COMPARATIVE STUDY OF FREEDOM OF RELIGION
UNDER VARIOUS CONSTITUTIONAL FRAMEWORKS

Bhanu Pratap Singh

Student, Gujarat National Law University, Gandhinagar, Gujarat, India
Email: bhanus660@gmail.com

ABSTRACT

The realm of religion is much wider and conflicting with other religions of the society, in such situations the state is bound to protect its subject from the harmful intersection of the religions. State has therefore granted its subjects certain liberties to profess, propagate, and practice their religion without interfering in the religious beliefs of the others and thereby aims at reduction of the propensity of the conflicts, but at the same time there are certain countries in the world which do not protect all the religions equally but recognize a particular religion to be state religion, while many countries declare them to be neutral in the matter of religion and state affairs. Indian Constitution has adopted a very unique mode of promoting harmony in the land of diversity by declaring India to be a Secular state, where every person has the freedom to profess, propagate and practice his religion without any interference and state shall not have any endorsement toward any particular religion neither it has been contemplated to be neutral like U.S.A where state shall have no active role to play in the matters of religion therefore Indian model of secularism does not merely gives religious freedom but also plays an active role in minimizing the animosity among various religious beliefs and thereby promoting harmony.

Keywords: Religion; Freedom; Secularism; Constitution; Harmony

INTRODUCTION

In the world, today mostly believes in the existence of God, though, a few may be agnostic, few may be atheist, but remaining have various religious affiliation. The relation between religion and law is very complex, Religion throughout the centuries has been a guiding source for the molding of rules, principles and institutions for governing the society. Religion and Law has always been debated and discussed as dualistic antinomies in many flourishing democratic countries. In present day, society recognizes dichotomy viz; “Rule of Law “and “Rule of God”, which are diametrically opposed in many respects, with some similarities, like sacred texts, their own mandates and sanctions to control human behavior which, again indicates their inevitable collision. Religion and Law are inseparable; therefore there is intersection of these two major controlling mechanisms of the society. Since, Religion and belief in God have made a giant comeback in the world politics and affected the constitutional framework of Democratic countries. A glaring example is 2012-13, Egyptian Protest, where Mohammed Morsi’s Constitutional Referendum, took the form of religious protest between the Liberals, Leftist, Secularists and Islamic Brotherhood Supporters. While on the other hand world has witnessed the rapid spread of constitutionalism and judicial review.
Now, in the modern democracies, the religious freedom have granted or conferred upon the citizens as a matter of legal rights. The debate over the freedom of practicing, professing and propagating the religion as a legal right in the countries like, India, U.S.A, U.K, France, Canada, which are considered to be the champion of the protector of rights an human values is becoming a matter of serious concern. In present time of globalization and unprecedented international migration flow, have established the spheres of cultural identity. Therefore, various political, legislative and judicial treatment of the issue has given different interpretation of freedom of religion. The Supreme Court of Canada’s seminal decision on freedom of religion, in R. v. Big M Drug Mart Ltd. Dickson J. said that:

“The essence of the concept of freedom of religion is the right to entertain such religious beliefs as a person chooses the right to declare religious beliefs openly and without fear of hindrance or reprisal, and the right to manifest religious belief by worship and practice or by teaching and dissemination. But the concept means more than that…..Freedom in a broad sense embraces both the absence of coercion and constraint, and the right to manifest beliefs and practices. Freedom means that, subject to such limitations as are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others, no one is to be forced to act in a way contrary to his beliefs or his conscience”.

Another connotation of Religious Freedom is that no man in religious matters is to be subjected to the censorship of the state or of any public authority; and the state is not to enquire into or take notice of religious belief, when the citizen performs his duty to the state and his fellows.

Since the constitutional status of the religion varies considerably across various constitutional models, there appears to be more cross-country divergence in the comparative constitutional jurisprudence of the religious freedom than with respect to most other freedom. There are eight types of existing constitutional models for arranging the relationship between State and Religion. These have been discussed in brief as following with main emphasis on the Constitutional Model of U.S.A, and India.

