Chapter 4

Group rights and cultural identity – the Indian scenario

This chapter views the Indian scenario against the background of the first three chapters to look at the ways in which law and society influence cultural identity. The chapter traces the journey of cultural rights through the concept of secularism and the right to freedom of religion in the Constituent Assembly Debates and the Constitution. The legislative measures (examined through selected aspects of Personal Laws) however do not seem to conform to the spirit of secularism or the right to religious freedom as understood by the Constitution. The attempts of the legislature to secularize through the Special Marriage Act and the Indian Adoption Bill have had the effect of stifling rather than facilitating the secular ideal. It also looks at some contemporary examples to illustrate the hold of the community over its members irrespective of the scope given to members to exercise their agency by the legislature. The examples also exhibit the assertion and grit of the members who find creative ways of relating to their culture so that they can identify with it.

This chapter is significant because cultural identity while not created by the state is validated only when recognized by the state and society. Perceptions of identity by the society and validation by the state can at times be influential enough even to constitute identities. The chapter begins by looking at the concept of secularism at work in India and delineates the strand the thesis feels is most relevant for the Indian scenario in contemporary times. It looks at the views expressed in the Constituent Assembly Debates on secularism and freedom of religion. It discusses the concept of secularism as understood in the constitution and the implications of the right to freedom of religion as it is worded in the Constitution. It discusses through
select examples the way in which legislation on personal laws has not been sensitive to the secular spirit and religious freedom of the Constitution. Finally, even within the framework of that legislation, it cites instances in society to illustrate the hold of community rulings and their refusal to acknowledge the alternative interpretations by members in the mediation of their cultural and religious identity.

Secularism

Why should the concept of secularism be invoked in making a case for the cultural rights of members? Secularism is closely associated with the right to religious freedom. Any study of ethno-cultural communities inevitably tends to include and is even dominated by the religious aspect. For example, the study of the Parsi community (Zoroastrianism), the Moplah community (Islam), the Syrian Christian community (Christianity), would also be studies in the respective religions as well. Of the things that constitute meanings in the cultural life of members, religious rituals and ceremonies are an important aspect. Matters of religion are a defining feature of the cultural life of members. As a defining feature they play a crucial role in constituting cultural identity. An understanding of the right to religious freedom is essential to negotiate the scope of cultural rights.

Before examining the concept of secularism as enshrined in the Indian constitution, let me examine the argument with regard to the need and viability of the concept in India.

Secularism basically refers to the disentangling of the religious and temporal spheres. Scholars like Nandy, Madan and Chatterjee are of the opinion that secularism is an imported doctrine that has failed to establish roots in India. The central premise of their argument is that secularism banishes religion from the political and social realm. This does not go well with South Asian cultures where religion plays an
important role in social and political spheres. Therefore secularism as a doctrine is seen as inappropriate for religious and cultural issues in India.²

However, in a country like India that is constitutionally committed to the ideals of religious freedom and equality as well as to cultural plurality, the doctrine of secularism is crucial to determine the relation between them. So what does the concept of secularism entail in India? At the very basic level it entails the absence of discrimination on religious grounds.

One of the early works on Indian secularism is that of D E Smith. For Smith, the secular state in India is involved in three distinct but interrelated acts of relationships, concerning the state, religion and the individual. First, as regards the relation between religion and the individual the secular state stays away from the relation between religion and individual. Second, as regards the state and the individual the secular state deals with the individual as a citizen irrespective of his religion. Religion is irrelevant for the secular state with regard to its relation with the individual as citizen. Finally, as regards the relation between state and religion the secular state is not constitutionally connected to any particular religion nor does it seek either to promote or interfere with religion. All religions are viewed as subordinate to and separate from the state.³

The question that arises is whether in a country like India where religion pervades several spheres of both the public and private domain, is such a clear demarcation between the categories of individual, citizen and religion possible. Also, given the inherent inegalitarianism of most religions and cultures, is it feasible to erect a wall of separation between the state and religion?

For a more feasible concept of secularism the thesis turns to the work of Rajeev Bhargava. Bhargava unequivocally states that even espousing the separation
of all religious and non-religious practices is an untenable thesis. What is argued for is the separation of some religious and non-religious institutions. For Bhargava, secularism is compatible with the view that the complete secularization of society is neither possible nor desirable. Differing from Smith on the strict separation of religion and state, he not only justifies secularism to sustain inter-communal solidarity but also endorses the intervention of the secular state to protect the dignity of its citizens. This view of secularism not only takes care of the criticism that the strict separation between religion and state is not feasible in India but also enables it to be practiced within the framework of a constitution that guarantees religious liberty as well as free, equal citizenship.

In a multi-cultural, multi-religious democracy like India, protecting the cultural identity of the various communities is as imperative as applying the value of equal citizenship. Cultural and religious communities more often than not are based on hierarchy rather than equality. The case is no different in India. Advocating equal citizenship by ignoring inequalities among and within communities is counter productive to the value of equal citizenship as citizenship is itself mediated among other components by cultural identity.

Also, equal citizenship as an ideal ought to challenge those tenets in communities that are hierarchical to the detriment of certain members. To apply the tenet of equal citizenship without compromising on the religious freedom of the concerned community demands a qualified interventionist approach by the secular state. This qualification is of a life of equal dignity for all – in other words, one of principled distance. The criteria for state intervention depends on what strengthens religious liberty or equality of citizenship for all.
CAD and the Concept of Secularism

In what circumstances did the concept of secularism evolve in independent India? It was against the background of legislation in colonial India characterized by census and administrative operations and forms of legal codification coupled with the immediate impact of the divisive communal forces of partition that the Constituent Assembly discussed the issues of cultural and religious identity.

The concept of secular state in the Constituent Assembly Debates can be understood under four broad strands. Under the first strand, it was felt that the State should have nothing to do with religion. Prominent among these were Tajamul Hussain (p.817, 863, 871, Book-II, Vol.7), H V Kamath (p.824, Book-II, Vol.7) and S V K Rao (382, Book-II, Vol.7). The reasons given were that religion is a private affair and that the state’s interference is not warranted in the private sphere. (T. Hussain in p.817, 863, 871 – Book-II).

