly reflect the homogenizing agenda of the majoritarian brand of secularism.

The paper is divided into five parts. Part I briefly evaluates the Supreme Court's decision in the *Hinsa Virodhak* case and raises a few crucial questions which we aim at addressing in subsequent parts. In Part II, we examine the changing paradigms of secularism and highlight some of the concerns which have arisen after the erosion of the 'wall of separation' in a country like the United States. We argue that the association of the agencies of the state with religion, explicitly or implicitly, is likely to pose problems to the private enjoyment of rights by persons, citizens and groups when policy decisions are informed only by the norms governing the majority. Part III succinctly deals with India's experience with classical secularism. We contend that D.E. Smith's complete disentanglement of the state from religion thesis has not been borne out in almost six decades of the working of the Indian Constitution. We elaborate this further in Part IV where we look at the changing judicial attitudes towards the accommodation of minorities. The employment of the 'essential practices' doctrine and the 'national integration' rhetoric have in many ways constricted religious freedoms and made minorities suspicious of the secularism project which is perceived as endeavouring to obliterate their distinct ways of living. In Part V, we finally explore the possibilities of decoupling the uniquely Indian idea of toleration from its majoritarian underpinnings through a review of scholarly writings on the subject and suggest that the democratic Indian state should have nothing to do with the private beliefs, practices and avocations of its citizens and groups unless they pose a greater law and order problem for society at large.

I. THE CASE - AN EVALUATION

Hinsa Virodhak came to the Supreme Court as an appeal by special leave against a decision of a Division Bench of the Gujarat High Court.² The common grievance of the respondents herein (writ petitioners at the Gujarat High Court) - a registered public charitable trust working to safeguard the interests of the persons engaged in the business of slaughter and sale of livestock, mutton etc., an Ahmedabad-based association of people who were engaged in the sale of mutton in Ahmedabad and an individual carrying on the business of selling mutton in Ahmedabad, at the Gujarat High Court was that with a view to appease the Jain community the State Government and the Ahmedabad Municipal Corporation had, from time to time, taken decisions/passed resolutions for closure of municipal slaughter houses in Ahmedabad during the period of the Paryushan festival since 1993.³ They contended that this resulted in a serious violation of their fundamental right to carry on trade and business in livestock, meat etc as guaranteed under Article 19(1)(g) of the Constitution.⁴ It was also submitted that the decision was totally arbitrary and discriminatory and hence violative of Article 14.⁵ The respondents were of the opinion that the resolutions passed by the Municipal Corporation were a response to the demands made by some Jain organizations and as such had nothing to do with the general public interest.⁶ The right to food of one's choice constituted an integral part of the right to life under Article 21 and as such could not be made subject to the whims and fancies of a particular community.⁷

² State of Gujarat v. Mirzapur Moti Kureshi Kassab Jamat and Ors., A.I.R. 2006 S.C. 212..

³ The two resolutions of the Standing Committee of the Municipal Corporation for the closure of municipal slaughter houses dated 14.8.1998 and 29.8.1999 were passed under Section 466(1)(D)(b) of the Bombay Provincial Municipal Corporation Act, 1949 which reads as follows: "The Commissioner may make standing orders consistent with the provisions of this Act and the rules and by-laws in respect of the following matters, namely:

.....
(D)(b) fixing the days and the hours on and during which any market, slaughter-house or stock-yard may be held or kept open for use and prohibiting the owner of any private market from keeping it closed without lawful excuse on such days or during such hours."

⁴ *Hinsa Virodhak Sangh v. Mirzapur Modi Kuresh Jamat*, A.I.R. 2008 S.C. 1892.

⁵ *Id.* ¶13.

⁶ *Id.*

The Municipal Corporation and the State Government of Gujarat on the other hand, argued that the impugned resolutions were valid and that there was no violation of any constitutional provision.⁸ Through references to the Supreme Court's decisions in *Haji Usmanbhai Qureshi v. State of Gujarat*⁹ and *Municipal Corporation v. Jan Mohammed*,¹⁰ it was submitted that non-vegetarians ought to respect the sentiments of the Jain community and that they had no reason to complain against the closure of the slaughter houses simply because it was likely to adversely affect their business for a few days.¹¹ All claims pertaining to the violation of Articles 14, 19(1)(g) and 21 were refuted.¹²

The Division Bench of the Gujarat High court declared the impugned resolutions to be constitutionally invalid.¹³ It held that the petitioners' right to freedom of trade could not be curtailed or abridged merely at the request of a particular community which feels that people should not eat non-vegetarian food during a particular festival. What food people ate was a private affair and not for the Court to pronounce upon.¹⁴

However, the Supreme Court reversed this judgment and held that the resolutions were constitutionally valid. The closure of municipal slaughter houses for a period of nine days during the Paryushan festival was considered to be a reasonable restriction under Article 19(6). Although the eating of food of one's choice was recognized to be an element of the right to privacy flowing from the guarantee of personal liberty in Article 21, a partial restriction for a limited period was thought to be permissible. Justice Markandey Katju opined that the nine days restriction was for a very short period of time. He suggested that non-vegetarians could surely become vegetarians and the dealers in meat could abstain from their

⁷ *Id.*

⁸ *Id.* ¶14.

⁹ A.I.R. 1986 S.C. 1213.. In this case, a Constitution Bench of the Supreme Court upheld the ban on slaughter of bulls and bullocks below the age of 16 years.

¹⁰ A.I.R. 1986 S.C. 1205.. In this case, closure of the municipal corporation slaughter houses by the Corporation for 7 days i.e. during Janmasthami, Mahatma Gandhi's Birthday, 30th January, Mahavir Jayanti, Ram Navami, etc. was held to be valid.

¹¹ *Hinsa Virodhak Sangh v. Mirzapur Modi Kuresh Jamat*, A.I.R. 2008 S.C. 1892.

