The Rise and Fall Of Judicial "Intermeddling" In the Jury's Assessment Of Damages In Sixteenth- And Seventeenthcentury Defamation Cases

Michael Stuckey[*]

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In the early seventeenth century superimposed on the certitude that periods of discord are trying ones for judges there was an increasingly political dimension in the law of defamation. This was difficult enough, but juries might, of course, make the most exorbitant awards of damages, and then arose the question of whether the court could or should intervene.

The action on the case for defamatory words is a comparatively recent development in the common law, having its origins in the early sixteenth century.[1] It is also significant that the action underwent a significant substantive expansion in the politically heated early years of the seventeenth century. Prior to the emergence of the action, harmful words were the province of either the ecclesiastical or the criminal courts. Baker has speculated that the reason for what appears to be "a deliberate new departure" was the perceived deficiencies in the law resulting from various legislative and common law-judicial interferences with the spiritual remedies.[2] Damages had never been available from the

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[1] *See generally* J.M. Kaye, *Libel and Slander - Two Torts Or One?*, 91 LAW QUARTERLY REVIEW (1975), pp. 524-539.

[2] J.H. BAKER, AN INTRODUCTION TO ENGLISH LEGAL HISTORY. (London: Butterworths, 1990), pp. 495-497 and also J.H. BAKER, THE REPORTS OF JOHN SPELMAN. (2nd vol.), (94 Selden Society, 1978), pp. 239-240, where particular reference is made to the 1528 edition of the *Natura Brevium* and the role of Wolsey.

ecclesiastical courts and the statutory actions such as the scandalum magnatum of 1378, usually confined recovery to particular classes of plaintiffs. From the outset of this action, as with other forms of tort, it was the jury which assessed the quantum of damages.[3] The jury's role as the arbitrator of the amount of damages was one which judges were unwilling to trespass upon, especially in the periods when the defamation action was either novel or undergoing its subsequent expansion.

One of the clearest instances of judicial reluctance to interfere with a jury' s assessment was *Hawkins v. Sciet*[4]. Helmholz quoting from *Hawkins v. Sciet*, states:

> "...in 1622 an attempt to reduce damages of one hundred and fifty pounds to fifty pounds in a slander case was refused 'sur grand avise' on appeal the justices holding that they did not wish to change the course of the law and that it was best to leave the question of damages 'to the finding of the jury which best knows the quality of the person, and their estate, and the damages which they may sustain from such disgrace'."[5]

Hawkins v. Sciet was a case where the defendant had called the plaintiff a bankrupt. Other than this, the report is scant of detail indeed.[6]

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[3] On which *see* G.T. Washington, *Damages In Contract At Common Law*, 47 AND 48 LAW QUARTERLY REVIEW (1931 AND 1932), respectively 345, pp. 345-346 and 90, pp. 90-108.

[4] (1622) Palmer 314; 81 ER 1099.

[5] R.M. Helmholz, Civil Trials and the Limits of Responsible Speech *in* R.H. HELMHOLZ AND T.A. GREEN, JURIES, LIBEL, AND JUSTICE: THE ROLE OF ENGLISH JURIES IN SEVENTEENTH- AND EIGHTEENTH-CENTURY TRIALS FOR LIBEL AND SLANDER. (Los Angeles: William Andrews Clark Memorial Library, University of California, 1984), 3, pp. 22-23.

[6] So scant indeed that it is possible to reproduce it in its entirety here: "In action sur case p appeller luy un banckrupt, fur general issue fuit trove p le plt', & 150 l. damages done; et p cest grand damage le Court p ascun circumstances reduce eux al 50 l. Mes apres sur grad advice, ils ceo revoke, & ne voilent changer le course de ley, et resolve p lever teils matters de fact al trover de jury, q mieulx conusont le quality del pson, & lour estate, & damage q poent sustaine p tiel disgrace; aliter lou le action est ground sur cause, q poet appeare al view del Court, sur q ils poet Judge; coe in maihem, &c. Et accordat est Dy. 105. Et issint ils done judgmt p le 150 l. accordant al verdict."

This case, and Helmholz's analysis of it, constitutes a threshold in the problem of judicial intermeddling in the jury's assessment of damages in sixteenth- and seventeenth-century defamation cases.

The report of *Hawkins v. Sciet* does cite as authority for the decision of the court the 1554 precedent of *Bonham v. Lord Sturton*[7]. In Bonham it was also argued whether it was for the court to mitigate the award of damages made by the jury. The report of Bonham is considerably more descriptive than the meagre law-french of Hawkins. Detailed glosses to the judgment in Bonham, added to the report in later years reveal that the issue of the jury's power to award damages was not so straight forward as might initially be thought from Helmholz's rendering of Hawkins. If nothing else the glosses indicate that the issue became one of contention. But the glosses aside, the bare finding of the court in Bonham was that:

> "...it was adjudged that [the court] could not [mitigate the jury's award] because the damages are the principal."

Central to Helmholz's analysis of these issues is the proposition that courts of the period did not seek to separate the issues of liability and assessment of damages in the way we now do. The corollary, for Helmholz, is that it is possible to discern, over time, a coincidence in the increase of judicial supervision of substantive matters with an increase in judicial influence over the jury's award of damages.[8] This is no doubt an accurate observation: only thirty-two years after *Hawkins v. Sciet* there is what Helmholz has (subsequently) purported to be the first instance of just such judicial intervention.[9] In *Wood v. Gunston*[10] it was ordered (pursuant to the jury's award of 1500 pounds to the plaintiff) that a new trial must be held. In this case counsel for the plaintiff, Sergeant Maynard, argued that it was wrong for the court to question the partiality of the jury after a verdict had been reached and furthermore that the order for a new trial in such circumstances was without precedent.

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[7] (1554) Dyer 1:105a; 73 ER 230. Also referred to by HELMHOLZ, *loc. cit.* and at n.77.

[8] HELMHOLZ, *op. cit.*, pp. 22-24. *See also* R.H. HELMHOLZ, SELECT CASES ON DEFAMATION TO 1600. (101 Selden Society, 1985).

[9] R.H. Helmholz, *Damages In Action For Slander At Common Law*, 103 LAW QUARTERLY REVIEW (1987), 624, pp. 637.

[10] (1655) Style 466; 82 ER 867.

Nevertheless Chief Justice Glyn was convinced that the Court was vested with a discretion to grant a new trial where a jury had miscarried.[11]

Both Helmholz and Washington make special mention of the fact that *Wood v. Gunston* was a case decided during the interregnum - but then leave this interesting fact for us to ponder.