**The Atheist State**

It cannot be denied that, Communist regimes stand at most anti-religious end of the contemporary models, where the State’s liability towards the protection of the religious faith of the citizens come into question. Following the Marx’s famous maxim, communist regime follows the Legal model too based on “opiate to the masses”, and holds an atheist position that seems reluctant in associating the religion in both public and private spheres. The establishment of People’s Republic of China in 1949 for example was accompanied by a campaign to eradicate religion from Chinese life and culture. China’s attitude towards religion was relaxed considerably in late 1970s, with the 1978 Constitution’s formal guarantee of freedom of religion. A move in the opposite direction may be seen in Russian State of the post-communist era, which unlike the days of Soviet Union, is no longer anti-religious and has become passively secularist, effectively resulting in the Orthodox Church’s return to prominence. At any rate, because the communist-atheist vision of the state and religion includes a concentrated effort by the state to eradicate religion, there is virtually no meaningful constitutional jurisprudence in communist states pertaining to religion.

**Assertive Secularism**

The Assertive Model establishes the form of assertiveness, even militant, secularism that goes beyond neutrality towards religion or a declared a-religiosity, to advance an explicitly
secular civic religion that resents manifestations of religion in the public life and views secularism as a core element of the modern nation and its members, or a collective identity. Despite their secular status, the U.S., France, and Turkey have, in fact, been deeply concerned with religion and have engaged it on many fronts. The different approaches of these three states regarding the wearing of headscarves reflect a broad array of policy differences among them. Historical and contemporary debates on secularism in all three cases have pointed to education as the main battlefield in state-religion controversies. France and Turkey the assertive secularists are dominant despite the challenge posed by the passive secularists. In the U.S., however, the assertive secularists are so marginal that they cannot mount a serious challenge to the dominant passive secularists; the real struggle occurs between the two different understandings of passive secularism as elaborated below. Passive and assertive secularism became dominant in these cases as a result of particular historical conditions during their secular state-building periods. In France and Turkey the presence of an ancient regime based on the marriage of monarchy and hegemonic religion was a crucial reason for the emergence of anticlericalism among the republican elite. The antagonistic relations between the republicans and the religious institutions underlay the historical dominance of assertive secularism.

U.S.A Model of Religious Neutrality

It is the most effective model of separating the state from religious affiliation, where state remains neutral, impartial and inactive towards religion rather than actively endorsing the secularism per se. This model of Neutrality towards religion is practiced in U.S.A. The Indian model of freedom of religion has evolved by judicial pronouncements in Australia and America, therefore Indian model is much more elaborative and advance in protecting the religious freedom. 1st Amendment to the U.S. Constitution provides that “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof”. And this “establishment of religion” has been interpreted in Everson v. Board of Education.

“Neither a state nor the federal Government can setup a church. Neither can pass laws which aid one religion, aid all religion over another. Neither can force nor influence a person to go to or remain away from Church against his will or force him to profess a belief or disbelief in any religion. No person can be punished for entertaining or professing religious beliefs or disbeliefs, for church attendance or non-attending.”

Further, it was held that, there is no official church in the USA, as in England and no particular religion is entitled to governmental support. The state cannot ‘pick and choose’ among religious belief.

Whereas neutrality towards religion is the motto today, but here this model is often accompanied by an ‘assimilationist’ or ‘melting pot’ approach to national identity. At the same time comparative polls often suggest that Americans are among the most likely in the West to refer to God or draw upon religious morality or principles in their everyday lives. ‘In God We Trust’ is on all American currency; each Supreme Court Session begins with the invocation ‘God save the United State and this Honorable Supreme Court’. The Supreme Court has justified these “government sponsorship of historical religion practices”, arguing that practices such a legislative prayers or opening court sessions with “God save the United States and Honorable Court” do not express governmental endorsement of religion, because they “have largely host their religious significance over time”.