¹² *Id.*

¹³ *Id.*

¹⁴ *Id.*

business for nine days in a year out of respect for the sentiments of the Jain community.¹⁵ He referred to the Supreme Court's decision in *Om Prakash v. State of Uttar Pradesh*¹⁶ where a municipal bye-law prohibiting sale of meat, fish and egg in Rishikesh was held to be valid considering the fact that:

*"most people in Rishikesh come for religious purposes and members of several communities are strictly vegetarian, and it is such people who come in large numbers to visit Haridwar, Muni-Ki-Reti are vegetarians."*¹⁷

It is clear from the tenor of writing that the Judge earnestly desired to promote a spirit of religious toleration among the various communities. It may indeed not be unreasonable to expect respect for a particular religious or cultural commemoration for a limited period of time in the larger social interest. But should the Court have concerned itself with the task of enforcing such behaviour? Should the agencies of the state involve themselves in the exercise of defining the contours of toleration especially at a time when they are being increasingly scrutinized by the minorities for their majoritarian biases? Can a selective enforcement of tolerance be justified?

We argue in this paper that the intervention of the agencies of the state in disciplining and regulating inter community interactions on the pretext of enforcing toleration is likely to pose a threat to the private enjoyment of rights by persons, citizens and groups, thereby endangering the plural ethos of the Indian collectivity. This is more so the case when policy decisions increasingly reflect the homogenizing agenda of the majoritarian brand of secularism. We believe that the discourse on toleration must be amended to bring it in line with the diverse and divergent individual and collective goals of the people of different communities and made especially accommodative of the distinct pursuits of minorities. We are aware of the fact that a large section of the Jain community has been persistently demanding minority status for itself given its distinct culture and beliefs,¹⁸ and in fact, many states now recognize Jains as minorities

¹⁵ *Id.* ¶29.

¹⁶ A.I.R. 2004 S.C. 1896.

¹⁷ *Id.*

under legislations constituting State Minority Commissions.¹⁹ Our problem however, is with the homogenizing language of enforced tolerance that the Court employs in this case.

II. THE CHANGING PARADIGMS OF SECULARISM

The onward march of modernity informed by Western values of liberty and equality was believed to uniformly inspire a progressive embrace of rational and scientific thinking. Forces antithetical to such progress were expected to be gradually trumped by the new way of life. Secularism, understood as the detachment of the ‘temporal’ from the ‘religious’ was thought to be the natural concomitant of such societies. The machinery of the modern nation state would regulate the public dealings of its citizens, whereas the religiosity of its people was to remain confined to the private realm, irrelevant for the functioning of the state. As per Donald Smith, a secular state is one which “guarantees individual and corporate freedoms of religion, deals with the individual as a citizen irrespective of his religion, is not constitutionally connected to a particular religion, nor seeks either to promote or interfere with religion.”²⁰ The infrastructure of modernity, Peter Berger expected, is supposed to create, pretty much by its own accord, “a liberated territory” populated by “an increasing number of individuals who look upon their world and their own lives without the benefit of religious interpretation.”²¹ In fact, sociologists as eminent as Max Webber and Steve Bruce had suggested that once a state in a modern industrial society adopted a secular constitution, the social significance of religion would begin to decline, which in turn would erode the “plausibility of the supernatural in the minds of individuals.” However, as Ronojoy Sen argues, the thesis of the progressive secularization of society has not

¹⁸ Bal Patil, *Is Jain Minority Right in India Receiving a Fair Deal?*, November 27, 2006, <http://www.countercurrents.org/hr-patil271106.htm> (last visited on October 12th, 2009).

¹⁹ *Id.* (Jains have been declared as minorities in Maharashtra, Karnataka, Madhya Pradesh, Uttar Pradesh, Rajasthan, Delhi, West Bengal, Uttarakhand and Jharkhand. Gujarat is the only State with a sizeable Jain population not to have accorded minority status to the community.)

²⁰ Donald Eugene Smith, *India as a Secular State* in SECULARISM AND ITS CRITICS 178 (Rajeev Bhargava ed., 1998).

²¹ PETER L. BERGER, *THE SACRED CANOPY: ELEMENTS OF A SOCIOLOGICAL THEORY OF RELIGION* 129 (1967).

been borne out.²² Notwithstanding the forces of modernity and Westernization, religion and religious beliefs continue to be a significant source of sustenance for the vast multitude in countries like India,²³ remain major determinants of norms and status in the social hierarchy and are being increasingly put to use by religious minorities to assert claims against the state for preferential treatment given their distinct group identities and their unequal social situation. Even the staunchest critics of the idea of the religionization of the public sphere concede the futility of arguing for a simple correlation between modernization and secularization.²⁴

Given religion's intrusion in the public sphere, the state policy of complete ambivalence towards religion has been long abandoned. Even in a country like the United States, where the quest for 'political assimilation'²⁵ between component units led to the erection of a rigid Jeffersonian 'wall of separation' between the church and the state,²⁶ the visible arms of the government now increasingly interact, negotiate and accommodate religion and religion based claims. As stated in *Lemon v. Kurtzman*:

*"we can only dimly perceive the lines of demarcation in this extraordinarily sensitive area of constitutional law . . . the line of separation . . . is a blurred, indistinct, and variable barrier."*²⁷

The State was originally prohibited to hinder the free exercise of religion or force citizens to act in accordance with religious doctrines.²⁸ In other words, the federal government was "expected to secure both the

²² Ronojoy Sen, *Legalizing Religion: The Indian Supreme Court and Secularism 2007*, (East-West Centre), <http://www.eastwestcenter.org/fileadmin/stored/pdfs/PS030.pdf>.

²³ Even Peter Berger now accepts that the "world today, with some exceptions . . . is as furiously religious as it ever was, and in some places more so than ever." See *THE DESECULARIZATION OF THE WORLD: RESURGENT RELIGION AND WORLD POLITICS 2* (Peter Berger ed., 1999).

²⁴ PIPPA NORRIS & RONALD INGLEHART, *SACRED AND SECULAR: RELIGION AND POLITICS WORLDWIDE* 304 (2004).