Making religion a private affair here however does not loosen the grip of group hegemony on the members. It is private to the extent that it is removed from the political realm thus rendering the state inactive.

Under the second strand, the discussion in the Constituent Assembly felt that though the State may not have a religious identity it should protect religion, especially that of minorities. The prominent voices were that of Thirumala Rao (p 348, Book-II, Vol.7), L K Maitra (p 348, Book-II, Vol.7), Mehboob Ali Baig (p544, Book-II, Vol.7) and K.T. Shah (p 815-816. Book-II. Vol.7).

This viewpoint visualised a more active role for the secular state. Thirumala Rao is keen that the ancient traditions and culture of the country be fully protected and developed by and through the constitution (p 348, Book-II, Vol. 7). L K Maitra observes that a secular state need not have a religious orientation, but need not deny
the right to profess, practice and propagate in accordance with one’s religion (p348, Book-II, Vol. 7). Maitra wants the state to promote the deeper values and importance of religion, the eternal values of spirit (p.831-832. Book-II, Vol. 7). To Mehboob Ali Baig freedom to practice religion is what is definitive of a secular state. He further grounds this freedom to practice religion in the observance of personal laws. (p544, Book-II, Vol. 7).

To the extent this strand does not specifically mention whether it is the religious freedom of the community or of the individual, it leaves the issue somewhat open-ended. The observation grounding the freedom to practice in the observance of personal laws forges a connection between personal laws and religion.

The third strand views the role of the secular state as instrumental in consolidating the nascent nation. This view is clearly impacted by the immediate background to the Constituent Assembly Debates – partition and the communal violence that threatened the unity of the as yet emerging nation. This view was expressed by L Misra (p. 822, Book-II, Vol.7), M Tyagi (p.1051, Book-II) and Rev. Jerome D’Souza (p.1059. Book-II, Vol.7).

A somewhat extreme kind of an argument is put forward by L. Misra when he expresses that a secular state should accept one religion preferably religion of the majority. This view clearly sees religious diversity as anti-thetical to the unity of the nation (p. 822, Book-II). (Such a stand has been countered by discussions on toleration by L.K. Bharathi and K. Santhanam where the emphasis is on toleration (p.834, Book-II). On the other hand, Mahaveer Tyagi believed that it is by being secular that a state with many communities and religious diversity can facilitate the consolidation of nation (p.1051, Book-II).

The fourth stand views religion as a personal matter. This view is represented
by Karimuddin (p.880, Book-II, Vol.7) and Rev. Jerome D’Souza (p.1057, Book-II, Vol.7). As viewed by Karimuddin religion is a personal matter in a secular state. What is inferred from this is that – a secular state should not be anti-religious, a secular state implies that citizenship is irrespective of religious beliefs, in a secular state every citizen is equal before the law, has equal civil rights and equal opportunities to derive benefits from the state (p.1057, Book-II, Vol. 7). According to Rev. D’Souza, a secular state looks upon with sympathy upon the convictions of the entire people, a secular constitution is not a godless constitution (p.1059, Book II. Vol. 7).

Constitution and Secularism

The Constitution of India, as originally enacted, did not contain the word ‘secular’ either in the Preamble or in the Right to freedom of religion in the Constitution. While it was emphasized by the Constitution makers that the Indian concept of secularism recognizes the relevance and validity of religion in the life of the people, they were reluctant to use the word ‘secular’ in the Constitution as it might give the impression of establishing a State structure inconsistent with the cultural ethos of the Indian people. Secularism as understood in India was emphatically asserted by Dr. Radhakrishnan when he stated – ‘I want to state authoritatively that secularism does not mean irreligion. It means we respect all faiths and religions. Our State does not identify itself with any particular religion.’ However, during the emergency imposed by the government of Mrs. Gandhi, the Preamble of the Indian constitution was amended by the Constitution (42nd Amendment) Act 1976 so as to include the term ‘secular’ before the words ‘Democratic Republic.’ This was presumably in order to emphasize the secular character of the Indian Republic which appeared to be developing communal strains. The result is that since 1976 the Preamble to the Indian
Constitution proclaims in no uncertain terms that India is a secular Republic.\textsuperscript{7}

\textit{Right to freedom of religion – Article 25}

The entire range of fundamental rights, including article 25, were discussed in the Constituent Assembly from 'citizens' or 'person's' point of view (except Articles 29 and 30). The secular spirit is clearly evidenced in the way Article 25 (right to freedom of religion) is worded.

In the Indian Constitution Article 25 in right to freedom of religion is expressed in the following terms –

'Freedom of conscience and free profession, practice and propagation of religion.

(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, practise and propagate religion.

(2) Nothing in this article shall affect the operation of any existing law or prevent the State from making any law –

(a) regulating or restricting any economic, financial, political or other secular activity which may be associated with religious practice;

(b) providing for social welfare and reform or the throwing open of Hindu religious institutions of a public character to all classes and sections of Hindus.

\textit{Explanation I.} The wearing and carrying of kirpans shall be deemed to be included in the profession of the Sikh religion.

\textit{Explanation II.} In sub-clause (b) of clause (2), the reference to Hindus shall be construed as including a reference to persons professing the Sikh, Jain or Buddhist religion, and the reference to the Hindu religious institutions can be constructed accordingly.
Let me attempt to draw implications from the text of this article for the thesis. Let me begin with the phrase 'all persons.' This indicates that the freedom granted by Article 25 is a personal freedom. It is a freedom that a person can claim for personal exercise at will.

The most outstanding proof is the text of the Constitution itself, referring to 'all persons equally.' It can be argued that one cannot infer from the term 'person' that the right to religious freedom is an individual right as person can refer to the corporate person of the group as well as person at the unit of a single individual. However, considering that rights enumerated in Part III are basically individual rights, except when specifically referred to as rights of a group as in Cultural and Educational Rights, one can reasonably infer that the term person in Article 25 also refers to the person at the unit of a single individual.