In any case, it is indisputable that the growth of the "new trial" procedure was a significant development in the power of the judges to intervene in a jury's award of damages. Prior to this development it had always been possible for a court to utilise the attaint procedure to mitigate what was thought to be an "erroneous" (excessive) award of damages.[12] The procedure involved the establishment of a cumbersome grand jury. However, by the sixteenth century this procedure had fallen into disuse. In the meantime, judges in slander cases had taken advantage of another procedure, the remittitur, to control juries' assessments.[13] This procedure involved a "forgiving" of the excessive portion of the assessed damages by the successful plaintiff upon the defendant's application and the exercise of a judicial discretion. During this period we find not reluctance but some degree of enthusiasm amongst the judges for intervention. There was a large number of instances where the remittitur procedure was used to mitigate excessive damages in defamation cases.[14]

In 1622 *Hawkins v. Sciet* marks the end of the remittitur style of judicial intervention. According to Helmholz the substantive expansion of the action for words (to include previously unactionable types of slanders) which had occurred in the first two decades of the seventeenth century meant that the judges were increasingly unable to assess the actual damage suffered by the plaintiff.[15] The result was the immediate obsolescence of the remittitur. This left an application for a new trial the only avenue available to the defendant who believed that the assessment of damages by the jury was excessive. However, this time judicial intervention came as a trickle, not a tide. Just as the judges had been

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[11] HELMHOLZ, DAMAGES, p. 637 AND WASHINGTON, *op. cit.*, p. 351.

[12] WASHINGTON, *op. cit.*, pp. 346-351.

[13] HELMHOLZ, DAMAGES, pp. 629-634.

[14] *id.*

[15] *ibid.*, pp. 635-638.

reluctant in the first place to even entertain actions for harmful words so too (once the action on the case for words had been expanded) were they generally loath to interfere with the jury's award of damages.[16] It is interesting to note that during the more politically and juridically stable period of the tort, in the latter years of the sixteenth century, judicial intervention increased. But as the political heat rose and the tort came to be used for an expanded range of "insults" the issue of judicial intervention became a problematic one, as the glosses to Bonham evidence. Perhaps it was the case that, in addition to being unable to accurately assess damages in the expanded compass of the tort, many judges were also unwilling to play this more active part in potentially dangerous controversies. In 1676 Chief Justice North with whom Wyndham and Scroggs JJ agreed, is paraphrased in the report as saying (obiter):

> "in civil actions the plaintiff is to recover by way of compensation for the damages he hath sustained, and the jury are the proper judges thereof...[the trial judge said]...he could not tell what value to set upon the honour of the plaintiff."[17]

Times of political unrest are difficult ones for judges. The early seventeenth century saw the development of an overtly political dimension in defamation law compound this truism. Juries sometimes made the most outrageous awards of damages. But the only way out, for the judge as well as the unsuccessful defendant, was the new trial. Whether because of inability or reluctance even that device was considered only in the most extreme circumstances. In *Huckle v. Money*[18], almost a century

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[16] On which *see (generally)*: A.K.R. KIRALFY, POTTER'S HISTORICAL INTRODUCTION TO ENGLISH LAW AND ITS INSTITUTIONS. (London: Sweet and Maxwell, 1962), pp. 429-438; F. POLLOCK AND F.W. MAITLAND, THE HISTORY OF ENGLISH LAW BEFORE THE TIME OF EDWARD I. (volume II, Cambridge, Cambridge University Press, 1968), pp. 536-538; Baker, An Introduction, pp. 495-508 and Baker, The Reports Of John Spelman, pp. 236-248.

[17] *Lord Townsend v. Hughes* (1676) 2 Mod 150; 86 ER 994 at 150-151; 994. However, the dissenting judge, J. Atkins, commented: "...a new trial should be granted, for it is every day's practice; and he remembered the case of Gouldston [sic] v. Wood in the King's Bench...that Court granted a new trial, because the damages were excessive...if they are too great, the Court may grant a new trial."

[18] (1763) Wilson 2:205-7; 95 ER 768-769.

after *Wood v. Gunston*, Lord Chief Justice Pratt confidently stated:

> "...it is very dangerous for the Judges to intermeddle in damages for torts; it must be a glaring case indeed of outrageous damages in a tort and which all mankind at first blush must think so, to induce a Court to grant a new trial for excessive damages."

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THE MUSLIMS IN INDIA

INTRODUCTION

The great majority of the Indian population - more than 82 per cent of the country's population of over 850 million - are of the Hindu faith. Islam is the second largest religion, and its followers comprise some 11½% of the population. The Muslim minority in India is larger than the population of most Islamic countries. Islam has been deeply rooted in India for many centuries and has made a substantial contribution to the political and cultural history of the country. This article briefly outlines the position of the Muslims from a historical and sociological point of view. It then goes on to consider the main Hindu fundamentalist party - the BJP. Hitherto the BJP has not succeeded in obtaining a majority in the central Parliament, but two central Governments have already been dependent on its support. Its influence seems to be growing.

The Indian Constitution proclaims a secular State in which equality and non-discrimination are guaranteed for each person, irrespective of his or her religion. The Constitution also contains a number of specific guarantees of freedom of conscience. This constitutional system is briefly described in this article.

The central Government in New Delhi has repeatedly declared that it champions equal rights for the Muslims and defends the secular character of the State with the support of a parliamentary majority. Nonetheless, the Muslims consider that they are discriminated against as a minority, and there is regular friction and violence between the Hindu and Muslim communities. This article considers various problems of a general nature:

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first of all, the Kashmir problem (Kashmir being the only State of the Indian Union to have a Muslim majority), second the continued existence of a separate Muslim personal and family law contrary to the provisions of the Constitution and, third, the destruction of the centuries' old mosque at Ayodhya by fundamentalist Hindus and the measures subsequently taken by the central Government and the cases decided by the Supreme Court.

The problem of the secular State and the place of the Muslims in it plays an important role in the various tensions that are described in this article. The principle of the religious neutrality of the State is by no means undisputed: it is challenged by both the Muslims and the Hindu fundamentalists. Nonetheless, the principle seems essential to the stability and cohesion of the Indian system. It will become evident in this article that the Supreme Court envisages a central role for itself in maintaining the secular State.

1. THE MUSLIMS IN INDIA

Islam has been long established in India. Its origin lies in the various invasions of Muslims which took place in Northern India from the eleventh century onwards. In the sixteenth century the Mughal Empire was founded by Muslims originating from Uzbekistan. In due course it extended over all of northern and central India. The Taj Mahal in Agra, the Red Fort and the Jama Masjid mosque in Delhi together with numerous other important monuments in India were built by Mughal rulers. Only in the south a number of small Hindu kingdoms did survive.

After Aurangzeb (1658-1707), the Mughal Empire fell into decay and disintegrated into a number of independent states. The last Mughal emperor was deposed after the Great Mutiny of 1857 and the vast majority of the subcontinent was placed under direct British rule.

The British rulers strengthened the Muslim's feeling of community in relation to the Hindus. Since the end of the previous century, the British had pursued a policy of divide and rule, converting their originally anti-Islamic policy into support for Islamic organisations as a counterweight to the Indian National Congress[1], which was dominated by Hindus. The

[1] The Indian National Congress, which was founded in 1885, started as a debating club which was convinced of the blessings of the colonial regime but was in favour of a greater share in government for the Indian elite. Gradually the Congress evolved into a popular movement advocating self-rule and, ultimately, independence.

colonial administration upheld the privileges of the Islamic elite of princes and large landowners. A very important factor was the separate representation of the Muslims following the Indian Councils Act of 1909. However, the separatist sentiments among the Muslims cannot be attributed exclusively or indeed even mainly to the British intervention. The Indian National Congress claimed that it represented all Indians, including Muslims, and refused at a crucial moment (1937) to work with the Muslim League - the Islamic popular movement. This attitude confirmed the Muslims in their fear that the future of their community would never be safe in an unpartitioned, independent India. These fears were also fuelled by the regular riots and violence between Hindus and Muslims. All these factors contributed in 1947 to the partition of the British colony into two States: religiously neutral India and Islamic Pakistan. This partition of the country was accompanied by the migration of millions of people and huge massacres. Nonetheless, a substantial proportion of the Muslims continued to live in India.