²⁵ GARY J. JACOBSON, *THE WHEEL OF LAW: INDIA'S SECULARISM IN COMPARATIVE CONSTITUTIONAL CONTEXT* 59 (2003).

²⁶ DANIEL L. DREIBACH, *THOMAS JEFFERSON AND THE WALL OF SEPARATION BETWEEN CHURCH AND STATE* (2002).

²⁷ 403 U.S. 602 (1979).

²⁸ U.S. CONST. amend. 1.

positive freedom to freely act on one's beliefs and the negative freedom against a coercive partnership if the state were to establish a religion."²⁹ Today however, as Penelop Foster Portuguese's insightful research reveals, free exercise is the standard, and negative freedom has been replaced with the private right of corporations to make demands on the national government.³⁰ Justice Stewart complained in 1963 that the "single constitutional standard of 'separation of church and state' is an oversimplification."³¹ Exasperation with the strict definition of the 'wall of separation' caused Chief Justice Rehnquist to go to the extent of asserting that Jefferson did not write the constitution.³²

The erosion of the 'wall of separation' has brought into limelight serious concerns pertaining to the nature and width of the state-religion interface. When is it desirable for the state to intervene in religion? Who ascertains if a particular intervention is based on a compelling state necessity? What if the principle of neutrality is breached only to impose dominant notions of everyday existence on unwilling individuals? To what extent can a state render deference to the claims of cultural groups and subgroups to differential treatment on the basis of distinct identities? How far can state enforcement of toleration be justified given its perceived majoritarian leanings?

These questions have been deliberated upon for a long time now, and without any definitive conclusions. Consensus and convergence over a particular set of answers seems at this moment only a distant dream. Revisiting all the debates that have been played out over the years with much passion and zeal is far too ambitious a venture for an academic paper. Our objectives are relatively modest. We merely wish to establish through a critique of the *Hinsa Virodhak* judgment that the intervention of the agencies of the state in disciplining and regulating inter community interactions is likely to pose a threat to the private enjoyment of rights by persons, citizens and groups. This is more so the case when policy decisions are informed only by norms governing the majority.

²⁹ Penelop Foster Portuguese, *Private Motives in the Public Domain: Religious Identity Groups in America* available at http://www.allacademic.com/meta/p268893_index.html (last accessed on October 20th, 2009).

³⁰ *Id.*

³¹ *Abington Township School District v. Shempp*, 374 U.S. 203 (1963).

³² *Wallace v. Jaffree*, 472 U.S. 38 (1985).

*Braunfeld v. Brown*³³ is an interesting case dealing with the members of the Orthodox Jewish Faith who claimed they were being unfairly penalized for their religious beliefs. In 1959, a Pennsylvania Statute banned merchants from selling retail items on Sundays.³⁴ Braunfeld, a member of the Orthodox Jewish faith, claimed that because he was unable to operate his retail shop from Friday night through Saturday evening, his only choice was To operate the shop on Sundays in order to remain competitive and profitable. He claimed that not only was the statute a violation of the Jews' right to practice their religion (a free exercise violation),³⁵ the state was effectively establishing religious practices by punishing non-Christians for breaking Christian cannon (working on Sundays). The Statute was however not struck down by the Supreme Court. Chief Justice Warren asserted that the law was valid as it served a legitimate state purpose in providing for the general welfare by establishing a day of rest.³⁶ The imposition of an indirect burden on religious observance was not accepted as a deterrence for the state to advance its secular goals. It was Justice Brennan's dissenting opinion which agreed with the claim that the Statute prohibited the free exercise of the appellant's religion. The Statute may not have effectively established a religion, but there still was an unfair curtailment of religious liberty.³⁷ Justice Stewart agreed with Brennan and commented: "*Pennsylvania has passed a law which compels an Orthodox Jew to choose between his religious faith and*

³³ 366 U.S. 599 (1961).

³⁴ 18 Purdon's PA Statute Ann. (1960 Cum. Supp.) 4699.10 provided: "Whoever engages on Sunday in the business of selling, or sells or offers for sale, on such a day, at retail, clothing and wearing apparel, clothing accessories, furniture, housewares, home, business or office furnishings, household, business or office appliances, hardware, tools, paints, building and lumber supply materials, jewelry, silverware, watches, clocks, luggage, musical instruments and recordings, or toys, excluding novelties and souvenirs, shall upon conviction thereof in a summary proceeding for the first offense, be sentenced to pay a fine of not exceeding one hundred dollars (\$100), and for the second or any subsequent offense committed within one year after conviction for the first offense, be sentenced to pay a fine of not exceeding two hundred dollars (\$200) or undergo imprisonment not exceeding thirty days in default thereof."

³⁵ Members of the Orthodox Jewish faith are supposed to use Friday evening and all day Saturday as a "Sabbath" day of rest, and abstain from all manner of work.

³⁶ *Braunfeld v. Brown*, 366 U.S. 599 (1961) at 602-03.

³⁷ *Id.* at 610-17

his economic survival. That is a cruel choice. It is a choice which I think no State can constitutionally demand."³⁸

The approach of the Court significantly resembles Justice Katju's rationale in *Hinsa Virodhak* although there was no need for the explicit use of the language of tolerance to regulate the conduct of the Jews in this case. The dissenting voices however, clearly brought out the problem at hand. When an agency of the state draws from and aligns itself with majoritarian norms of living in utter disregard of the equally respectable norms and interests of other individuals and groups, questions will be raised about the impartiality of the state machinery. We shall examine these concerns in greater depth in the light of India's experience with secularism and tolerance in the subsequent parts of the paper.