Two implications emerge – (a) It is not a right of any particular community or religion, majority or minority. (b) The right can be exercised by any member of the community regardless of the placement of the member in the structure of the community.

In decoding the term 'conscience' one needs to be aware of the distinction between conscience and what is binding in conscience. What is binding in conscience may be a matter of conditioning, while conscience per se minimally refers to a conscious evaluation and consequent endorsement or negation of issues that are being examined. For example, as a Hindu one might feel the need to refrain from eating beef binding in conscience, while at the same time find that conscience does not permit the person to eat not just beef but any form of meat as a vegetarian. Freedom of conscience is to be free not just from external binds but also from what is binding in conscience as well.
Freedom of conscience also indicates that the Indian constitution has endorsed free choice regarding religion. The perception of the individual as capable of exercising free choice involves acknowledging the individual’s capacity to make an informed choice as well as acting in accordance with that choice. Prior to that it implies giving each individual the choice to be or not to be a part of religion. (See Choice right in Chapter 3). While the right to be an atheist can be reasonably inferred, the right to follow a certain conception of religion that may not be in conformity with the contemporary dominant interpretation(s) is not clearly spelt out.

Unlike secularism in the West where a wall of separation exists between religious and temporal spheres, the Indian Constitution had to accord to the state the power to intervene with freedom of religion. This was because in the West secularism emerged as a successor to the separation between religious and temporal areas throughout the process of Renaissance. The Indian state had to perform the historic function of respecting yet confining religion to its essential sphere and not allow it to impinge on the temporal sphere of social, economic and political life.\(^\text{10}\). One of the reasons for intervention is protection of Fundamental Rights as guaranteed in Part III of the Constitution.

The question then arises as to the extent of state intervention. Since, Article 25 applies to all equally, does it mean that the extent of state intervention has to be equal for all communities? Also, what are the grounds on the basis of which the state can intervene?

This can be dealt with by again resorting to Bhargava’s explanation. According to him, Secularism requires principled distance, not exclusion or equidistance. Principled distance is not mere equidistance. In the strategy of principled distance, whether or not the state intervenes or refrains from action
depends on what really strengthens religious liberty and equality of citizenship for all. If this is so, the state may not relate to every religion in exactly the same way; intervene to the same degree or in the same manner. All it must ensure is that the relation between religious and political institutions be guided by non-sectarian principles that remain consistent with a set of values constitutive of a life of equal dignity for all – in other words, principled distance.\textsuperscript{11}

The Constitution is a framework. It is the law made by the legislature that defines the identities and boundaries of individuals and the group. Legal codification has a significant impact on the perception as well as constitution of identity. The legislature’s contribution has been examined through select aspects of Personal Laws.

**Personal Laws**

While the Fundamental Rights in the Constitution, do include the right to freedom of religion, they are mainly in the form of negative injunctions. They endorse the acknowledgement of basic human rights and the need for basic human dignity. Their placement as Fundamental Rights in the Constitution prevents the state from violating them. Constitutionally in India therefore the state has little scope of intervening or modifying the secular ideal that has emerged through the Constituent Assembly Debates and is enshrined in the Constitution. However, the legislative process has a vast scope to shape the secular ideal.

Why should a secular state protect Personal Laws? A secular state will not discriminate its citizens on the grounds of religious beliefs and practices and accords importance to all that gives meaning to an individual’s life. Personal Laws are laws that are specific to each community and govern matters of marriage and divorce, infants and minors, adoption, wills, intestacy and succession for the members of the community.\textsuperscript{12}
While Personal Laws evolve within communities, the community or the members of the community have no right to articulate its content. Its historical status also is acknowledged only when duly recognized by the legislature. While the judiciary may raise objections, the ability to validate or invalidate a personal law lies neither with the community or its members or with the judiciary. It solely lies with the legislature. The legislature while it does not create personal laws plays a role so significant by recognizing them so as to negate their very existence by not recognizing them. Accordingly as pointed out by Diwan, 'No one, even a community, organization, or movement, is free to alter, vary or create a ceremony at one's pleasure. When the Arya Samaj movement simplified the ceremonies and rites for the solemnization of marriage among the Arya Samajists, an Act had to be passed to set at rest all doubts relating to validity of such marriages. (The Arya Marriage Validation Act, 1937). Even for the validity of marriages among the Sikhs by *anand karaj* a statute had to be passed.¹³

The thesis examines the role of the legislature in upholding the right to freedom of religion and the doctrine of secularism in the Constitution. In India Personal Laws represent the idea of maintaining religious plurality. However, the pluralism that personal laws supposedly represent is in fact premised on an enormous reduction within the community to which the body of personal laws cater, while the very notion of religion which underlies personal laws is one formed through a process of homogenization. The British homogenized personal laws through codification and further codified custom through the accumulation of case-law, scarcely incorporating the enormous diversity of belief, sect and practice in different regions and classes that existed even within the rubric of the major denominations. Subsequent reforms of personal law have shown no respect for or commitment to protect this substantial
diversity. In fact the reformed Hindu law and the Shariat Application Act helped to create newly unified versions of Hindu and Muslim 'communities' across the subcontinent. Even now, reform of personal laws from within, 'without' or above is likely to continue this process and intensify the conception of sharply defined, bounded and exclusive religions on which such laws are based.\textsuperscript{14}

\textit{Background to Personal Laws}

The 19\textsuperscript{th} century was characterized by census and administrative operations and forms of legal codification. Uniformity within the community became a qualifying criterion for cultural/religious identity. According to Shodhan, this was expressed through the 'purification' of religions, the insistence on discrete marriage and funeral rights. As Shodhan further states, the attempt was to establish and function through voluntary associations, educational institutions and the popular press. There was policing of boundaries by religious spokesmen in a tacit but unspoken relation of mutuality and reciprocity with each other. Their matching visions of uniformity as a principle of community cohesion bespoke a roughly similar notion of religious community though in each case the religion was different.\textsuperscript{15}