Available online on www.abhinavjournal.com
Regarding the principle of non-establishment, in U.S.A the commonly accepted view is that Establishment Clause prohibits the sponsorship of any religion, as well as the preference for religion over non-religion. According to the “Lemon Test” which prohibits on the establishment of religion and prohibits Government from appearing to take a position on question of religious belief or term making adherence to a religious relevant in any way to a person’s standing in the political community and thus prohibits excessive entanglement between Government and religion. In 1997 Court modified this analysis, holding that the question of ‘excessive entanglement’ was really part of the inquiry into whether the impugned legislation or activity aided or inhibited religion. The Court listed three factors for evaluating whether a law that aids religious organizations has a non-religious primary effect:

1. Whether the aid was used in or used in governmental ‘indoctrination’,
2. Whether the aid program defined recipients by some reference to religion and
3. Whether there was an excessive entanglement between government and religion as a result of aid program.

One of the hotly contested issues with the respect to establishment clause has been the place of religion in the public education system. In Lee v. Weisman the Court held (5:4) that a policy permitting invocation and benediction prayers at a public middle school graduation ceremony violated the Establishment Clause. More challenging questions arise in relation to the funding of religious schools. In Board of Education of Kiryas Joel Village School District v. Grumet, the U.S Supreme Court invalidated a law that created a separate school district for a village populated exclusively by Jeish Satmar Haidim. The goal of the law was to provide accommodation for Satmar children with special needs. The majority of the Court struck down the law on the basis that it violated the neutrality principle. Three judges dissented, holding that the Court’s precedent of prohibiting religious accommodation was improper. Later in case, the court held that a public school board could provide educational assistance to the students of a religious school. Establishment Clause did not prohibit any legislative program that provides indirect or incidental benefits to a religious institution provided-

- The law has a secular legislative purpose.
- It has primary effect that neither advances nor inhibits religion.

The Establishment Clause can be invoked only in “the absence of any substantial legislative purpose other than a religious one.”

Where the State extends some welfare services to all parents or children for secular purposes the fat that religious institutions may indirectly benefit from such government aid would not offend against Establishment Clause. On this Principle, the Court has upheld the extension of the general services like, Bus transportation services, health services, fire protection etc.

With respect to the free religious exercise principle, the Court has held that a law passed for the main purpose of burdening or providing a benefit to a group on the basis of its members’ substantive religious belief is unconstitutional. The Court’s jurisprudence is mixed in case involving Free Exercise Clause based claims for the exemption from government laws. The Court has held that some laws of general applications require exemptions for religious reasons. In the landmark ‘expansive accommodation’ ruling in Wisconsin v. Yoder the court held that state cannot compel members of the Amish church to send their children to school beyond the eighth grade. Members of the old Amish Community who reached the age of the
fourteen were thus exempted from two additional years of schooling that would have otherwise been mandated by the state’s compulsory education law.

The struggle over free exercise based exemptions extends to the other areas, such as military service or tax exemptions. Supreme Court evaluated a law that granted an exemption from conscription to the persons who by ‘religious training and belief in relation to a supreme being’ were opposed to war in any form. The law also stated that the objection could not be based on the essentially political, sociological or philosophical views or a merely personal moral code’. The Court interpreted this exemption as applying to the persons whose non theistic beliefs occupied the place of religion in their lives.

The United States constitutional experience of the last two centuries provides an interesting illustration of how a constitutional order itself can acquire a near-pious status. As Sanford Levinson astutely observes, that American Constitution is nation’s most revered text and has evolved into a pillar of American ‘Civil religion’. The essence of the Anti-establishment Clause is religious neutrality. When any secular purpose is absent in a statute, or the legislation recommends a religious practice as favored practice, it will be unconstitutional. It will also be unconstitutional if it results in an excessive entanglement of the Government with religion, e.g., where an Act forbids the teaching of the scientific theory of the evolution in public schools unless it was accompanied by the Biblical Theory of Creation as an act of God in six days. Thus, it is obvious that the overriding purpose of the religion clauses, taken together, is to protect religious liberty in the United States. The Establishment Clause protects religious liberty by prohibiting the government from taking action that advances or inhibits religion and it interacts with the Free Exercise Clause to provide affirmative protection for the religious freedom of individuals and religious institutions.