III. SECULARISM IN INDIA- THE CLASSICAL VERSION

Donald Eugene Smith, in his famous work 'India as a Secular State', conceptualized secularism as a product of the liberal-democratic tradition of the West. To him, a secular state involved three sets of relations- religion and the individual (freedom of the individual); the state and the individual (citizenship); and the state and religion (separation of church and state). These relations can be classified under the three broad principles of liberty, equality and neutrality. For Smith, a secular state is one where freedom of religion is guaranteed, all citizens are equal irrespective of their religion and the state is not connected in any way to religion.³⁹

Smith opined that the Indian Constitution provided a relatively sound basis for the building of a secular state. He felt that there was a good chance that twenty years from the 1963 publication of his work many of India's constitutional anomalies regarding the secular state will have disappeared.⁴⁰ He wrote: "*The forces of Westernization and modernization at work in India are all on the side of the secular state. Industrialization, urbanization, the break-up of the joint family system, greatly increased literacy, and opportunities for higher education- all tend to promote the general secularization of both*

³⁸ *Id.* at 616

³⁹ D.E. SMITH, INDIA AS A SECULAR STATE (1963).

⁴⁰ *Id.*, at 14.

private and public life."⁴¹ However, many of the anomalies that troubled Smith- the existence of separate personal laws for religious groups, the intervention of the state in religious institutions and practices and reservations for groups defined by caste continue to be integral components of the Indian experience.

In fact, the Smithian version of secularism is insufficient to explain the Indian engagement with the idea. There exist significant departures from the notion of complete disentanglement of the state from religion in the Constitution itself.⁴² We do not aspire to undertake a thorough investigation of the working of secularism in India. Our objective is to show is that the thesis of the progressive secularization of society has encountered a myriad of problems since independence. Through a critique of the *Hinsa Virodhak* judgment, we try to point out that approaches towards secularism rooted in majoritarian aspirations pose major threats to individuals and groups pursuing competing interests and goals. Tolerance and respect for religious sentiments may definitely be an imperative prerequisite for the survival and progress of the Indian collectivity. But the selective enforcement of toleration by the agencies of the state through legal fiats may not be a viable solution, especially at a time when they seem to be increasingly aligning with and endorsing the dominant understanding of secularism. It runs the risk of being vociferously resented by groups reposing faith in divergent norms of daily regulation. At the same time, as seen in this case, toleration may be achieved at the cost of compromising with the constitutional guarantees of the people.

IV. CHANGING JUDICIAL ATTITUDES TOWARDS MINORITIES- THE ESSENTIAL PRACTICES DOCTRINE AND THE NATIONAL INTEGRATION RHETORIC

Before elaborating any further, we briefly examine the shifting attitudes of the higher judiciary towards religion and religious minorities in

⁴¹ Smith, *supra* note 23, at 224.

⁴² INDIA CONST. art. 25 for example entitles all persons to the freedom of conscience and the right freely to profess, practice and propagate religion but makes it subject to public order, morality and health. It also empowers the State to provide for social welfare and reform or the throwing open of Hindu religious institutions of a public character all classes and sections of Hindus.

particular. The trend towards the rationalization and homogenization of religion and religious practices, particularly of Hinduism has in many ways constricted the sphere of religious freedom. Though premised on the liberal democratic notions of the framers of the Constitution, the judicial discourse on secularism has tended to significantly overlap with the ontology of Hindu nationalism.⁴³ The emphasis on conformity of religious communities with particular ways of life has made minorities more suspicious of the secular project.

The pronouncements of the Supreme Court have been critical in determining the sphere of religion in public life. It has taken recourse to the 'essential practices doctrine'⁴⁴ to carve out a distinction between the sacred and the secular. One of the most notable features of its operation is the constant attempt of the Court to appreciate religion according to the prerogatives of a modern state rather than unquestionably accepting the perspectives of its practitioners.⁴⁵ This assumption by the judges of the theological authority to determine which tenets of a faith are 'essential' to any faith and their striking down of those 'essential' tenets which conflict with the dispensation of the Constitution makes them unusually powerful.⁴⁶ With the employment of such a stripped down rationalist definition of religion and classifying religious practices that fall outside this grid as 'superstition' or 'accretion', the Court has dispensed with pluralism and popular practices.⁴⁷

⁴³ Sen *supra* note 25. Sen believes that this strengthening of the hands of the Hindu right, whose ideology is based on a monolithic conception of Hinduism and intolerance of minorities has led to the putting in place of a circumscribed multiculturalism in the name of secularism by the Indian state.

⁴⁴ Scholars generally trace the 'essential practices doctrine' in India to Dr. B.R. Ambedkar and his famous statement in the Constituent Assembly during debates on the proposed codification of Hindu law: "*The religious conceptions in this country are so vast that they cover every aspect of life from birth to death. There is nothing extraordinary in saying that we ought to strive hereafter to limit the definition of religion in such a manner that we shall not extend it beyond beliefs and such rituals as may be connected with ceremonials which are essentially religious.*" See CONSTITUENT ASSEMBLY DEBATES (PROCEEDINGS) – VOLUME VII, available at <http://164.100.47.132/LssNew/constituent/vol7p18b.html>.

⁴⁵ Sen *supra* note 25.

⁴⁶ Rajeev Dhawan & Fali S. Nariman, *The Supreme Court and Group Life: Religious Freedom, Minority Groups and Disadvantaged Communities*, in SUPREME BUT NOT INFALLIBLE: ESSAYS IN HONOUR OF THE SUPREME COURT OF INDIA 259 (B.N. Kirpal ed. 2000).

⁴⁷ Sen *supra* note 25.

One of the few early cases decided under the Constitution where the Court showed a willingness to leave scope for a minority community to regulate its affairs as per norms internal to it was *Sardar Syedna Taher Saifuddin v. State of Bombay*.⁴⁸ In this case, the Bombay Prevention of Excommunication Act of 1949 was challenged by the Da'i-al-Mutlaq, the religious head of the Dawoodi Bohra community. The majority decision rendered by Justice K.C. Dasgupta declared the Act unconstitutional by holding that "*excommunication cannot but be held to be for the purpose of maintaining the strength of the religion.*"⁴⁹ Justice N.R. Ayyangar concurred, holding that "*The power of excommunication for the purpose of ensuring the preservation of the community has therefore prime significance in the religious life of every member of the group.*"⁵⁰ Without couching the judgment in the rights language, the Court tacitly recognized the status of distinct legal systems and their customs and traditions as being protected by provisions of Part III of the Constitution.⁵¹ Most subsequent decisions have however, not been so deferential to the divergent ways of living prevailing in the country.