The docketing and labeling of different religions – produced in the interaction of colonial administration, class formation, and politically vocal community claims often made from communal positions – formed a descriptive overlayer that muffled a far more extensive, unclassifiable diversity. It also assisted the general erosion not only of the diversity within these religions (largely loose constellations of denominations, sects, orders, movements), but also of their common histories, overlapping beliefs and practices, their many interfaces, and the many in-between areas that have been thrown up through continuous interaction and contiguity. It involved ignoring religious or belief systems that were unable to spawn communities.
As Sangari points out, Ironically it was this severely limited definition of religions, one that was in fact implicated in the partial erosion of extant religious diversity that is today going under the names of religious plurality and/or cultural diversity.\cite{16}

*Constituent Assembly Debates and Personal Laws*

The Constituent Assembly Debates saw two opposing views regarding personal laws. One view was that the state should have nothing to do with Personal laws. This view was prominently represented by Mahboob Ali Baig (p.297, Book-II, Vol.7) and M.H. Mohani (p.759, Book-II. Vol.7). Apart from the privacy argument, it was felt that personal laws are divinely ordained and therefore human agency had no scope in changing it.

The second view felt that the state had a positive role to play. It was felt that the state should protect personal laws to uphold its secular character and to protect minority communities from the tyranny of the majority. This view was voiced by Pocker Sahib Bahadur (p.544,545, Book-II, Vol.7) and Mohd Ismail Sahib (p.540-541, Book-II. Vol.7).

Regarding intervention in personal laws, suggestions ranged from reforming personal laws to replacing it by a Uniform Civil Code. Social reform and welfare was given as the main reason for reforming personal laws (A. Ayyangar in p.777, Book-II, Vol.7). Pocker Sahib admitted that he had received representations from various organizations, including those of Hindus, which characterized the provision relating to the common civil code as tyrannical (CAD, Vol. II, 1948, pp. 544-546). The accusation that intervention in personal laws violates the right to freedom of religion was countered by the justification that religion is distinct from personal laws (K.M. Munshi in p.547, Book-II. Vol.7). (This is noteworthy as a large part of case law on personal laws view them as a part of religion).
Constitution and Personal Laws

Article 372(1) of the Constitution provides: ‘All the laws in force in the territory of India immediately before the commencement of this Constitution shall continue in force therein unless altered or repealed or amended by a competent Legislature or other competent authority.’ Article 372(3) further provides: ‘The expression “law in force” in this article shall include a law passed or made by a Legislature or other competent authority in the territory of India before the commencement of this Constitution and not previously repealed, notwithstanding that it or parts of it may not be then in operation either at all or in particular areas.’ Read together it would seem that laws in force includes personal laws as applied before the Constitution came into force in 1950.

Item 5 of the Concurrent List in the Seventh Schedule of the Constitution has been viewed as supporting the continued existence of Personal Laws. It lists, as within the jurisdiction of both the Centre and the states: ‘Marriage and divorce; infants and minors; adoption; wills, intestacy and succession; joint family and partition, all matters in respect of which parties in judicial proceedings were immediately before the commencement of this Constitution subject to their personal law.’

Personal Laws – Well Being of Individuals

Perhaps the most important point to be considered in a system of personal laws is the argument that such a system helps to affirm the distinct identities of ethnic and religious groups. In affirming the identities of these groups, the state contributes to the well being of the individuals who compose them. In particular it contributes to their sense of existing and of having meaning in their lives. If one goes by the criterion that the reason for the existence of personal laws is their contribution to the individuals’ sense of leading a meaningful life, it logically follows that personal laws
ought to represent and reflect what individuals who constitute the community regard meaningful. Now individuals are not individuals with singular, simplistic identities. Even those individuals who consider culture as their primary foci of identification, live in several spheres that impact their perception of as well as identification to cultural identity. As discussed in Chapter 3, Waldron points out, that the cosmopolitan individual is a creature of modernity, conscious of living in a mixed-up world and having a mixed-up self.¹⁹ To bestow meaning on the lives of such individuals, Personal Laws need to be open to interpretations that the individuals identify with in order to contribute to their state of well being.

*Select aspects of Personal Laws*

Let me now look at certain aspects of Personal Laws and examine them in the light of the above observations.

*Hindu Law*

Let me begin with some of the provisions of the Hindu Adoptions and Maintenance Act, 1956. This Act proclaims that adoption under the Hindu Adoptions and Maintenance Act can take place for secular as well religious reasons. A Hindu adopting under this Act can adopt a Hindu child of any caste. Only one boy and one girl can be adopted subject to the condition that the adoptive parents have no male heir for the next three generations (in case a boy is to be adopted) and no female heir (only on the son’s side) for the next two generations.

With regard to the capacity to adopt, the capacity of a female Hindu differs from that of a male Hindu. A Hindu female can adopt in an independent capacity only if she is single (either as unmarried, or as a widow, or whose husband has renounced the world, or whose husband is of unsound mind). A Hindu male has to have the consent of his wife (wives) to adopt, but can adopt in an independent capacity
whether married or not. However, a Hindu female who is married, whose husband is alive, is of sound mind, and has not renounced the world, cannot adopt in an independent capacity even with the consent of her husband.

While the bar on adopting a child of the same sex that the adoptive parents are already parents of is not explained, a guess can be hazarded that the religious reason for adoption is accorded primacy over any other reason. It also does not seem to be free of patriarchal biases as the condition of adoption of a daughter is limited by the presence of a daughter till the second generation, that too only on the son’s side.

From the above mentioned provisions, the following emerges – if adoptive parents adopt a child of the same sex that they are already parents of, or if a married woman adopts a child, even with the consent of her husband, the adoption is invalid. What invalidates such adoption is that as Hindus, the concerned individuals cannot violate the above conditions. This grossly ignores and thereby violates the influence of equality that may have permeated the psyche of these members and become a part of their person. It is very difficult to defend such a law on the basis that it contributes to the well being of individuals in the community by bestowing meaning on their lives.