Religion Dominant Constitution

Under this kind of Constitutional establishment, the entire legal and constitutional system is based on the inherently dual commitment to religious fundamentals and constitutional principles, or a bi-polar system of constitutional and sacred texts and authority. The ‘ideal’ version of this model can be summarized by outlining four main cumulative elements:

1. The presence of the single religion or religious denomination that is formally endorsed by the state, akin to a “State Religion”.
2. The constitutional enshrining of the religion, its texts, directives and interpretations as or the main source of the legislation and judicial interpretation of the laws—essentially, laws may not infringe upon the injunctions of the state endorsed religion.
3. A nexus of the religious bodies and tribunals that often not only carry tremendous symbolic weight but are also granted official jurisdictional status on either regional or substantive bases and which operate in lieu of, or in an uneasy tandem with, a civil court system.
4. Adherence to some or all core elements of modern constitutionalism, including the formal distinction between the political and religious authority, qualified protection of religious freedoms for the minorities, and the existence of some form of the active judicial review.

Most importantly, their jurisdiction autonomy notwithstanding, some key aspects of the religious tribunals’ jurisprudence are subject of constitutional review by apex courts often state created.
The 1979 Islamic revolution in Iran established a paradigmatic example of constitutional theocracy. The preamble of 1979 Islamic Republic of Iran’s Constitution enshrines the Shari’a as the Supreme Law—superior even to the Constitution itself. Articles 2 and 3 declare that authority for the sovereignty and legislation has a divine provenance and that the leadership of the clergy is a principle of the faith. According to Article 6 the administration of the state is to be conducted by the wider population: the general public participates in the election of the president and the Majlis representatives and municipality councils. Article 8 further entrenches principles of the popular participation in deciding the political, economic and social issues. Most Notably, Iran has seen the emergence of the Guardian Council- a de facto constitutional court armed with mandatory constitutional preview powers and the composed of six Mullahs appointed by the Supreme Leader- and six jurists proposed by the head of the judicial system of the Iran and voted in by the Majlis. The supreme leader has the power to dismiss the religious member of the guardian council, but not its jurists members. At the same time Iran’s constitutional regime combines religious supremacy, pragmatist institutional innovations, alongside carried-over legacies of 1906 Imperial Constitution, primarily with the respect to the notion of the popular sovereignty, elected parliament and some separation of the powers principles.

While Iran features what is arguably one of the strictest manifestations of the strong establishment, several softer versions of this model have emerged, primarily in the Islamic world. From 1970s to 2000 alone at least two dozen predominantly Muslim countries from the Egypt to Pakistan, declared Shari’a ‘a’ or ‘the’ source of the legislation. Another very strong establishment model is essentially a mirror image of the religious jurisdictional enclave, where, most of the law is religious; however certain areas of the Law, such as economic law or certain aspect of the gender equality are ‘craved out’ and insulated from the influence by religious law. An interesting case in point in Saudi Arabia, arguably one of the countries whose legal system comes the closest to being based on the fiqh (Islamic Jurisprudence). Article 1 of the Saudi Arabia is a sovereign Arab Islamic State with Islam as its religion; God’s Book and Sunnah of His Prophet, God’s prayer and peace be upon him are its constitutional words commonly found. Article 23 establishes the State’s duty to advance Islam: ‘The state protects Islam; it implements its Sharia’a; its orders people to do right and shun evil; it fulfills the duty regarding God’s call. At the same time, Chapter 4 of the Basic law protects private property, provides a guarantee against the confiscation of assets, and suggests that ‘economic and social development is to be achieved according to the just and scientific plan’. Moreover, whereas Saudi courts apply Shari’a in all the matters civil, criminal or personal status, Article 232 of the 1965 Royal Decree provides for the establishment of a commission for the settlement of all the commercial disputes. Although judges of the ordinary courts are usually appointed by the Ministry of justice from among graduates of recognized Shari’a law colleges, members of the commission for the settlement of the disputes are appointed by the ministry of the Trade. In other words Saudi Arabia has effectively exempted the entire finance, banking and corporate capital sectors from the application of the Shari’a rules. Softer examples of this model are commonly Maldives, Qatar and United Arab Emirates. In short, religion has made a major comeback over the last few decades, and is now a de facto and often de jure pillar of the collective identity, national meta- narratives and constitutional law in the numerous predominantly Muslim Countries in Asia, Africa and Middle East. In Pakistan, though one cannot be sure whether any part of the Bhutto Constitution survived the Military regime (1977) of General Zia-ul-Haq, this is much certain that Pakistan remains an ‘Islamic Republic’, having for its object the promotion of Islam as a ‘State Religion’. Article 20 of the Constitution of the Pakistan 1973 provides that
“subject to law, public order, and morality, every citizen shall have the right to profess, practice, and propagate his religion.” Some government practices, however, limited freedom of religion, particularly for religious minorities. Freedom of speech is constitutionally “subject to any reasonable restrictions imposed by law in the interest of the glory of Islam.” Abuses under the blasphemy law and other discriminatory laws continued; the government did not take adequate measures to prevent these incidents or reform the laws to prevent abuse. On August 17, police detained on blasphemy charges Rimsha Masih, a Christian girl who reportedly suffered from a mental disability, after a local Muslim cleric alleged that he observed the girl desecrate pages of the Quran. There were instances in which law enforcement personnel reportedly abused religious minorities in custody. At least 17 people are awaiting execution for blasphemy and 20 others are serving life sentences, although to date the government has never carried out an execution for blasphemy.