In *Mohammed Ahmed Khan v. Shah Bano*⁵², the Supreme Court addressed the plight of destitute divorced Muslim women. It made it obligatory for Muslim men to maintain a divorcee beyond the three month post-divorce '*iddat*' period under section 125 of the Criminal Procedure Code, 1973. This decision was hailed as a landmark in the fight for social justice for Muslim women. It reflected the Court's concern that secular law applies uniformly to all citizens irrespective of religion. The decision however, provoked sharp reaction from Muslims all over the country. The interpretation of Qur'anic verses in its attempt to seek justification for the stand in religion did not go down well with large sections of the

⁴⁸ A.I.R. 1962 SC 853.

⁴⁹ *Id.* at 869.

⁵⁰ *Id.* at 876.

⁵¹ Shubhankar Dam, *Legal Systems as Cultural Rights: Traditional Legal Systems Under the Indian Constitution*, 16(1) INDIANA INT'L. & COMP. L. REV., 295, 332 (2006). P.K. Tripathy though, is critical of the majority opinion for its failure to give primacy to the rights of individuals over religious denominations. See P.K. Tripathy, *Secularism: Constitutional Provision and Judicial Review*, 8(1) JOURNAL OF INDIAN LAW INSTITUTE 1 (1966).

⁵² A.I.R. 1985 SC 945.

community.⁵³ In addition, it was apprehended that the uniform civil code that the decision heralded would be used to undermine their religious freedom and impose upon them the narrow nationalism of the Hindu right.⁵⁴ They saw in the judgment an attempt at the total assimilation of minority groups, thereby gravely threatening their distinct identity.

*Sarla Mudgal v. Union of India*⁵⁵ saw four women sue for bigamy after their husbands had converted to Islam in order to marry again without first divorcing them. The Supreme Court invalidated the second marriages as they violated Hindu personal law. But rather than squarely condemn the defendants for their conversions to Islam, the Court unambiguously laid the blame for fraudulent conversions to Islam on the plurality of personal laws in India. It called on the government to enact a uniform civil code for people of all religions.⁵⁶ The Court further noted that State reforms of Hindu, Buddhist, Jain and Christian personal laws showed that these groups “had forsaken their sentiments for the cause of national unity,” while other communities had not done so.⁵⁷ In addition, the Court implicitly distinguished between ‘true Indians’ and those who engaged in religious practices which deviated from rituals of the majority: “Those who preferred to remain in India after [the partition of India], fully knew that the Indian leaders did not believe in a two-nation or three-nation theory and that in the Indian Republic there was to be only one nation-the Indian Nation-and no community could claim to remain a separate entity on the basis of religion.”⁵⁸

A significant chunk of the Muslim population saw these two decisions not as statements of social reform, but as statements about the perceived problems which Muslims posed to national unity. The call for a uniform civil code has always been viewed by minorities as a threat to their constitutionally protected right to manage their own religious affairs.

⁵³ Anika Rahman, *Religious Rights Versus Women's Rights in India: A Test Case for International Human Rights Law*, 28 COLUM. J. TRANSNAT'L L. 473, 479 (1990).

⁵⁴ Parmanand Singh, *The Problem of Minorities and the Constitution-A Prefatory Note*, in MINORITIES AND STATE AT THE INDIAN LAW: AN ANTHOLOGY 7 (Tahir Mahmood ed., 1991).

⁵⁵ A.I.R. 1995 SC 1531.

⁵⁶ *Id.*, at 1533.

⁵⁷ *Id.*, at 1538.

⁵⁸ *Id.*, at 1539.

Some of the fears were indeed justifiable. In addition to its concern for social justice, the Court has often tended to use the national integration rhetoric in its call for a uniform civil code implying that minority groups would be better off forgoing 'disparate loyalties' to their religion in favour of allegiance to the Indian nation.

The disenchantment of religious minorities over perceived injustices of the Indian legal establishment has been coupled with the rise of Hindu nationalism in the country. With mainstream political parties like the Bharatiya Janata Party and the Shiv Sena at the helm, the movement advocates the establishment of a Hindu state, and calls for a return to a sense of Hindu identity called 'Hindutva'.⁵⁹ The 'Hindutva' election propaganda of these political parties was challenged in a series of cases involving BJP and Shiv Sena candidates in elections in the State of Maharashtra.⁶⁰

The Hindutva cases gave the Supreme Court an opportunity to clarify its position on attempts made by certain elements in the polity to give a majoritarian colour to the idea of secularism. While it was asked to pronounce upon the legality of the use of the term 'Hindutva' in election campaigning, the attitude it demonstrated by leaning towards interpretations of the norms pertaining to shared living proffered by the Hindu nationalists was crucial in further alienating the minorities. Under sections 123(3) and 123(3A) of the Representation of the People act, 1951, the use of religion or religious symbols to promote one's candidacy or to affect adversely the election of another candidate constitutes a corrupt practice and is punishable

⁵⁹ 'Hindutva' literally means "Hinduness" and is aimed at ensuring political, cultural and religious supremacy of Hinduism.