Since independence, relations with Pakistan have produced three wars (1947-1948, 1965 and 1971). The Kashmir problem played a role in all three wars, but relations between India and Pakistan have always been tense quite apart from this issue. As soon as serious acts of violence occur in India, for example the bomb explosions in Bombay in 1993, the Indian Government immediately points an accusing finger at Pakistan, even before a serious investigation has been carried out. The assumption is that Pakistan obtains assistance from Muslims in India in carrying out such acts of subversion.

The present position of the Muslims in India is not only determined by the relationship of India and Pakistan. Also important are the Hindu-Muslim riots, which tend to occur with the regularity of a clock. Many of these disturbances are of merely local significance: a pig is found in the vicinity of a mosque and the Hindus are blamed, a handcart is involved in a collision with a police jeep and a few copies of the Koran end up on the ground, or a herd of holy cows led by Hindus gets mixed up with a procession of Muslims and several Muslims are trampled upon. Despite the futile nature of the events occasioning such riots, they can cause dozens or even hundreds of deaths or injuries and poison the atmosphere in a given area for a long time. Nonetheless, it should be realised that by far the majority of Muslims in India co-exist peacefully with the Hindus. It is by no means unusual for the two large religious communities to celebrate each other's religious festivals.

Economically and socially the position of the Muslims is, on average, unfavourable. Part of the Muslim community lives in ghettos in the old cities. The percentage of Muslims in the higher grades of the civil

service is relatively low, and the Muslims are at a disadvantage in trade and industry too. The Muslim community tends to be conservative and adopts a defensive attitude towards the remainder of the population. It should, however, be noted that India has had Islamic presidents and that Muslims are regularly appointed as ministers in the central Government in New Delhi and in State Governments. Political parties generally try to obtain the support of Islamic leaders in the hope that they will put their vote bank at the disposal of such parties. In the past the political recommendations of the *shahi imam* of the Jama Masjid mosque in Delhi in particular have had a major influence on the Islamic community in northern India. With the exception of the Hindu fundamentalist parties, no political party in India can afford to ignore the power of the Muslim electorate. This has traditionally been very true of the Congress Party, which is now in power in the central Government. At national level, parties that represent only Muslim interests do not play a role of significance.[2]

2. HINDU FUNDAMENTALISM

Organisations based on Hindu fundamentalist ideology have existed for a long time in India. The Rashtriya Swayam Sewak Sangh (RSS) and the Vishwa Hindu Parishad (VHP) are organisations which, although formally non-political, have close ties with Hindu fundamentalist political parties. The main national Hindu fundamentalist party since 1951 has been the Bharatiya Jan Sangh. This party merged with the Janata Party in 1977, but was re-established in 1980 under the new name Bharatiya Janata Party (BJP). In the State of Maharashtra, there is also the Shiv Sena, which is if anything even more militant.

These parties take the view that India is fundamentally a Hindu

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[2] Separate electoral rolls for Muslims have been rejected as a matter of principle in post-independence India since they are regarded as a cause of Muslim separatism (see the ban on separate electoral rolls on the ground of religion etc. in article 325 of the Constitution). Nor are any seats in Parliament specially reserved for Muslims, even though this is the case for "Scheduled Castes and Scheduled Tribes" (the former category were previously known as Untouchables) and for Anglo-Indians. After the secession of Pakistan, the Indian Muslims were a much smaller and fairly mistrusted group. This was why the Islamic members of the Constituent Assembly which drafted the Indian Constitution waived their demand for reserved seats in the hope that this sacrifice would guarantee them fair treatment by the Hindu majority. *See* GRANVILLE AUSTIN, THE INDIAN CONSTITUTION. CORNERSTONE OF A NATION. (Bombay 1972), p. 151.

country: Islam is regarded as a foreign, non-Indian religion. It is argued that the Muslims should show greater respect for the Hindu traditions and culture and that they should either break off all links with Pakistan and other Islamic countries or should emigrate there. In addition, they should relinquish their own Muslim family and personal law, should end the slaughter of cattle, should learn to speak Hindi better (instead of Urdu) and in general should surrender all privileges which they still are supposed to enjoy under the present constitutional system. Mosques which were built many centuries ago by Muslim rulers on the sites of important Hindu temples should be demolished. History should be rewritten in order to show the Hindu warriors in a better light who ultimately capitulated to the Sultan of Delhi and the Mughals. Finally, the Indian State should cease to be of a secular nature.

The role of the Bharatiya Jan Sangh (later the BJP) has been important at both national and State level. At the national level, its most notable achievement hitherto was its involvement in the Desai coalition Government from 1977 to 1979. This was the first central Government not to be composed of members of the Congress Party. The Bharatiya Jan Sangh was in fact formally disbanded not long afterwards in order to merge with other parties to form the Janata Party. However, this cooperation was destined to be of short duration, because the Desai Government fell in 1979 as a result of the disintegration of the Janata Party. This was due to the fear of a number of leaders of the Janata party that members of the disbanded Bharatiya Jan Sangh were trying with the support of the RSS to capture power and take over the organisation of the party.

After a short period of office of the interim Government of Charan Singh[3], Congress (I)[4] came to power under Indira Gandhi. In this period the members of the former Bharatiya Jan Sangh founded the Bharatiya Janata Party (BJP). Congress (I) remained in power until 1989, during which time the BJP was in opposition.

In 1989 Congress (I), led by Rajiv Gandhi, who had succeeded his murdered mother Indira Gandhi, suffered a major defeat in the elections to the lower House of Parliament (Lok Sabha), and the National Front under the leadership of V.P. Singh formed a minority Government. This Government obtained external support from both the BJP and the parties of

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[3] Charan Singh led the splinter Janata Party (S), in which the "S" stood for "secular", in contrast to the remainder of the Janata Party, of which the former Bharatiya Jan Sangh formed part.

[4] Congress (I) was a secession party of the Congress party under the direction of Indira Gandhi. The (I) stands for Indira.

the left. However, it fell in 1990 when the BJP voted against it in the Lok Sabha on a motion of confidence. The reason for this was that the leader of the BJP, Lal Krishna Advani, had been arrested during a demonstration to support the building of a temple on the site of the mosque at Ayodhya.

Since then the BJP has been in opposition. The lower House elections of 1991 were won by Congress (I), partly on account of the murder of Rajiv Gandhi. Subsequently the Government of Narasimha Rao was formed. At present, the BJP is the largest opposition party in the Lok Sabha.