Also, while adoption in Hindu law is said to be for secular as well as religious can be taken in adoption the very point that only a Hindu (of any caste) betrays the priority of the religious aspect over any other consideration. (A Hindu here refers to anyone who is not a Muslim, Sikh, Christian or Parsi. It includes orphans who are being taken care of by Hindu missionaries and trusts). What it implies is that if a Hindu adopts a child of any other faith either the adoption is invalid or the adoptive parent cannot claim to be a Hindu who has adopted a child. The way out is to probably renounce Hinduism. But that cannot be done by merely declaring that one is
not a part of a religion. To renounce a religion, especially Hinduism, one has to either renounce the world, or one has to convert to another religion, whether one identifies with it or not. This is a particularly harsh dilemma in India since there is no other law (secular or personal) that allows adoption. Of course, the entire choice is a false choice as one may not want to renounce Hinduism and yet adopt a daughter in spite of being parents of a daughter, or adopt a child whose parents are non-Hindus, or adopt as a married woman in an independent capacity.

Another example in Hindu Law that defies the category of Hindu as a legal category rather than a religious category is to be found in S. 26 of the Hindu Succession Act. According to S. 26 – Where, before or after the commencement of this Act, a Hindu has ceased to be a Hindu or ceases to be a Hindu by conversion to another religion, children born to him or her after such conversion and their descendants shall be disqualified from inheriting the property of any of their Hindu relatives, unless such children or descendants are Hindus at the time when the succession opens.

This section interestingly renders conversion from Hinduism as a ground of disqualification not for the convert in view of the provisions of the Caste Disabilities Removal Act. 1850. (The Caste Disabilities Removal Act, 1850 abrogated all laws and usages which on ground of conversion or excommunication inflicted forfeiture of any right or property or in any way affected or impaired any right of inheritance). But the children born to the convert after the conversion and their descendants incur the disqualification.

This clearly is problematic for two reasons. One, it is an affirmation of the term ‘Hindu’ as a religious rather than a legal term. Two, the axe falls on the person (descendants of the convert) who did not even have a choice in the decision.
Christian Personal Law

The law relating to marriage among Christians is based on the Indian Christian Marriage Act, 1872 and the law relating to divorce is the Indian Divorce Act, 1869, both based on the law as it stood in England then. Under Section 10 of the Indian Divorce Act, the husband is entitled to dissolution of marriage on the ground of adultery simpliciter on the part of the wife, the wife is not entitled unless she proves that ‘the husband’s adultery is incestuous’ or is ‘coupled with cruelty’ or ‘bigamy’ or ‘desertion’ as the case may be depending upon the ground she has based her claim for divorce.

The discriminatory nature of the Act particularly against Christian women was partly amended by the Parliament in August 2001. The most significant aspect of the Bill is to make cruelty, adultery and desertion independent grounds of divorce.20

Another significant aspect of the Amendment is making available the remedy of divorce by mutual consent divorce to a Christian couple for the first time thus doing away with the need of proving matrimonial fault. While all other communities could avail of this facility for the last several decades, a Christian couple had to collude and fabricate false grounds of matrimonial fault against each other.21

But all this happened not before a century and a half had passed till which time the individuals within Christianity had been bearing the brunt of their personal law that not just was discriminatory to the women in the community but also to the community vis-à-vis the Personal Laws of other communities.

The Christian law is a case in point to see how local laws and customs can actually nullify any liberating potential that a central act may have.

The most famous instance is the Mary Roy case.22 The redeeming feature of the personal law of Christians is the Indian Succession Act that governs succession
among Christians in India. This is the only personal law that grants equal rights to both spouses. This for a long time did not apply to the Christians of Travancore and Cochin. The Travancore Christian Succession Act, 1916 as well as the Cochin Christian Succession Act, 1921 discriminated against daughters in favour of sons in matters of succession. Since many Christians in these places were Syrian Christians, Syrian Christian women were affected by this. This continued even after the Indian Union passed the Indian Succession Act in 1924, according to which the widow gets one-third of the intestate property, and sons and daughters get equal share of the remaining property. Technically, after 1951, the Indian Succession Act should have been applicable in Travancore and Cochin. The Church however resisted this and verdicts in Kerala and Madras High Courts supported the Church’s stand. During the 1960s and 1970s Syrian Christian women made several attempts to have the Indian Succession Act applied to them. Nothing came of this because of the Church’s official position that was against any change. It was in this context that Mary Roy along with others filed the case in the Supreme Court in 1986. The Court for the first time upheld her right to be governed by the Indian Succession Act like any other Indian Christian Woman from 1951 onwards.

The other example is with regard to the validity of marriage between a Christian and a non-Christian. The Indian Christian Marriage Act, 1872 made children of such marriages legitimate and qualified them for property inheritance. However, it was argued that the Anglican Church forbade marriages of Christians with non-Christians even though such mixed marriages were deemed legal under the Indian Christian Marriage Act, 1872. According to Bishop Azariah of the Dornakkal church, ‘Christian standards and ideals stand firm and unaltered, whatever the State legislation may say. Mixed marriages are wrong according to Christian ideals, and it
is the duty of the Churches by ecclesiastical action to give clear guidance to their ministers and to uphold the Christian standards by Church discipline.' Since such 'irregular marriages' even provoked acts of excommunication, a member of the Dornakkal church in spite of a State legislated law would not be able to enjoy the benefits of the legislation without risking her/his church membership. 23

_Muslim Personal Law_

The process of codifying Muslim Personal Law was initiated in the 1930s at the behest of the members of the community. This era witnessed the passage of the Shariat Act, 1937, and the Dissolution of the Muslim Marriages Act, 1939. It was regarded as a progressive move as it gave Muslim women rights denied to them under customary law. During this period the codification of Muslim Personal Law was seen as an example to be emulated by other communities. However, in the decade after independence the focus was on Hindu law. From the mid 1950s to the mid 1970s little or no debate took place on the issue of Muslim Personal Law in the legislature. 24 In the 1960s, when a move was made to reform the Muslim Personal Law, Vice-President Zakir Hussain conveyed a sense of resentment on behalf of the entire community and the attempt was promptly dropped. 25