⁶⁰ The twelve cases were, *Manohar Joshi v. Nitin Bhaurao Patil*, 1995 S.C.A.L.E. 30; *Prabhoo v. Prabhakar Kasinath Kunte et al.*, 1995 S.C.A.L.E. 1; *Bal Thackeray v. Shri Prabhakar Kasinath Kunte et al.*, 1995 S.C.A.L.E. 1; *Ramchandra G. Kapse v. Haribansh Ramakbal Singh*, 1995 S.C.A.L.E. 60; *Pramod Mahajan v. Haribansh Ramakbal Singh & Anr.*, 1995 S.C.A.L.E. 60; *Sadhvi Ritambhara v. Haribansh Ramakbal Singh & Anr.*, 1995 S.C.A.L.E. 60; *Ramakant Mayekar v. Smt. Celine D'Silva & Anr.*, 1995 S.C.A.L.E. 72; *Chhagann Bhujbal v. Smt. Celine D'Silva & Anr.*, 1995 S.C.A.L.E. 72; *Balasaheb Thackeray v. Smt. Celine D'Silva & Anr.*, 1995 S.C.A.L.E. 72; *Moreswar Save v. Dwarkadas Yashwantrao Pathrikar*, 1995 S.C.A.L.E. 85; *Chandrakanta Goyal v. Sohan Singh Jodh Singh Kohli*, 1995 S.C.A.L.E. 88; *Shri Suryakant Venkatrao Mahadik v. Smt. Saroj Sandesh Naik*, 1995 S.C.A.L.E. 92.

by law.⁶¹ In *Prabhoo v. Prabhakar Kasinathe Kunte et al.*,⁶² the Court led by Chief Justice Jagdish Sharan Verma, found that references to Hindutva, a movement for 'Hindu awakening', was not in violation of the law since Hindutva represented a "way of life in the sub-continent" and, as such, was distinguishable from Hinduism. By legitimizing such an interpretation, the Court became "*wittingly or unwittingly, a medium for the achievement of antiseccular aspirations ...*"⁶³

In many ways, *Hinsa Virodhak* can be seen as being inspired by the trend followed in some of these prominent cases. The language used by the Court and the concerns it sought to address, the stress on national unity for example, are pretty much the same and by now well known to the minorities. Consequently, the results of such sort of a pronouncement will also be fairly similar. The dangers of letting the principle of toleration be informed only by a majoritarian perspective are evident and we need to guard against them as we seek for alternatives for a better future.

V. THE WAY AHEAD- REINTERPRETING TOLERATION

The principle of toleration has been a chief distinguishing feature of Indian secularism. Equal respect for all religions is in fact one of the foundational pillars of the multicultural Indian state. The problem however, lies in it being hijacked by majoritarian moorings of the dominant religion. The curious question vexing scholars working in this area is precisely this: Can this uniquely Indian idea of toleration be decoupled from its majoritarian and explicitly religious basis? And is it really possible to retain the essence of the discourse on toleration after freeing it from its majoritarian underpinnings?

Prakash Chandra Upadhyaya ventures to call for the complete abandonment of the Indian brand of secularism which he feels has led to

⁶¹ The Representation of the People Act, 1951 Section 123(3) of the prohibits candidates from any appeal to religion, race, caste, community or language to further their prospects prospect for election, or for prejudicially affecting the election of any other candidate. Section 123(3A) prohibits candidates from promoting "feelings of enmity or hatred between different classes of the citizens of India on grounds of religion, race, caste, community or language" for the purposes of gaining votes or prejudicially affecting the votes of another candidate.

⁶² (1996) 1 S.C.C. 130.

⁶³ Jacobsohn *supra* note 28, at 190.

the communalization of politics in India in favour of the one that is rooted to the idea of state neutrality towards religion.⁶⁴ He concedes that far from the confrontationist and intolerant ways of communalism, majoritarianism represents accommodation and moderation, preaches religious heterodoxy, maintains a semblance of tolerance and seeks to replace the language of religious antagonism with the vocabulary of non-antagonistic communalism.⁶⁵ In spite of these significant differences, he concludes that “at moments of communal polarization, majoritarian secularism is always in danger of being swamped by Hindu communalism.”⁶⁶

For Brenda Kossman and Ratna Kapoor however, the prevalent discourse on toleration seems to offer more political promise.⁶⁷ They recognize the desirability of the segregation of religion and politics in the ultimate analysis, but are aware of the unviability of the disconnect in the current political environment. They believe that the talk of a ‘wall of separation’ between religion and politics will simply be written off as a “misguided effort to impose a western model of secularism onto the highly distinctive character of Indian society.”⁶⁸ The principle of toleration they suggest must be democratized based on a substantive approach to equality requiring explicit recognition of group differences and challenging dominant norms as those that are appropriate to judge cultural minorities against.⁶⁹

Ashis Nandy, one of the fiercest critics of the secularism project, argues that secularism is part of the formation of the modern state that has also promoted ‘religion as ideology’ and ‘communalism’. His writings decry the hegemony of what he calls the “imperialism of categories” and seek to provide a political preface to the recovery of the “*well known domain of public concern in South Asia, ethnic and essentially religious tolerance from the hegemonic language of secularism popularized by the*

⁶⁴ Prakash Chandra Upadhyaya, *The Politics of Indian Secularism*, 26(4) MODERN ASIAN STUDIES 815 (1992).

⁶⁵ *Id.*, at 852.

⁶⁶ *Id.*, at 853.

⁶⁷ Brenda Cossman and Ratna Kapur, *Secularism's Last Sigh?: The Hindu Right, the Courts, and India's Struggle for Democracy*, 38 HARV. J. INT'L L. 113 (1997).

⁶⁸ *Id.*, at 158.

⁶⁹ *Id.*

*Westernized intellectuals and middle classes exposed to the globally dominant language of the nation state in this part of the world.”*⁷⁰ Reposing confidence in the cultural traditions of pre-modern India, he suggests that instead of relying on the secularism of the modernized elite, Indians should “*explore the philosophy, the symbolism and the theology of tolerance in the various faiths of the citizens and hope that the state systems in South Asia may learn something about religious tolerance from everyday Hinduism, Islam, Buddhism, and/or Sikhism . . .*”⁷¹ To him, things such as old fashioned neighbourliness or principles of neighbourliness, the principles of hospitality encrypted in the various religious traditions and the persistence of community ties how so ever inferior and inadequate alternatives they may seem to be conceptually, are the ones which are more accessible to the people, form a part of their moral frame and social existence, and have protected religious minorities in India for years.⁷²

Partha Chatterjee grapples with the same doubt- “whether secularism necessarily ensures toleration”, but unlike Nandy, sets out to find a political conception of toleration.⁷³ He tries to build up a defensible argument in favour of minority cultural rights in the legal-political scenario prevailing in India. Tolerance, the willing acceptance of something of which one disapproves, is in his scheme justified by the moral argument of the principle of respect for persons and can hence be claimed as an entitlement.⁷⁴

⁷⁰ Ashis Nandy, *The Politics of Secularism and the Recovery of Religious Tolerance* in MIRRORS OF VIOLENCE, COMMUNITIES, RIOTS AND SURVIVORS IN SOUTH ASIA 69-93 (Veena Das ed., 1992).