There were reports of societal abuses or discrimination based on religious affiliation, belief, or practice. During the year, societal intolerance continued while there were increasing attacks against members of the Shia Muslim community. Human rights and religious freedom advocates and members of minorities reported self-censorship due to a climate of intolerance and fear. Acts of violence and intimidation against religious minorities by violent extremists exacerbated existing sectarian tensions. Violent extremists in some parts of the country demanded that all citizens follow their authoritarian interpretation of Islam and threatened brutal consequences if they did not abide by it. Violent extremists also targeted Muslims who advocated tolerance and pluralism. There were scores of attacks on Sufi, Hindu, Ahmadiyaa Muslim, Shia, and Christian gatherings and religious sites, resulting in numerous deaths and extensive damage. Some religious groups protested against public debate about potential amendments to the blasphemy laws or against alleged acts of blasphemy.

Indian Model of Secularism

This model is based on the selective accommodation of religion in certain areas of the law. The general law is secular, yet a degree of jurisdictional autonomy is granted to religious communities, primarily in the matters of personal status and education. The Indian model of granting religious freedom as a matter of Fundamental right is based on the ‘secular principles’ and the concept of secularism is implicit in the Preamble of the Constitution which declares the resolve of the people to secure to all its citizens “Liberty to thought, belief, faith and worship”. The 42nd Amendment Act, 1976 has inserted the word ‘secular’ in the Preamble. In India, a secular state was never considered to be irreligious or atheistic state. It only means that in the matters of religion it is neutral. Explaining the secular character of Indian Constitution the Supreme Court said, there is no mysticism in secular character of the state. Secularism is neither anti-God nor pro-God, it treats alike the devout, the antagonistic and atheist. It eliminates God from the matter of the state and ensures that no one shall be discriminated against the ground of the religion. Further in S.R. Bommai case the Supreme Court has held that “secularism is the basic feature of the Constitution” and State treats equally all religions and religious denominations. Religion is a matter of the individual faith and cannot be mixed with secular activities. Secular activities can be regulated by the state by enacting the laws. Justice Ramaswami observed that secularism is not anti-God. In the Indian context Secularism has positive content.

Justice Dharmadhikari has observed that secularism can be practiced by adopting a complete neutral approach towards religions or by positive approach by making one section of religious people to understand and respect religion and faith of the other section of people.
Based on such mutual understanding and respect for each other’s religious faith mutual distrust and intolerance can be gradually eliminated.