Legislation on Muslim Personal Law then was picked up in 1986 with the Muslim Women (Protection of rights on Divorce) Act 1986. This Act was a result of the controversy that followed the Supreme Court's judgment in the Shah Bano case (1985). The Supreme Court in the said case upheld the right to maintenance to Muslim women under Section 125 Cr. PC. Section 125 Cr. PC that granted the deserted or destitute wife the right to claim a maximum amount of maintenance from her husband was extended to include a divorced wife by expanding the scope of the term wife to include ex-wife (or divorced wife). Applying Section 125 Cr. P C by
itself was neither novel nor contentious. What were contentious were the statements on Islamic law as degrading to women and the suggestion of a Uniform Civil Code as a solution. To assuage the communal backlash the government introduced a Bill in Parliament titled, The Muslim Women (Protection of Rights on Divorce) Bill to exclude divorced Muslim women from the purview of Section 125 Cr. PC.

As the debate on the Act raged between the ‘modern and rational’ voices against the ‘orthodox and communal’ voices, the subject of the Act – Muslim women were given a difficult choice of supporting the judgment and betraying the community or supporting the communal voices and rejecting the liberating potential of modernity and secularism. Shah Bano herself disowned the judgment. In an open letter she stated, ‘... Now the Supreme Court has given the judgment on 3rd April 1985 ... which apparently is in my favour. But since the judgment is contrary to the Qur’an and the hadith and is an open interference in Muslim Personal Law, I, Shah Bano, being a Muslim, reject it and dissociate myself from every judgment that is contrary to the Shar’iat. (Inquilab. 13th November, 1985).’

The Bill was opposed at several levels. Daniel Latifi and Sona Khan, lawyers, filed a writ petition against the Act in the Supreme Court. The petition submitted that the Act be struck down on various grounds, including that it violated the right to equality before law and equal protection of the law guaranteed under the Constitution; that it would encourage divorce and female infanticide, thus militating against ‘two of the causes to which the Holy Prophet of Islam dedicated a great part of his life.’ (Writ Petition NO. 868 of 1986).

The Act was a clear case of privileging the powerful voices of the patriarchal elements in the community as a tool of political opportunism. It was concerned with neither the progress of the community nor the plight of members within it.
Legislation of Secular Laws

The Special Marriage Act

The Special Marriage Act, 1954 replaced the Special Marriage Act, 1872. As enacted in 1954, it served two purposes. For one who wished to marry within his or her own religious community, the Act came as an alternative to her/his religion based personal laws of marriage – the discretion of opting between the two laws being entirely of the persons concerned. It also enabled a person to marry outside her/his community, irrespective of the restrictions on such a marriage under her/his personal law.28

The enactment of the Special Marriage Act in 1954 is the only significant move in the post-independence period to secularize family laws. The Act provided for a civil marriage of two Indians, without the necessity of renouncing their respective religions. As enacted in 1954, once the parties opt for a secular form of marriage, in matters of succession they are governed by the Indian Succession act (which is more egalitarian and gender-just) and not by the provisions of their respective personal laws. Conservative Hindu, Muslim and Christian opinion was strongly opposed to the Act. A section of Muslims demanded exemption from its purview as persons marrying under it would not be governed by the Shariat. Interestingly Nehru retorted that the constitutional provision which guarantees the freedom to practice religion also includes the freedom not to practice a religion (something that is grossly overlooked by the Indian courts in the application of personal laws. See chapter 5).

The potential of the Act to develop its egalitarian content was curtailed in 1963 by an amendment that subordinated the Special Marriage Act to customary practices. Prior to this the Special Marriage Act subordinated the personal laws to its provisions. The 1963 amendment reversed this by subordinating the Special Marriage
Act to the personal laws. The Act was further amended in 1976. According to the 1976 amendment to the Special Marriage Act, if a Hindu couple married under the Act, they were taken out of the purview of the Indian Succession act of 1925 and were to be governed by the Hindu Succession Act. This helped to prevent the dissolution of coparcenaries that clearly protect the interests of the Hindu male and are anti-women. (So the amendment hit the interests of the female Hindu in limiting her rights of inheritance). It also hit the choice right of Hindus who got married under the Special Marriage Act but were not given a choice to be governed by the secular law of succession.

*The Indian Adoption Bill*

The Indian Adoption Bill was introduced in the Rajya Sabha in 1972. The Bill as a proposed secular law on adoption was the first of its kind. It sought to permit and enable all Indians to adopt a child without reference to the religion of the child or the adoptive parents. The adopted child was to take the religion of its adoptive parents. Adoption was to be irrevocable.29

This bill would have been an answer to those who wanted to adopt a child but were prohibited by their community/religion from doing so. (Muslim, Parsis, Christians cannot adopt in India. They can only become guardians under the Guardians and Wards Act, 1890). The Bill lapsed when the Parliament was dissolved in March 1977. The Janata government, which was voted to power after the election, introduced a new Bill but withdrew it following opposition from a section of the Muslims. In 1980 when the Congress party regained power, the government reintroduced the Bill in a modified version and paid heed to the Muslim demand for exclusion. At this juncture, the Parsi community demanded exemption from its application. Thereafter the Bill was abandoned.30 The reasons put across by Muslims
and Parsis in opposition to the Bill is pertinent for the concerns of the thesis.