⁷¹ Ashis Nandy, *The Politics of Secularism and the Recovery of Religious Tolerance*, ALTERNATIVES XIII, Apr. 1988 at 177.

⁷² Ashis Nandy, *Unclaimed Baggage*, THE LITTLE MAGAZINE III (2), <http://www.littlemag.com/faith/ashis.html> (last visited on 3rd October, 2009).

⁷³ Partha Chatterjee, *Secularism and Toleration*, 29 ECONOMIC & POLITICAL WEEKLY 1768 (1994).

⁷⁴ *Id.*, at 1774. Naturally, toleration need not be extended to practices which are disrespectful to persons. This becomes more important in the context of groups which are tolerant towards others, but do not respect their own members. Chatterjee is aware of these concerns, but readily accepts that “there will be political contexts where a group could insist on its right not to give reasons for doing things differently provided it explains itself adequately in its own chosen forum.”

Martha Minow explores the dilemmas toleration poses to the accommodation of sub-groups and cultural minorities and concludes that mere non-intervention in their affairs may fail to adequately respect their specific particularities.⁷⁵ Protection of cultural minorities she asserts, requires a respect for cultural diversity which is “a more active demand than toleration, for it may call for accommodation of subgroup practices and, therefore, changes in dominant institutions.”⁷⁶

These and many other scholars have been troubled by the homogenizing ways of the Hindu right. If the ideology of the state starts drawing from the ideology of Hindu nationalism, the plural ethos of the Indian collectivity may be threatened. It is therefore crucial to preserve and protect the principle of toleration from acquiring a majoritarian tinge.

The *Hinsa Virodhak* judgment succeeds in so far as it engages in the task of locating alternatives to the majoritarian perspective on toleration. Instead of asserting the cultural superiority of the all embracing Hindu religion, Justice Markandey Katju extensively referred to the tolerant policies of Emperor Akbar and Nawab Wajid Ali Shah.⁷⁷ Recognizing Akbar’s contribution to modern secularism, he said: “*The architect of modern India was the great Mughal Emperor Akbar who gave equal respect to people of all communities and appointed them to the highest offices on their merits irrespective of their religion, caste, etc. The Emperor Akbar held discussions with scholars of all religions and gave respect not only to Muslim scholars, but also to Hindus, Christians, Parsis, Sikhs, etc. Those who came to his court were given respect and the Emperor heard their views, sometimes alone, and sometimes in the Ibadatkhana (Hall of Worship), where people of all religions assembled and discussed their views in a tolerant spirit. The Emperor declared his policy of Suleh-e-Kul, which means universal tolerance of all religions and communities. He abolished Jeziya in 1564 and the pilgrim tax in 1563 on Hindus and permitted his Hindu wife to continue to practise her own religion even after*

⁷⁵ Martha Minow, *Putting Up and Putting Down: Tolerance Reconsidered*, 28 OSGOODE HALL L.J. 409 (1990).

⁷⁶ *Id.*, at 414.

⁷⁷ *Hinsa Virodhak Sangh v. Mirzapur Modi Kuresh Jamat*, A.I.R. 2008 S.C. 1892 ¶ 40-47.

their marriage. This is evident from the Jodha Bai Palace in Fatehpur Sikri which is built on Hindu architectural pattern."⁷⁸

Justice Katju was unequivocal in his criticism of all people irrespective of their community allegiances who posed a threat to the unity and integrity of the nation. He was saddened by the perpetual ease at which people are "willing to protest often violently, about anything under the sun on the ground that a book or painting or film etc. has "hurt the sentiments" of their community."⁷⁹ He cautioned that these are "dangerous tendencies and must be curbed with an iron hand."⁸⁰ Finally, he asserted that "*We are one nation and must respect each other and should have tolerance.*"⁸¹

However, the judgment fails to be accommodative of the reality of divergent ways of living and the variety of cultural practices prevalent in India. It is disrespectful of cultural diversity when it asks: "*If the Emperor Akbar could forbid meat eating for six months in a year in Gujarat, is it unreasonable to abstain from meat for nine days in a year in Ahmedabad today?*"⁸² It is as though the Court is seeking to provide a justification for imposing its understanding of toleration on the minorities from medieval practices of rulers who belonged to their community. The constitutionally guaranteed right to practice any profession or to carry on any occupation, trade or business is subordinated to the Jain community's vision of '*ahimsa*' all be it only for a period of nine days. The restriction was deemed reasonable enough given the need for the promotion of respect and recognition of beliefs and practices of one another without interference. But tolerance cannot be achieved by forcing the religious beliefs of one group on all others.⁸³ Again, what remains

⁷⁸ *Id.* ¶40.

⁷⁹ *Id.* ¶51.

⁸⁰ *Id.*

⁸¹ *Id.*

⁸² *Id.* ¶46.

⁸³ Tarunabh Khaitan, *Vegetarianism, Tolerance and Discrimination*, THE HINDU, May 26, 2008 <http://www.thehindu.com/2008/05/26/stories/2008052653861000.htm> (last visited on October 19th, 2009). One of the rare opinion pieces available on the case, it asserts that enforced vegetarianism amounts to indirect discrimination, and calls for the Parliament to take action to prevent our cities from fragmenting completely on religious and caste lines given the propensity of the executive to

reasonable is for the subjective satisfaction of the judges to determine. For example would a restriction on the playing of music or depiction of movies in cinema halls during the thirty days of the Islamic month of Ramadan satisfy the test of reasonability? To what extent will courts be willing to accommodate religious sentiments as valid justifications for restricting the fundamental rights of citizens, persons and groups?