As far as the States are concerned, the BJP has in the past formed Governments in various States. At the time of the Ayodhya incident, which will be discussed below, the party was in power in the States of Uttar Pradesh, Himachal Pradesh, Madhya Pradesh and Rajasthan. All these Governments were deposed by the central Government in response to the incident, but in later elections the party once again managed to capture power in the capital Delhi and the States of Rajasthan (with the support of independents), Gujarat and Maharashtra (together with the Hindu fundamentalist party Shiv Sena, which is very powerful there).[5] For a short period the Government in the State of Uttar Pradesh was also dependent on the external support of the BJP.

The BJP is therefore a substantial power factor both in a number of States and in national politics. Although the party has been damaged by the Ayodhya incident and by the events in Gujarat and Uttar Pradesh,[6] there

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[5] The Government in Maharashtra has recently taken a number of anti-Islamic measures: voters in predominantly Muslim areas were informed that they would have to demonstrate their Indian nationality by reference to a number of official documents if they wished to exercise their voting rights and not to run the risk of being deported as aliens (this measure has been quashed by the Supreme Court); in addition, measures have been taken to start deporting Pakistanis and Bangladeshis who are illegally resident. The State Minorities Commission, which championed the welfare of the minorities, has been abolished and the city of Aurangabad, which was named after the Mughul ruler Aurangzeb, has been given a Hindu name (like Bombay, which has been renamed Mumbai, the name of a Hindu goddess).

[6] In Gujarat a BJP Chief Minister was replaced by a fellow party member owing to dissension in the ranks of the party. In Uttar Pradesh the BJP briefly supported the BSP Government of Mayawati. The BSP was a party of and for Untouchables, and Mayawati herself belonged to this section of the population. It was ironic that of all parties it should be the BJP, which is regarded as a party of and for the higher castes, should have supported such a Government. The main reason for this was that support for the BSP would help to bring about the fall of the coalition Government led by Mulayam Yadav, who was greatly hated by the

is still a chance that it may come to power in the central Government too. Under the Indian electoral system, the candidate is elected who has obtained the relative majority of the votes in his electoral district. This means that large fluctuations are possible, and that a party which has obtained the votes of only a minority of voters can still achieve a large majority in the Lok Sabha provided that the other parties fail to cooperate sufficiently.[7] In addition, even if it does not obtain a majority, the BJP can still exert considerable influence if a minority Government is dependent on its external support or if there is a multi-party coalition.

3. THE SECULAR CONSTITUTIONAL SYSTEM

The preamble to the Indian Constitution declares that India will be a "sovereign socialist secular democratic republic". The word secular was added (together with the word socialist) by the 42nd constitutional amendment of 1976 during the state of emergency under Indira Gandhi. This amendment confirmed the secular character of the constitutional system, which had existed from the outset.

The concept "secular" is not defined in the Constitution. Attempts to include a definition have always failed.[8] However, the Supreme Court has attempted a definition. In *S.R. Bommai v. Union of India*[9], J. Sawant formulated this as follows: "[it prevents] the State either identifying itself with or favouring any particular religion or religious sect or denomination. The State is enjoined to accord equal treatment to all religions and religious sects and denominations." J. Ramaswamy stated: "Positive secularism believes in the basic values of freedom, equality and fellowship ... It moves mainly around the State and its institutions and, therefore, is political in nature ... Religion and secularism operate on different planes. Religion is

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BJP. As one reason for its support for Mayawati, the BJP mentioned the desirability of losing its upper caste image, but it withdrew its support for Mayawati just over four months later.

[7] In 1980 Congress (I), with 42.6% of the votes, obtained a two thirds majority of the seats in the lower House (Lok Sabha).

[8] The 45th Constitution Amendment Bill ("secular means a republic in which there is equal respect for all religions") was defeated in the upper House (Council of States, Rajya Sabha). The 80th Constitution Amendment Bill added article 28-A to the Constitution, which was of similar content. This Bill was not even put to the vote.

[9] (1994) 3 SCC 1.

a matter of personal belief and mode of worship and prayer, personal to the individual, while secularism operates on the temporal aspect of the State activity in dealing with the people professing different faiths. The more devoted a person in his religious belief, the greater should be his sense of heart, spirit of tolerance, adherence of secular path. Secularism, therefore, is not antithesis of religious devoutness. Our religious tolerance received reflections in our constitutional creed." J. Jeevan Reddy held: "Secularism is more than a positive attitude of religious tolerance. It is a positive concept of equal treatment of all religions. This attitude is described by some as one of neutrality towards religion or as one of benevolent neutrality."

All the judges added to this that the State is entitled to take regulatory action if religion moves into secular fields. Reference is made in this connection to the provision of the Representation of the People Act, 1951, prohibiting appealing to any religion or seeking votes in the name of any religion in the course of election campaigns. J. Ramaswamy held: "The right to free profession of religion and exercising right to organise religious congregations does not carry with it the right to make inflammatory speeches, nor be a licence to spread violence, nor speak religious intolerance as an aspect of religious faiths. They are subject to the State control."

The State may therefore regulate the practice of religion, but seven of the nine judges expressly held that "secularism" should be regarded as "a part of the basic structure of the Constitution", which means that it may not changed fundamentally even in the case of an amendment to the Constitution. This will be discussed below.

The secular character of the State is elaborated in numerous articles of the Constitution, particularly in the form of fundamental rights. Articles 14-18 guarantee the right to equality. After the general principle of equality is enunciated in article 14, article 15, clause 1, prohibits discrimination "against any citizen on grounds only of religion ...". This provision is defined more precisely in clause 2. Article 16 guarantees equal treatment in the case of appointment to "any employment or office under the State". These articles do not in fact prevent a system of beneficial discrimination or affirmative action for disadvantaged population groups. This system, which is now of considerable size, has been of little benefit to the Muslims as such, with the exception of relatively small groups of Muslims who are in a particularly disadvantaged position.[10] As mentioned previously, article

[10] The Islamic community has pressed for the system of affirmative action to be applied to the Muslims as such, but this does not seem feasible in the present political climate. A minister of the central Government also advocated such action

325 of the Constitution expressly prohibits separate electoral rolls on the ground of religion etc. Articles 25-28 regulate the right to freedom of religion. Article 25, clause 1, states: "Subject to public order, morality and health and to the other provisions of this Part (of the Constitution), all persons are equally entitled to freedom of conscience and the right freely to profess, practice and propagate religion." This is elaborated in the subsequent articles.

In 1993 the Congress (I) Government presented the Constitution (80th Amendment) Bill to strengthen the secular nature of the State still further. On the basis of this Bill, fundamentalist parties could be proscribed and fundamentalist members of Parliament could lose their seats.[11] Serious objections to these drastic provisions were raised not only by the BJP but also by the other opposition parties and even within Congress (I). The Bill was not put to the vote.

The maintenance of the Constitution and hence of the rights of the Muslim minority is a matter for the judiciary, headed by the powerful Supreme Court. This court, which also includes Islamic judges, enjoys great prestige. Its decisions play an important role in the Indian constitutional system, rather similar to the role played by the Supreme Court in the United States. It should, however, be noted that the gap between law and reality is probably much greater in India than in the majority of developed, western countries. This is particularly true where deeply rooted social customs are at issue, although this is by no means the only example.