The Bill was opposed by Muslim members on the following grounds – adoption was against the Quran, it would throw the Islamic law of inheritance out of gear, it would add more persons to the list of prohibited degree of relationship for marriage, it was viewed as an attempt to foist Hindu law on Muslims.\(^\text{31}\)

The Joint Committee to which the Bill was referred tried to explain that the Bill was only an enabling legislation. It would force no one to adopt. The answer was that even “bad” Muslims should not be allowed to adopt, which the proposed legislation would do. One of the opposing members, Mohammad Jamalurrahman while admitting to the voluntary character of the Bill expressed the opinion that, ‘... Muslims as a community should not have the option to get into or run away from the provisions of the Muslim Personal Law; rather in our frame of society, there should be no such law to give any community, including the Muslims, a liberty of abandoning their personal law.’\(^\text{32}\)

This view clearly hits those members of the Muslim community who want to adopt and yet not relinquish their Muslim identity. Prior to that, it denies members of the community a choice (choice right). As to the objection that adoption does not exist among Muslims and that it is against the Quran, Imtiaz Ahmed has referred to the well-rooted practice of adoption amongst Muslims of Delhi, and said that there was even a term in Urdu – “Gode-nama” for the deed of adoption.\(^\text{33}\)

On adoption being prohibited by the Quran, there are alternative interpretations of the Quran that it does not prohibit adoption. As to which interpretation is valid again raises the issue of politics of interpretation. This foregrounds the role of human agency is validating any strand of interpretation and thereby any particular interpretation cannot be labeled as divinely ordained.
As for the Parsis, the reaction to the Indian Adoption Bill ranged from a qualified approval to total rejection. Some did not wish their charitable trust funds, and their fire temples to be thrown open to non-Parsi adopted children. They had no objection to inter-religious adoption if the rights of the non-Parsi adopted child were restricted to inheritance of private property. Most Parsis were in favour of a proviso which would extend the religious and economic rights to only those children who were Parsi by blood on the father's side. Some wanted to restrict Parsi parents to adopt only Parsi children.34

The Bill lapsed when the Parliament was dissolved in 1984. The corresponding secular Act – The Guardians and Wards Act has no law on adoption but allows for guardians. Though a secular law, Section 19 of the Act states that when an application is made to the Court for the appointment or declaration of a person as guardian, the Court is required to take into consideration the personal law of the minor. The personal law with its wavering stand between being a legal or religious category supervenes even over the secular law of guardianship.

Cultural Identity and Societal Recognition

Does the placement of the secular ideal in the constitution ensure societal acceptance of religious liberty?

Rights as legal rights are the easier notion, because it is easier to say how we would establish that somebody had legal rights. Legislatures exist to make laws, and courts to interpret and apply them. There are complications here which jurists discuss. But in principle there is a decision-procedure for determining what the law is in a particular case. As far as legal rights are concerned, all societies have rules of recognition whereby they decide the content and mode of exercise of 'right.' But legal rights cannot ensure recognition and acceptance by society.
The most common form of bringing a right into being in society is the recognition of such a right, not always in a deliberative manner or democratic procedure. Recognition or non-recognition of a right in the social realm can have a forceful and immediate impact on concerns of identity, dignity and self-esteem. A constitutional or legislative right, once proved that it needs to be changed does have scope to be changed. There is a certain procedure legislatively to bring the right into being and by the same procedure the right can suitably amended. However rights in the social realm are not similarly amenable to change. To that extent rights in the social realm are most elusive to reform.

Given below are certain instances to substantiate the view that in spite of the constitutional right to the freedom of religion, the same can be thwarted and blatantly violated in the social realm.

_Summary of rights and recognition in the social/community realm_

Rights can be understood under the rubric of legal rights and moral rights. Legal rights are the easier notion, because it is easier to say how we would establish that somebody had legal rights. Legislatures exist to make laws, and courts to interpret and apply them. There are complications here which jurists discuss. But in principle there is a decision-procedure for determining what the law is in a particular case. Moral rights operate in a societal framework. As it is crucially dependent on the endorsement of society for its application, a moral right in a certain sense is a social right. All societies have rules of recognition whereby they decide the content and mode of exercise of ‘right.’ The trouble with moral rights in a societal framework is that there seems to be no decision-procedure as for legal rights. That is why disputes about moral rights are so intractable. This dispute is also evident in those areas of
legal right that arise out of codifying a moral right. As Hare states, the question is one of what the law morally ought to do, not what it is. 35

Example I

In 1990, a young Parsi woman, Roxan Darshan Shah died in a car accident. Though she had married out of the community she continued to practice the religion she was born into and had even married by a special marriage ceremony that legally asserted that she remained of the religion of her birth. When her father brought her body to the Towers of Silence, the Parsi Panchayat did not allow him to do the last rites in the Towers of Silence. The reason given was that since the deceased had married outside the community, she was no longer pure. Allowing the rites of a dead person who had married outside the community would defile the sacred Towers of Silence. One of the high priests went on to explain in a letter that ‘to marry outside the fold is next to adultery ... a child born in such a situation is considered to be illegitimate.’ The image of the grieving father abandoned by his religion in the hour of his greatest need shook the community badly. The Roxan case took to the extreme the question of whether a Parsi fundamentally changed through intermarriage. This was not the question of whether an outsider or even a child would be admitted within the fold; the issue was whether someone who was clearly a member of the community, and moreover continued to practice her religion as a member of the community, had somehow changed her very substance in marrying a non-Parsi, as if her birth had somehow become invalidated. 36

Two kinds of argument came up. One defended the position of the priests while the other pressed for change. The conservative argument emphasized custom. Much was made of a letter from seven high priests of Bombay and Gujarat: ‘We once again inform you that sacred rules in the books, the customs and ceremonies of the
religion accordingly state that after marriage the lady who had such a marriage (an outmarriage) cannot be a Parsi Zoroastrian and so cannot use any religious institutions or dokhmas ... On the other side, the liberals uniformly pressed for the need to change with the times. The argument was that customs are made for the times and do not define the people. It was felt that rituals as customs have no power in themselves; they are chosen by the dictates of need and circumstance. When need and circumstance change they can also change.37

The recourse taken by Roxan Darshan Shah was a legal recourse of the Special Marriage Act. She had not tampered with the personal/religious laws of the community she was born into. (Not that the application of personal laws were in tandem with the secular principles of individual dignity and freedom of conscience of the constitution). She exercised her constitutional right to freedom of religion with a free conscience by practicing the religion she was born into even after her marriage. But as these rights were not recognized by her community, even her constitutional and legal rights were denied to her.