Most concerning is the wide scope the judgment leaves for the selective enforcement of toleration. We believe that tolerance is an intrinsic value to individuals and groups, and can never have an external agency which enforces it as a prescriptive norm. Moreover, there is a fair chance the principle of toleration as demonstrated in this case, may be used only to curtail the rights of minorities. Unity and integrity may be a desired goal from the point of view of the Indian nation, but trying to achieve it by issuing legal fiats in this way is likely to prove counterproductive. Judicial pronouncements of such sort will raise questions about the impartiality of the state machinery and of those who are responsible for upholding the lofty ideals enshrined in the constitutional text and spirit. Vulnerable groups will obviously become more suspicious of the perceived majoritarian agenda. Their lingering fears about a homogenous society bent on obliterating their ways of living will only aggravate, giving rise to more frictions and disturbances in due course.

The solution to the conundrum eluded above lies precisely in the failures of the Court in this case. Tolerance for each other has been one defining characteristic of the Indian collectivity over the ages enabling it to survive the vicissitudes of time and flourish in all spheres of life without mandating its constituent elements to give up their distinct particularities. It is thus not required of courts and other agencies of the state to tutor the people in collective living. A democratic state should ideally have nothing to do with the private beliefs, practices and avocations of its citizens and groups unless they pose a greater law and order problem for society at large. Tensions would occur from time to time, but we feel that the resilient tolerant spirit of the people would carry the society ahead.

We have nothing new to offer to the enraging debates on secularism. Our only wish is to convey through this socio legal analysis

pass intolerant orders and the tendency of courts to routinely uphold them.

that secularism, as traditionally understood as the separation of the church and the state is perhaps a spent force even in the West today. Importing the concept to describe the Indian experience is, as seen in scholarly writings, fraught with a lot many difficulties. Its employment by the coercive state apparatus while issuing strictures requiring minorities to conform to certain behavioural patterns expected of them in a tolerant set up robs them of their basic entitlements for a fulfilling existence. This fixation with categorizing everything on the basis of neatly defined Western concepts is lamentable and far removed from the Indian reality. It would be unwise to ignore the context in which secularism emerged as a political doctrine three centuries ago as a response to a particular set of circumstances prevailing in Europe post reformation. Applying it in the same sense universally across space and time is uncalled for. Religion and politics have never been viewed as distinctly separable domains in the more than five millennia of the survival of the Indian civilization. People are obviously aware of some sort of a distinction between the transcendental and the immanent, but both are not impenetrable categorizations in that the everyday world we immediately see around us cannot be understood purely in its own terms.⁸⁴ As with Plato, the existence and development of the things around us can only be understood in terms of the corresponding ideas which exist in a realm outside space and time.⁸⁵ However, it is not unique for metaphysical narratives to draw from popular symbols and images to construct belief systems ordering the way of life of adherents and devotees.

The cooperative and conflicting coexistence of diverse cultures in the Indian context may perhaps be better explained in terms of the Spanish *convivencia* which Nandy alludes to in his writings.⁸⁶ Public life

⁸⁴ Charles Taylor, *Foreword* to *SECULARISM, RELIGION AND MULTICULTURAL CITIZENSHIP* xix (Geoffrey Brahm Levey & Tariq Modood eds., 2008).

⁸⁵ *Id.*

⁸⁶ Ashish Nandy, *A Billion Gandhis*, retrieved from <http://www.outlookindia.com/article.aspx?224252> (on October 6th, 2009). *Convivencia* was a term used in Moorish Spain to describe the mutual coexistence of Muslims, Jews and Christians under different kingdoms in relative peace leading to a fascinating interplay of cultural ideas between the three groups. It is arguably the only truly multi-ethnic, multi-religious polity Europe has produced during the last thousand years.

has never remained insulated from religious influence, but indigenous traditions have over the ages largely been accommodative to the idea of “opening up spaces for a continuous dialogue among religious traditions and between the religious and the secular.”⁸⁷ Positing the ‘self sufficient secular’ as having a monopoly over ‘exclusive reality’ belies the entire history of the evolution, growth and flourishing of the Indian civilization which has seen religious communities continuously exploring fair and harmonious modes of mutual coexistence. Ruling establishments over here have rarely interfered in the private realm of the population. And hence, nothing in the circumstances of today should encourage the instrumentalities of the state to try disciplining the conduct of different communities *vis-à-vis* each other.

VI. CONCLUSION

We have tried to show in this paper that the increased interaction of the state with religion is likely to pose threats to the plural ethos of the Indian collectivity especially when policy decisions seem to be guided by the homogenizing majoritarian brand of secularism. Through a critique of the *Hinsa Virodhak* judgment, we have attempted to establish that the state enforcement of toleration by the imposition of restrictions on private beliefs, practices and avocations of citizens and groups will always be received unfavourably by vulnerable minorities suspicious of the perceived majoritarian agenda. As long as the state associates itself with the religious, questions about the impartiality of its machinery and of those who are responsible for upholding the lofty ideals enshrined in the constitutional text and spirit will always be raised.

The Indian situation does not call for a strict separation of state and religion. State hostility towards religion, incited by the modernity discourse which aims at relegating the irrelevant religious realm to the periphery, will be disrespectful of the enormous ethical and moral influence of religion over politics, and violate the freedom of religion mandated by the Constitution. What concerns us is the subordination of constitutional guarantees to a religiously informed conception of secularism. We have sought to put forth the idea of tolerance as an intrinsic value decoupled

⁸⁷Taylor *supra* note 87, at xxi.

from its majoritarian underpinnings as the unique guiding principle of Indian civilization over the ages. Toleration ought not to be enforced by issuing legal fiats lest it may harm the plural ethos of society. Agencies of the state must eschew interference in inter community affairs unless a situation poses a greater law and order problem for society at large. The Indian collectivity has survived and flourished, and will continue to do so without needing external agencies to discipline and regulate inter community interactions.