

**Church-State Relations and Religious Liberty: Comparative Perspectives  
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**Panel II: The New Hope Case  
Equality and Religious Freedom: India**

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I. Some preliminary comparative reflections

“Please comment on your country’s likely response to this case.” The most natural interpretation of this request is that it wants to find out how the New Hope case would be decided in Country X. Presumably there are precedents and constitutional provisions in X that bear upon the facts detailed in the hypothetical. These legal desiderata provide sources to enable one to produce an informed answer, namely that the contested Equality Law is either constitutional or it is not in light of the constitutional law of X. But the proper initial response to the request should be: “Tell me more.”

For example, we are told that New Hope (as well as the country of Carolingia) is “religiously pluralistic.” But that designation tells us only that the population is diverse in its spiritual affiliations, it does not convey a sense of the nature of that diversity. Is the Catholic minority well integrated into the cultural life of the broader community, such that its distinctive belief structure does not coincide with idiosyncratic social proclivities that sets it apart from other religious groups, in particular the one that enjoys the largest popular following? Several weeks ago in Orissa, a poor state in eastern India, a Hindu mob attacked Christian villagers, leaving sixteen people dead across a broad swath of territory. As reported in the New York Times (September 4), “Chanting ‘Kill these pigs’ and ‘All Hindus are brothers,’ the mob began breaking into homes that displayed posters of Jesus, stealing valuables and eventually burning the buildings. When they found residents who had not fled to the nearby jungle fast enough, they beat them with sticks or maimed them with axes and left them to die.” For those who follow such sordid events, it will recall other episodes of depraved communal violence, most notably the vileness of what occurred in Gujarat in 2002, a relatively flourishing state in western India and the home of Mohandas Gandhi. The mass killings of Muslims following a controversial train incident was shocking even to those in that country who had become inured to having their lives punctuated by reports of violent riots. What had become ubiquitous could not prepare one for the genocidal brutality that accompanied the slaughter of innocents. And so it goes.

From its earliest days as an independent state, ethno/religious violence has been India’s constant affliction. Nothing that has occurred since that time can quite rival the horrific bloodletting that accompanied the partition of British India into two states, but the subsequent history of deadly inter-communal conflagration is in its own way comparably appalling in what it reveals about the enduring nature of entrenched hatreds. Like so much else in India that is jarring in the magnitude of its incongruities, this history co-exists with a story of democracy that is remarkable for having unfolded as successfully as it has within such an inhospitable environment.

The judiciary has played an important role in this story; indeed after the bloodletting in Orissa the Supreme Court ordered the government of that state to submit a report on its efforts to control the violence. But for our purposes, of much greater importance have been the Court's efforts to develop a jurisprudence crafted to the unique circumstances of Indian religious pluralism. What happened in Orissa was not mainly about theological differences; its principal causes were social and economic, as the Christian minority – through such activities as conversion – came to be perceived by its attackers as having threatened the rigidly hierarchical structure of Indian society. This connection between religion in India and the configuration of society is at the core of the country's jurisprudence of church/state relations.

Thus to develop an Indian response to the New Hope case also requires more information about how consequential religiosity is in the life of that society. For its practitioners, is it a *way of life*, in which a system of beliefs, symbols, and values has become ingrained in the basic structure of society, ultimately setting the parameters within which vital societal relations occur? Where faith and piety are widely and directly inscribed in routine social patterns, a viable constitutional approach to religion and politics will require greater attention to the substance of religious belief than in places where social conditions bear a less theological imprint.

Indeed, from the very beginning of constitutional governance in independent India official indifference to what transpired within the religious domain was never a plausible option. Such a stance represented a costly indulgence that could only serve to legitimate an unacceptable status quo. As important as had been the goal of communal harmony, an equivalent priority in the constitution-making process was the goal of social reconstruction. The depth of religion's penetration into a social structure that was by any reasonable standard grossly unjust, meant that the framers' hopes for a democratic polity would have to be accompanied by State intervention in the spiritual domain. The design for secularism in India required a creative balance between socio-economic reform that could limit religious options and political toleration of diverse religious practices and communal development.