Any discussion of the secular State can also not ignore the fact that numerous parties and politicians who maintain that they champion the cause of secularism still need to take constant account of the Hindu convictions of the majority of the population and that specific decisions may therefore turn out to be to the detriment of the Muslims. In addition, it is quite normal for

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shortly before the State elections in the autumn of 1994, but this suggestion came to nothing after the elections. The independent Election Commission seriously criticised the minister in question about what it regarded as a blatant attempt to win the favour of Muslim voters.

[11] Apart from the addition of article 28-A as mentioned previously, the Bill provided an explicit constitutional basis for the proscription of an "association or body of individuals ... if it ... promotes ... disharmony or feelings of enmity or ill-will between different classes of citizens of India (i) on ground of religion ...". The duty of monitoring observance was to rest with the Supreme Court. In addition, a member of the central Parliament or of a State Legislature could even lose his or her seat on such a ground, this being a matter for the decision of the Election Commission. An analogous amendment to The Representation of the People Act, 1951 was also proposed.

leading politicians to visit Hindu temples and maintain close ties with Hindu religious leaders. In fact, Hinduism permeates the behaviour and thinking of most politicians to a much greater extent than many of them realise.[12]

4. THE KASHMIR PROBLEM

From the very outset the State of Jammu and Kashmir has been a problem area in independent India. This is partly due to the way in which this State joined the Indian Union in 1947.

In the colonial era, a quarter of the territory of the British Empire in India and over one fifth of the population were governed by over 500 princes. The British Crown exercised "paramountcy" over these Indian States; this meant that the Crown was responsible for foreign relations and defence, but left the States concerned a large degree of internal autonomy. The Indian Independence Act, 1947, abandoned this doctrine of paramountcy by declaring: "The suzerainty of His Majesty over the Indian States lapses...". Partly due to pressure exerted by the departing British and partly in the realisation they were too weak to exist independently, almost all these princely states acceded either to Pakistan or to India before independence day. However, the Hindu maharaja of Kashmir, the majority of whose subjects were Muslims, hoped for the independence of his State and refused to accede to either of the neighbouring States. He was able to maintain this position for only two months, because the State was invaded by Pathan Muslims from Pakistan. When these tribal fighters threatened the capital of Srinagar, the maharaja decided to call on India for assistance. This assistance was granted on condition that Kashmir would formally accede to India. In exchange India promised that, once peace had been restored, the population of Kashmir could decide in a plebiscite whether to accede to India or Pakistan. The war in Kashmir lasted until 1949 when a cease-fire was agreed as a result of action by the United Nations. Pakistan obtained the western part of Kashmir (Azad Kashmir) and India received the eastern part (the State of Jammu and Kashmir, referred to below as Kashmir). The promise to hold a plebiscite was never kept. The reason cited for this was that Pakistan should first withdraw from Azad Kashmir. Nowadays, India takes the position that the maharaja unconditionally agreed

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[12] Even the Constitution contains a small Hindu sentiment since article 48 provides that "the State shall ... take steps for .. prohibiting the slaughter of cows and calves and other milch and draught cattle". However, this provision is "not ... enforceable by any court" (article 37).

that his State would legally accede to India, and that Kashmir has become an integral part of India. The Indian Government also argues that the various elections held in Kashmir since the accession have taken the place of a plebiscite.

Although the State of Jammu and Kashmir is regarded by India as an integral part of its territory, this State does have a different position under the Constitution. Owing to the promise of a plebiscite, the 1949 Constitution of India (which came into force in 1950) is only in part directly applicable to Kashmir: namely article 1, which defines the territory of India, and article 370, which contains "temporary provisions with respect to the State of Jammu and Kashmir". The latter article is very complicated, but provides in brief that further articles of the Constitution may be declared applicable to Kashmir by presidential order ("subject to such exceptions and modifications as the President may by order specify"), although in some cases the consent of the State Government is required and in other cases it has to be consulted beforehand. The central Parliament has legislative power in respect of Kashmir only as far as the President has specified so by order with the consent of the Government of Kashmir. The presidential order in question was initially the Constitution (Application to Jammu and Kashmir) Order, 1950.

A Constituent Assembly elected in 1951 specially for Kashmir abolished the hereditary position of maharaja and adopted a separate Constitution for Kashmir in 1956. In this way, Kashmir became the only State to have its own Constitution. The administrative organisation of this State is regulated in this document and not, as in the case of all other States, in the Constitution of India. The Constitution of Kashmir expressly provides that Kashmir "is and shall be an integral part of the Union of India".

The political history of this State within independent India has been extremely unfortunate. The main political leader, Sheikh Abdullah (otherwise known as "The Lion of Kashmir"), who had advocated accession to India in 1947, had later become Chief Minister of the State Government and had won the elections in 1951, was dismissed and imprisoned in 1953, because he had argued in favour of a large degree of autonomy for Kashmir within India. The State Government which was subsequently appointed agreed to the Constitution (Application to Jammu and Kashmir) Order, 1954, under which Kashmir was integrated more fully into the Indian constitutional system. Sheikh Abdullah's release in 1958 was of short duration, because he was rearrested as soon as he pressed for Kashmir to be given a real choice. In the period that followed, the State Governments who/which/that? were in power were always favourably disposed to the central Government in New Delhi and cooperated in the further integration of Kashmir by agreeing to amendments to the Constitution (Application to

Jammu and Kashmir) Order, 1954.[13] There is now no doubt that the various elections to the State Legislative Assembly were fraudulent.[14] Abdullah was released in 1964, but was detained again for a short period in 1968. After his party had been banned from 1971 to 1973, he concluded an agreement with the central Government of Indira Gandhi in 1975 under which the separate position of Kashmir based on article 370 of the Constitution was confirmed, but at the same time the constitutional integration of the State in India was maintained. Sheikh Abdullah was appointed Chief Minister and his party (National Conference) won the State elections of 1977 convincingly. After his death in 1982, he was succeeded by his son Dr Farooq Abdullah. The State elections of 1983 produced a great victory for him, but he was still dismissed in 1984 as a result of the machinations of Congress (I).[15] Nonetheless, he staged a comeback in 1986 when he returned at the head of a coalition Government which, remarkably, included Congress (I). In the State elections of 1987 his National Conference party won half of the seats. However, the unrest and terrorism in the State rapidly increased, and he was forced to resign in January 1990. Governor's Rule was declared, and was followed six months later by President's Rule. This situation, in which power is in fact vested in the central Government and no State Government is in office, has continued to

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[13] In 1964, article 356 of the Indian Constitution was declared applicable to Kashmir too as a result of an amendment to the Constitution (Application to Jammu and Kashmir) Order, 1954. The article allows what is termed "President's Rule" (in "a situation ... in which the government of the State cannot be carried on in accordance with the provisions of this Constitution", for which purpose "this Constitution" must be interpreted as including the Constitution of the State). In such a situation, the central Government (formally the President) can assume all the powers of the State Government and order that the powers of the State Legislature pass to the central Parliament. In addition, article 92 of the Constitution of Kashmir contains a provision allowing for "Governor's Rule" whereby the Governor of Kashmir can assume power "in case of failure of constitutional machinery in the State". Two sets of emergency arrangements therefore co-exist in Kashmir.