In the latest resolution from the high priests of the Zoroastrian community, the priests have stated that those marrying outside the community will not have their marriages validated by the community. Further to preserve the "unique identity of the race its purest form", the resolution, adopted on March 7, 2003, also suspends the right of priests to perform the 'Navjote' ceremony on children from mixed marriages.38

Example II

The mosque has a central place in most communities among Muslim. As stated by D'Souza, Whatever the variations among different communities we find that with few exceptions the mosque is commonly described as having a 'central' place within Muslim society.39
On December 18th, 2003, the Hindustan Times, a national English newspaper published that some Muslim women of Tamil Nadu have decided to build their own mosque with their own jamaat. The decision, taken under the banner of a voluntary organization called Chaaya, was provoked by the discriminatory verdicts handed down by the male-dominated jamaats in family disputes. Especially in divorce matters. According to a convener, Sherifa, ‘when a man seeks divorce, only his case is heard by the jamaat. The wife is never called for a hearing, saying that women are not permitted inside mosques, where jamaats usually sit.’ The all women mosque will be a proper structure with minarets. There will be a woman moulvi versed in the Koran and Islamic tenets.

This case again has two reactions – one to preserve status quo and the other that is comfortable with the change. Mohammed Sikander, secretary of a jamaat in Chennai responded in the following words, ‘Normally women are not allowed into mosques because their presence could disturb men during prayers. Jamaats have been asked to settle disputes outside mosques so that they can hear the women’s side. This arrangement (of women having their own mosque) is not really necessary.’ The other reaction came from Maulana Kalbe Sadiq, the vice-chairman of the All India Muslim Personal Law Board, ‘there is no harm is constructing such a mosque. Women have the right to construct mosques and offer prayers in the jamaat.’

Example III

The lighting of the funeral pyre in Hinduism is seen as the bastion of a male relative. There have been ground breaking steps by females who have exercised an equal right to light the funeral pyre. According to Kirti Singh, ‘The law does not forbid women from performing the last rites of their parents or spouse, its only social custom which does. There are any number of cases where a daughter, in the absence
of a son, have looked after parents financially and emotionally, but have been prevented from performing their last rites in preference of a distant male relative. What we probably need is a law to end such discrimination.\textsuperscript{42}

Yet another male bastion that has been stormed is the realm of the priesthood (paurhitya). The movement for women priests started in the 1950s in Andhra Pradesh. In Pune since 1974 Mama Thatte had begun a five-year course to train stree purohitas in the performance of rituals that had thus far been the preserve of men.\textsuperscript{43}

In all the above examples those who have pressed for change are clearly those who value their cultural membership. They are people who are clearly not looking for the right to exit. On the contrary they are people who are redefining or seek to redefine their mode of membership to the community in ways that would further substantiate their sense of belonging.

Example IV

In February 2003, two Sikh women were refused the right to participate in the Sukhasan Sahib procession at Sri Darbar Sahib Ji. The two Amritdhari Sikh women, Mejindarpal Kaur and Lakhbir Kaur from the United Kingdom lodged a complaint with the Akal Takht Jathedar and the SGPC seeking an immediate restoration of the right of Sikh women to undertake all types of seva at Sri Darbar Sahib Ji. The petition clearly stated that The observance of non-Sikh practices at Sri Darbar Sahib Ji has led to the erosion of the principles of Sikhism as propounded in the Sikh Reht Maryada and threatens the religious injunctions of Sikhism as ordained in Sri Guru Granth Sahib Ji. (interestingly a case where the dominant voices imagine to uphold the cultural identity at the cost of the very kernel of the values of the cultural community.)

The denial of Sikh women's right to undertake all types of seva at Sri Darbar Sahib Ji has continued despite the following:
1. The SGPC's Religious Advisory Committee passed a resolution on 9 March 1940 to allow Amritdhari Sikh women to perform Kirtan inside Sri Darbar Sahib Ji;
2. On 9 Feb 1996 the Jathedar Akal Takht (along with four other Singh Sahibans) directed the SGPC to allow Sikh women to perform seva at Darbar Sahib Ji following a petition from the Sikh sangat;
3. In 2002 the Sikh sangat again petitioned the SGPC and the Akal Takht to implement the 1996 Sikh religious leaders' directive on the Sikh women's right to do seva.

Conflicts arise in the mediation of cultural identity of individual members when the terms of recognition accorded to an individual member in her/his cultural distinctness are not the same as those terms of recognition that are applied to recognizing the cultural community. Recognition of the identity of the cultural community is recognition of the symbols (representational systems) and structure (order). On the other hand, recognition to the identity of the individual member in light of her/his cultural distinctness is recognition of the individual's capacity and autonomy to interpret and make meaning of the symbols in the given context, the orientation of the member in the structure and the member's ways of living out meanings through activity and practices.

In the above examples, the symbols of the community have not been challenged. If anything the stress is on the adherence to rituals that have a symbolic significance – be it disposing the dead in a certain manner, turning to a religious law for divorce verdicts, performance of rituals and religious ceremonies, all indicate the need to be a part of the community. The resistance is to being a passive recipient of the meanings as articulated by the dominant sections of the community.
The only recourse to members who have been denied the right to cultural identity by the community and are not recognized by the society is to turn to the judiciary. If the legislature violates the cultural rights of members in the garb of serving the interests of the community, the judiciary’s role should ideally be to restore the rights to the members. The next chapter looks at the role of the judiciary in serving the community or upholding the rights of the members.
END NOTES


(3) Smith, Donald (1963) India as a Secular State. Princeton and Oxford. UK


(22) AIR 1986 SC.


(40) Shekhar, G C – ‘Muslim women to build their own mosque.’ December 18th, 2003. The Hindu.

(41) Shekhar, G C – ‘Muslim women to build their own mosque.’ December 18th, 2003. The Hindu.


(44) www.voicesforfreedom.org