Article 25 of the Constitution of India guarantees to every person the freedom of conscience and right to profess, practice and propagate religion. The right guaranteed under Article 25 is not absolute and it is subject to the public morality health and to other provisions. Thus under Article 25 a person has two fold freedoms

1. Freedom of the conscience,
2. Freedom to profess practices and propagate religion.

To ‘practice’ religion is to perform the prescribed religious order in which he believes. To ‘propagate’ means to spread and publicized his religious views for the edification of others. But the word ‘propagation’ only indicates persuasion and exposition without any element of coercion. The right to propagate one’s religion does not give a right to convert any person’s own religion. There is no fundamental right to convert any person to own religion. As it is clearly mentioned in Article 25 the right to freedom of religion is not absolute, and there are restriction on the freedom of the religion viz; Religious liberty subject to public order, morality and health, forced conversion is no allowed where in Supreme Court held that “what Article 25 grants is not the right to convert another person to one’s own religion, but to transmit or spread one’s religion by an exposition of its tenets”. Again, in Mohd. Hnif Quareshi v. State of Bihar the petitioner claimed that the sacrifice if cows on the occasion of Bakraeid were essential part of his religion and therefore the state law forbidding the slaughter of cows was violative of his right to practice religion. The Court rejected this argument and held that the sacrifice of cow on the Bakraeid was not an essential part of Mohammedan religion and hence could be prohibited by state under clause (2) (a) of Article 25. Similarly the right of Sikhs to wear and carry Kripans is recognized as a religious practice in Explanation 1 of Article 25. This does not mean that he can keep any number of kripans. He is entitled to keep one sword. He cannot possess more than one kripan without a licence. Though American and Indian Constitution guarantees freedom of the religion but, certainly have some points of differences like Article 25 itself implies that the state shall have no established religion and it does not envisages “wall of separation between Church and State” as is supposed in America. Furthermore dogma of complete separation has broken down in the U.S.A and the modern doctrine is that in carrying out its secular program, the state may incidentally or indirectly support religion, provide all religions are treated equally, and it does not involve any substantial entanglement of the state into affairs of the church.

CONCLUSION

Expanding the horizons of the comparatively reveals more diversity than often meets the eye with respect to the constitutional models for arranging religion and state relations worldwide. The dichotomous view of the separation in the west versus entanglement of religion and state elsewhere is rather unrefined. In reality, several prototypical modes exist, ranging from atheism or assertive forms of Secularism to constitutional enshrinement of religion as the state religion and as main source of legislation. Obviously, there is considerable variance within, let alone among, these prototypical or ideal models; each comes in different shapes forms and sizes, with local nuances and idiosyncrasies abounding. These variances is often rooted in distinctive political legacies, differences in the constitutional structures and aspirations, dissimilarities in historical inheritances and formative experiences, as well as non-trivial differences in the value systems and foundational Meta narratives. Unlike, the conventional image of the clash of civilizations or the west and the rest, there is actually a

Available online on www.abhinavjournal.com
strong echo of religion in each and all of these models. In fact, all constitutions, every single
one of them from France to Iran and anywhere in between addresses the issue of the religion
head on. Some, Constitutions despite it, others embrace or even defer to it, and yet others are
agnostic but are willing to accommodate certain aspects of it. But not a single constitution
abstains, overlooks or remains otherwise silent with respect to religion. With exception of
the concrete organizing principles and prerogatives of the polity’s governing institutions, the
only substantive domain addressed by all the modern constitutions is religion. What could be
a more telling illustration of religion’s omnipresence in today’s world, or a stronger
testament to constitutionalism’s existential fear of religion?

REFERENCES

1. Barzilai, Gad; Law and Religion; The International Library Of Essays In Law And
Society; Vol. 17 No. 8 August, 2007; Ashgate Publishing Ltd, 2007; pp. 556
2. Barnett, Laura; Freedom of Religion and Religious Symbols in the Public Sphere;
469-70.
5. Swatos, William H., Encyclopedia of Religion and Society; Hartford Institute for
6. Kuru, Ahmet T., Secularism and State Policies toward Religion: The United State,
France, and Turkey, Cambridge University Press (2009); pp.11
7. Stephen V. Monsma and J. Christopher Soper, the Challenge of Pluralism: Church and
8. Kuru, Ahmet T., Passive and Assertive Secularism Historical Conditions, Ideological
Struggles, and State Policies toward Religion; Project MUSE: Scholarly Journals
Online; World Politics 59 ( July 2007); pp. 568–94; http://www.euc.illinois.edu/_includes/docs/passiveandassertivesecularismkuru.pdf
602: 29 L Ed 2nd 745.
18. Supra Note 17.
22. Ibid Note 10.
33. AIR 1958 SC 731.