To address the situation in New Hope requires a more contextual understanding of what has been going on there. Assuming that such knowledge is available and can be added to the facts we already know, I now move on to outline the general principles of Indian constitutional jurisprudence that should determine the outcome.

## II. The Indian Approach

The balance between religious autonomy and substantive equality is inscribed in several constitutional provisions. Thus the ameliorative aspiration of Indian secularism is embodied in Article 25, which, after providing for religious freedom, declares that the State shall not be prevented from "regulating or restricting any economic, financial, political or other secular activity which may be associated with religious practice." Additional provisions are designed to accommodate the other principal facet of Indian social reality, the entrenched character of communal affiliation. Under Article 26, religious denominations are granted the right to establish and maintain institutions for

religious and charitable purposes, and the same right is extended to the creation and administration of religiously based educational structures in Article 30. Article 29 guarantees the right of minorities to conserve their distinct cultures. With admirable clarity, the document provides all Indians with a broad right to religious freedom, only to declare that this right is subject to substantial possible limitation.

The following are the principles and assumptions of most relevance to the case at hand:

- Unlike the Carolingian Constitution, which follows the American in forbidding “a law respecting the establishment of religion,” India’s Constitution endorses non-establishment without requiring a separation of religion from politics.
- The acceptance of religion in the public domain represents more than a straightforward commitment to accommodate religion on a non-preferential basis. While the state is officially neutral in its policy toward religions, it may treat them differently if in doing so it advances the end of achieving substantive equality. In this regard, the Court will uphold certain policies that distinguish between the majority and minority religions. Thus the state, in its dealings with religious groups, must comport with the principle of equal dignity for all without necessarily fulfilling a concurrent expectation of equidistance in these relationships. [Apropos of what has been said earlier, this can be seen as a contextual rendering of church/state relations that incorporates the particular constitutive features of a specific polity.]
- Access to public resources for the pursuit of religious work is in principle unproblematic; at the same time, the state may intervene so as to insure that these pursuits do not violate and undermine the Constitution’s commitment to public order and morality.
- Religious beliefs are protected against state regulation, but to the extent that they cannot be distinguished from behavior that may implicate worthy secular goals, their immunity from governmental intervention is not guaranteed. A presumption in favor of the right of religious denominations to regulate their own affairs exists; again, however, policies of the majority religion may be subject to a lesser degree of freedom and deference than those involving minorities. Thus the Constitution, consistent with the principle that equality trumps religious autonomy, forbids restrictions on caste-based access to Hindu worship at temples.
- While the Constitution is committed to the creation of a uniform code of civil justice, in practice minority communities are accorded considerable latitude in regulating the personal laws pertaining to their individual communities.
- In determining the validity of state regulations that impinge upon religious liberty, the Court applies what has come to be known as the “essential practices” test, in which those practices deemed non-essential are subject to greater regulation than those held to be critical to the religious identity of the individuals practicing them. Thus attempting to isolate what is integral to religion from what is not, however tricky and even dubious, is a necessary part of the judicial function; otherwise, social reform efforts face overcoming religious-based practices not only considered a way of life, but also poised to claim undifferentiated theological significance. As Dr. Ambedkar (India’s Madison) said at the Constituent Assembly: “There is nothing extraordinary in saying that we ought to strive hereafter to limit the definition of religion in such a manner that we shall not extend it beyond beliefs and such rituals as may be connected with ceremonials that are essentially religious....”

### III. On to New Hope

Carolingia is described as “a western liberal democracy.” The description is general enough to comport with alternatives perspectives for accommodating religiously grounded objections to secular law. Thus we find co-existing in the practices of liberal democratic nations both the principle of legal equality – Locke’s view that “private conscience” must not prevail over the obligations of general law -- and the principle of individual autonomy, which leads one to accommodate legal non-compliance that flows from conscientiously held beliefs, particularly as they may originate in a religious world view. It is possible that the Indian Supreme Court would decide the New Hope case in a manner consistent with either of these principles without, however, following their respective logics.