[14] "That the State's polls have been consistently rigged, except in 1977 or perhaps 1983, is now part of conventional wisdom", according to A.G. Noorani in The Statesman Weekly, 11/3/1995.

[15] Pressure exerted by Congress (I), which was in power in the central Government, caused a split in the National Conference. The Governor appointed by the central Government appointed G.M. Shah, the rival and brother-in-law of Dr Farooq Abdullah, as Chief Minister in a Government that depended on the support of those who had split off from the National Conference and Congress (I). The latter party championed above all the interests of the Hindus living in Kashmir.

the present day.[16]

No further elections have been held for the State Legislative Assembly, which was dissolved in 1990 (the last elections were held in 1987), and Kashmir was even excluded in 1991 from the elections for the national Parliament. Although democracy may have functioned extremely poorly in Kashmir prior to 1990, all pretence at democracy has since been abandoned. The faith reposed by the people of Kashmir in the Indian constitutional system has been dealt a serious blow, and separatist movements which advocate either accession to Pakistan or independence can count on increasing support. Terrorism, which is supported from Pakistan, has reached an unprecedented level.

The armed forces have been deployed to combat the terrorism. These troops are accused of numerous excesses, but owing to the draconian legislation their powers are extremely great and they are virtually immune from prosecution.[17] The police too have far-reaching powers and are hard to prosecute in the case of excesses.[18] The power of detention, which is

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[16] Under article 356 of the Constitution, President's Rule lasts for a maximum of six months. The period may be extended, but not for more than three years. Normally, a Constitutional Amendment is required for extension thereafter, but in the case of Kashmir extension has simply been arranged by amending the presidential Constitution (Application to Jammu and Kashmir) Order, 1954. Use is made in this connection of the power contained in article 370 to amend in this Order articles of the Constitution in so far as they are applicable to Kashmir. The prescribed consent of the State Government is granted by the Governor (who is appointed by the central Government). This practice shows that article 370, which is intended as a guarantee of Kashmir's autonomy, can in fact be used in a manner which destroys this autonomy!

[17] The Armed Forces (Jammu and Kashmir) Special Powers Act, 1990, grants the armed forces the power "to use force, even to the causing of death ..., to destroy any shelter, to arrest without warrant, to enter and search, without warrant, any premises, and to stop, search and seize any vehicle". Article 7 provides that the consent of the central Government is required for prosecution, suit or other legal proceedings "against any person in respect of anything done *or purported to be done* in exercise of the powers conferred by this Act".

[18] Jammu and Kashmir Disturbed Areas Act, 1990, later extended by the Jammu and Kashmir Disturbed Areas Act, 1992. This legislation includes a provision analogous to article 7 of The Armed Forces (Jammu and Kashmir) Special Powers Act, 1990. Under the Code of Criminal Procedure (Amendment) Act, 1991, the consent of the central Government is required in order to prosecute officials (including members of the armed forces) for acts performed during President's Rule.

anyway very far-reaching, is applied on a large scale.[19] There is no civil administration in the normal sense. The number of fatalities is estimated to be many thousands. The majority are Muslims. In addition, large numbers of Hindus have fled.

It became clear in the course of 1995 that the central Government intended to hold State elections in Kashmir before the end of the year. To put the population of Kashmir in a favourable frame of mind, the Prime Minister Narasimha Rao announced that article 370 of the Constitution would be maintained and that the Government was prepared to take measures to strengthen the autonomy of the State on the basis of the agreement of 1975 between Sheikh Abdullah and Indira Gandhi. The reactions in Kashmir were hardly encouraging. Dr. Farooq Abdullah castigated the offer as inadequate and demanded a return to the situation that had existed before the dismissal and imprisonment of his father in 1953. He added that if this demand was not met, the National Conference would consider boycotting the elections. The more militant parties demanded a plebiscite prior to elections, and also announced a boycott. It should be noted in this connection that under the Representation of the People Act, 1957 of the State, the election of a candidate who advocates the secession of Kashmir can be declared invalid and the person concerned can also be sentenced to seven years' imprisonment. In November 1995 the independent Election Commission, which was responsible under article 324 of the Constitution for "superintendence, direction and control of elections", ruled that the elections in Kashmir would not take place for the time being because "the sum total of factors available at present in the State of Jammu and Kashmir are not consistent with the conduct of a fair and free election".[20] As a result of this decision, it looks as though President's Rule will continue for the time being.

In conclusion, it should be noted that the Indian Government has not succeeded in the past half century in winning the hearts and minds of the population of Kashmir; if anything, the feeling of estrangement would seem to have become even stronger in recent years. Why does the Indian Government cling on to Kashmir? Naturally, there are strategic considerations - Kashmir is situated in an extremely sensitive area between India, Pakistan

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[19] There is a widespread feeling in India that the Terrorist and Disruptive Activities (Prevention) Act, 1987 (TADA) is misused on a large scale against minorities, particularly against Muslims.

[20] The Hindu International Ed. 18/11/1995. Besides the political situation and the terrorism in Kashmir, another factor played a role in this decision; the extreme cold in the months of December and January made it hard to hold elections.

and China - but the main reason for Nehru, whose ancestors in fact originated from Kashmir, was probably that the accession of a State with an Islamic majority confirmed the secular nature of the Indian State and was also a safeguard of this secularism.[21] This argument is still important even today: what would be the position of the Muslims in the rest of India if the only State with an Islamic majority were to secede? Would the strength of Hindu fundamentalism not become irresistible and maintenance of the secular system impossible? The arguments of the Hindu fundamentalists for the retention of Kashmir are of a very different nature, but are advanced if anything with even greater vehemence.[22] The Indian constitutional system would not seem able for the time being to achieve a fundamental solution to the Kashmir problem that does justice to the wishes of the population of this State.

5. TOWARDS A UNIFORM CIVIL CODE?

Article 44 of the Indian Constitution provides that "The State shall endeavour to secure for the citizens a uniform civil code throughout the territory of India". The Constituent Assembly intended this provision to kpromote the further unification of the people of India. To assuage the fears of the Muslims and Sikhs, the article was included under the Directive Principles of State Policy.[23] Although article 37 of the Constitution provides that the Directive Principles are "fundamental in the governance of the country and it shall be the duty of the State to apply these principles in making laws", it also stipulates that the Directive Principles "shall not be

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[21] *Cf.* MICHAEL EDWARDES, NEHRU: A POLITICAL BIOGRAPHY. (Harmondsworth 1973), pp. 226 and 271; Percifal Spear, India: A Modern History. (Ann Arbor 1972), pp. 442-443; Idem, A HISTORY OF MODERN INDIA, VOL. 2. (Harmondsworth 1973), p. 253; M.J. AKBAR, INDIA: THE SIEGE WITHIN. (Harmondsworth 1985), p. 244; PHILIP ZIEGLER, MOUNTBATTEN. THE OFFICIAL BIOGRAPHY. (Glasgow 1985), p. 601.

[22] The BJP takes the view that the special position of Kashmir - *i.e.* article 370 of the Constitution too - should be abolished. Kashmir should be fully integrated into India and there should be no concessions to the political leaders of Kashmir. India should even take steps to liberate the Pakistani part of Kashmir. It seems likely that the BJP will endeavour to win votes among the Kashmiri Hindus, the traditional vote bank of Congress (I).

[23] GRANVILLE AUSTIN, THE INDIAN CONSTITUTION. CORNERSTONE OF A NATION. (Bombay 1972), p. 80.

enforceable by any court". The latter provision has meant that a number of Directive Principles have hitherto proved to be dead letter, even if some Directive Principles do play a role in case law in the interpretation of other provisions of the Constitution.

In the 1950s, the personal and family law of Hindus were codified in a number of statutes.[24] This legislation also applied in part to Buddhists, Jains and Sikhs. And there was legislation for Christians and Parsis. However, the greater part of personal and family law of the Muslims is not recorded in legislation; they are subject instead to traditional Islamic law under the Muslim Personal Law (Shariat) Application Act, 1937. Despite the instruction contained in article 44 of the Constitution, it follows that there is still no uniform civil code in India. Indeed, the leaders of the Muslim community treat every attempt to introduce a uniform civil code as an attack on their religious freedom.

This controversy was suddenly brought to a head in 1985 as a result of the judgment of the Supreme Court in the Shah Bano Case (Mohd. Ahmed Khan v. Shah Bano Begum).[25] In this case, a divorced Muslim woman sought an order from the courts under article 125 of the Code of Criminal Procedure[26] directing that her ex-husband - also a Muslim - should pay maintenance. The husband argued that under Islamic law he was not obliged to pay maintenance after the period of *iddat* (a period of three months during which reconciliation is still possible). The Supreme Court upheld the order made against the husband by the High Court, holding that the object of article 125 was to prevent the poverty of divorced women and was not dependent on the religious conviction of the parties. The Supreme Court added that the former husband was also bound under Islamic law to maintain his former wife if the latter was not in a position to support herself.

This judgment caused great consternation in the Islamic community. This was due above all to an *obiter dictum* in the judgment, namely that "It is also a matter of regret that article 44 of our Constitution has remained a dead letter .... A belief seems to have gained ground that it is for the

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[24] Hindu Marriage Act, 1955; Hindu Succession Act, 1956; Hindu Minority and Guardianship Act, 1956; Hindu Adoptions and Maintenance Act, 1956.

[25] (1985) 2 SCC 556.

[26] This article provided as follows: "If any person having sufficient means neglects or refuses to maintain (a) his wife, unable to maintain herself, ... a Magistrate ... may, upon proof of such neglect or refusal, order such a person to make a monthly allowance for the maintenance of his wife ..." It was expressly provided that the term 'wife' included a woman who had been divorced.

Muslim community to take a lead in the mater of reforms of their personal law. A common Civil Code will help the cause of national integration by removing disparate loyalties to laws which have conflicting ideologies. No community is likely to bell the cat by making gratuitous concessions on this issue. It is the State which is charged with the duty of securing a uniform civil code ... a beginning has to be made if the Constitution is to have any meaning."

In the same year, the Government majority in New Delhi met the demands of the Muslims by passing The Muslim Women (Protection of Rights on Divorce) Act, 1985.[27] Under this Act, a divorced wife who is unable to maintain herself must be supported after the period of *iddat* not by her former husband but by the members of her own family or, if this is not possible, by the State Waqf Board. By creating an exception for the Muslims not only in the area of personal and family law but also in the area of criminal law, this Act caused great resentment among large sections of the Hindu population, above all of course among the Hindu fundamentalists. Nor are there any signs that this resentment has died away.

In the past decade, no concrete steps to bring the constitutional ideal of a uniform civil code closer have been taken either at central level or at the level of the individual States. After some years of restraint,[28] however, the Supreme Court once again pressed for such measures with renewed vigour. The case of Sarla Mudgal v. Union of India[29] dealt with a phenomenon which, according to the judgment, occurs fairly frequently, namely the conversion of Hindu men to Islam for the sole purpose of being able to marry more than one woman. For a proper understanding of the case, it is important to realise that the Hindu Marriage Act, 1955 is based on the principle of monogamy, whereas Muslim men may have up to four wives. The Indian Penal Code provides that a person who "having a husband or wife living" contracts a new marriage commits a punishable offence "in any case in which such marriage is void by reason of its taking place during the life of such husband or wife". This provision does therefore not apply to Muslims who are married to not more than four wives.

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[27]It is generally supposed that Congress (I), which had lost a few seats in bye-elections in electoral districts where many Muslims lived, attempted to recapture the votes of the Muslim community by means of this Act. *Cf.* PANNALAL DHAR, NATIONAL INTEGRATION AND INDIAN CONSTITUTION. (New Delhi), 1986, p. 179.

[28] As recently as 1993 in *Maharshi Avadhesh v. Union of India*, 1994 Supp. (1) SCC 713.

[29] (1995) 3 SCC 635.

The Supreme Court held that under the Hindu Marriage Act, 1955 the marriage of a Hindu continued until a divorce was pronounced. As long as the first marriage still existed under this Act, no second marriage could be contracted. A second marriage would therefore be invalid and the man who contracted it would be criminally liable. The Supreme Court added, through the words of J. Kuldip Singh, that: "Those who preferred to remain in India after the partition, fully knew that the Indian leaders did not believe in two-nation or three-nation theory ... In this view of the matter no community can oppose the introduction of a uniform civil code for all citizens in the territory of India. The successive Governments have to date been wholly remiss in their duty ..." J. Kuldip Singh instructed the Indian Government to fulfil its obligation under article 44 of the Constitution and also ordered that it produces an affidavit in August 1996 "indicating therein the steps taken and efforts made, by the Government of India, towards securing a 'uniform civil code' for the citizens of India". In a concurring opinion, J. Sahai placed article 44 of the Constitution in the context of the constitutional ideal of a secular State. He made clear that it would be permissible to move towards this ultimate goal in various steps. The first step would have to be "to rationalise the personal law of the minorities to develop religious and cultural amity". The Law Commission should be asked to draft legislation, in consultation with the Minorities Commission, that was "in keeping with the modern day concept of human rights for women". The Government should also appoint a commission to draft a Conversion of Religion Act to prevent the abuse of religion.[30]

The response of the central Government to this judgment was extremely unenthusiastic. Prime Minister Narasimha Rao stated that a uniform civil code was not possible and that his Government had no plans of this kind. However, the opposition leader Lal Krishna Advani announced that his party - the BJP - was studying the legal scope for introducing a uniform civil code in the States where it was in power.[31] The Government of the State of Maharashtra, where the BJP is in power with its fellow

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[30] According to a report in The Statesman Weekly of 19/8/1995, J. Kuldip Singh had stated during the course of a hearing of a later case before the Supreme Court that the remarks on a uniform civil code in Sarla Mudgal v. Union of India had been obiter and were therefore not binding. It should, however, be noted in this connection that 1. "well-considered" *obiter dicta* of the Supreme Court are generally regarded as binding and 2. that these remarks were not impromptu asides but were concrete orders to the central Government!