While India has many features of a western liberal democracy, and certainly aspires to embody more of them, certain of its anomalous practices are important in addressing this case. Although the state has legislatively intervened in the regulation of personal behavior as this relates to the majority Hindu community, it has, often to the chagrin and resentment of many Hindus, granted minorities considerable latitude in governing the personal lives of members of their communities. This includes behavior – for example, bigamy – that violates the “moral vision” of the prevailing national ethos. The Catholic minority in Carolingia is much larger than it is in India; indeed nationally it is considerably larger than is the Muslim minority in India.

This suggests one of two possibilities: 1) The Court would defer to the alternative vision of the Catholic minority on the question of discrimination under the theory that the distinctive cultural profile of the religious group, however disagreeable, must be respected through the granting of an exemption from the Equality Law. There is no indication that the province of Essex has a regime of personal laws, but the underlying logic of that common arrangement in India (as well as Article 29) would push the Court in the direction of requiring the exemption. 2) The Court, mindful of the size of the Catholic minority, would be loath to grant an exemption that might establish a precedent that would be perceived as legitimating massive non-compliance for behavior at odds with the Constitution’s moral vision of equality. Moreover, the status of Catholics in Essex is not comparable with that “enjoyed” by Christians in Orissa, the heightened vulnerability of the latter arguing for greater judicial solicitude than what the Court would be likely to extend to Catholics in New Hope.

The critical question, however, involves the Court’s probable application of the essential practices test. The underling assumption behind this test is that religion is a constitutive presence in the lives of most people, which on the one hand argues for respecting their way of life (quite literally), and on the other for preventing that way of life from undermining the constitutional aspiration for a quite different way of life. Unlike many constitutions, India’s is deliberately confrontational and subversive, which is to say that it seeks to reconstruct a society whose problematic characteristics are inseparable from the religiously inspired practices of its population.

The Essex Equality Law is described as having a “moral vision” in tension with the moral vision of the Roman Catholic Church. Article 25 of the Indian Constitution says:

“Subject to public order, morality and health...all persons are equally entitled to freedom of conscience and the right freely to profess, practice and propagate religion.” So the question is whether the tension present in these divergent moral visions is of a magnitude as to compromise in a substantial degree the fundamental commitments of the Constitution. Does the tolerance of discrimination threaten to derail the transformational project implicit in constitutional design? Or was that project less demanding, perhaps even acquiescent, as far as the personal choices of the citizenry were concerned? Does theologically based discrimination against homosexuals overlap with a pervasive pattern of discriminatory behavior that could even call into question the description of the country as a liberal democracy?

Of course, if the discrimination is not theologically driven, then the claim for an exemption is, under the essential practices test, clearly less compelling. When the Indian Court concluded that the practice of bigamy was not a religious requirement, as it was alleged to be in the case of a Hindu couple’s failure to produce a male child, it could claim that its failure to grant an exemption was not a repudiation of a spiritually inspired conscientious belief. Under Article 25, the state’s interest could in any case have trumped that of the religious objector, but there is a definite strategic advantage for the Court in minimizing the significance of the secular – religious conflict. While there is a danger in judges presuming to know what is essential for a religion, the Indian circumstance, in which the dominant religion is wildly heterodox in doctrinal matters, makes the option much easier to execute than would be the case if a hierarchical ecclesiastical authority existed to determine questions of theological orthodoxy.

Thus it would not have escaped the Indian Court’s notice that in Carolingia the policy pertaining to homosexuals stemmed from an edict of the Vatican’s Sacred Congregation for the Doctrine of Faith. For the Court to deny that this policy was essential to the Catholic faith would amount to an act of judicial *chutzpah* so blatant as to call into question the very legitimacy of the institution. In order, then, to deny the exemption on constitutional grounds it would be necessary to address directly the question of whether the discriminatory behavior of a group, which was also a mandated practice of a religious denomination, was a sufficient threat to public order and morality as to justify the state’s rigid enforcement of its Equality Law. It is unlikely that the particular discrimination at issue in this instance would trigger an affirmative judicial response from the Court were the case to be transposed to the Indian environs. But as to how the Indian Court would respond to a request that it suspend its court docket in India in order to adjudicate the specific case in New Hope, the outcome would be by no means certain. Or, shall we say, it would remain uncertain until the Court could pursue a more ethnographic, contextual investigation of this unfamiliar constitutional locale.