[31] Personal and family law is on the Concurrent List of the Constitution, which means that both the Union and the States are competent in this field.

Hindu fundamentalist party Shiv Sena, has announced that it will introduce a civil code of this kind. This would appear to be easier said than done. If such a code is introduced, the Muslims seem bound - in the light of past experience - to regard this as an attack on their faith, which could once again create great tension between the Hindu and Muslim communities.[32]

7. THE DESTRUCTION OF THE MOSQUE AT AYODHYA

The destruction in 1992 of the centuries-old mosque at Ayodhya by a mob of 100,000 Hindu fundamentalists and the ensuing riots between Hindus and Muslims were and still are regarded as extremely threatening by the Indian Muslims. Only a brief account of the incident is possible in the context of this article.[33]

The Hindu fundamentalists believed that the god-king Rama was born in Ayodhya and that the Hindu temple dedicated to him had been demolished by the Mughals in 1528 in order to build a mosque. The Hindu fundamentalist organisations (VHP and RSS) and the BJP had campaigned for years to have a Hindu temple built on the site. Mention has already been made above that the central Government of V.P. Singh fell in 1990 following the arrest of Lal Krishna Advani, the leader of the BJP, in connection with a demonstration in support of the building of such a temple.

The Places of Worship (Special Provisions) Act, 1991 came into force in 1991. This Act provided that "the religious character of a place of worship", as it existed on 15 August 1947 (Independence Day), should be left intact and that any breach of this provision was a criminal offence. Section 5 of the Act expressly made an exception for Ayodhya, perhaps because legal proceedings on this matter were already pending.

The mosque was destroyed in December 1992 when several leaders of the BJP were present, at any rate initially. The Government of the State

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[32] Another question which may stir up emotions is the judgment of the High Court of Allahabad of April 1994, in which it ruled that a Muslim man could not validly divorce his wife by uttering the word "talaq" three times in one transaction, since this would be contrary to the Constitution. The Supreme Court has stayed the operation of the judgment and is considering the matter itself (The Hindu Int. Ed. 23/4/1994 and 13/8/1994).

[33] For a more detailed account, see my article entitled *Het Indiase Supreme Court in de strijd om de seculiere staat*, in Recht en Kritiek, vol. 21 (1995) no. 2, p. 101 ff.

of Uttar Pradesh, which consisted of members of the BJP, failed to intervene and was in fact sympathetic to the cause of those pulling down the mosque. Following the disturbances, the central Government responded by taking four steps, albeit not all at once. First of all, President's Rule was promulgated in Uttar Pradesh and a week later in the other three States where the BJP was in power (Himachal Pradesh, Madhya Pradesh and Rajasthan). The various State Governments were dismissed and the State Legislatures were dissolved. Second, the Unlawful Activities (Prevention) Act, 1967 was used to proscribe a number of Hindu fundamentalist organisations, in particular the RSS and the VHP (but not the BJP). Evidently in order to maintain a balance, two Islamic organisations were also banned at the same time. Third, the disputed site in Ayodhya was expropriated by law. The Acquisition of Certain Area at Ayodhya Act, 1993 provided that "the rights, title and interest in relation to the area shall ... stand transferred to, and vest in, the Central Government", which was entitled to assign all these rights to a trust, but was required in the meantime to maintain the status quo. It was expressly provided that "any suit, appeal or other proceeding" relating to the area "pending before any court ..., shall abate" (section 4, clause 3). In the fourth and last place, the central Government (formally the President) made a reference to the Supreme Court under article 143 of the Constitution requesting an advisory opinion on the question of "whether a Hindu temple ... existed prior to the construction of the Ram Janma Bhumi-Babri Masjid[34] ... in the area on which the structure stood". In its commentary, the Government observed that on receipt of the advisory opinion it would first seek a negotiated solution. If it did not succeed in this, the wish of the Hindus would be honoured if the answer was in the affirmative and the wish of the Muslims would be honoured if the answer was in the negative. This position was said to be balanced by the Government. Naturally, this was open to criticism because in the event of an affirmative answer by the Supreme Court the destruction of the mosque would in fact be legitimated retrospectively without the Muslims having any means of redress.[35]

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[34] This is the usual name of the mosque.

[35] The Government may have assumed that the Hindu majority of the population would agree to the dismissal of the BJP State Governments, which had after all permitted or supported the illegal destruction of the mosque, but would be less inclined to accept the rebuilding of the mosque on a site regarded as holy by the Hindus.

President's Rule did not last for long in the various States.[36] Elections were held in the four States concerned in November 1993. The BJP suffered a defeat and was able to form a Government only in Rajasthan (and in Delhi, where elections were also held). In 1994 the Supreme Court delivered an important judgment on the promulgation of President's Rule[37]. In the case of S.R. Bommai v. Union of India,[38] the Supreme Court held that President's Rule was valid. Over six months later, the Supreme Court responded to the request of the central Government and also ruled at the same time on the validity of the Acquisition of Certain Area at Ayodhya Act, 1993, which had been challenged by interested parties (*Ismail Faruqui v. Union of India*).[39] In addition, various courts, including the Supreme Court, have given rulings on the validity of the Government orders banning certain organisations.

One reason why the judgment in the case of S.R. Bommai v. Union of India is important is that the Supreme Court considered at length the secular character of the Indian constitutional system. Some passages from the judgment have already been quoted above. The Supreme Court concluded that "any State Government which pursues unsecular policies or unsecular course of action acts contrary to the constitutional mandate and renders itself amenable to action under Article 356" (this is the article that regulates President's Rule). This conclusion would seem to be a clear warning to the BJP for the future.

In *Ismail Faruqui v. Union of India*, the Supreme Court first considered whether or not the Acquisition of Certain Area at Ayodhya Act, 1993 (referred to below as the Acquisition Act) was constitutional; only afterwards did the Supreme Court respond to the question put by the Government.

The Acquisition Act was held by a majority of the judges of the Supreme Court (J. Verma, C.J. Venkatachaliah, J. Ray) to be valid, albeit subject to one important exception: the provision that "any suit, appeal or other proceeding" relating to the area "pending before any court (...), shall abate" was declared invalid as being contrary to the rule of law underlying the Constitution. The reason given for this was that the Act took away the

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[36] The Government of Madhya Pradesh was restored to office in the course of 1993 by a ruling of the relevant High Court.

[37] In Himachal Pradesh, Madhya Pradesh and Rajasthan; the introduction of President's Rule in Uttar Pradesh was not submitted to the Supreme Court.

[38] (1994) 3 SCC 1.

[39] (1994) 6 SCC 360.

judicial remedy "without providing for an alternative dispute-resolution mechanism for resolution of the dispute between the parties thereto". The result of this judicial decision was that the old legal proceedings concerning the question of who was entitled to the disputed structure (which had been destroyed in the meantime) were revived. The Government would eventually have to transfer the area to the persons held to be entitled to it on the basis of the court judgments. In fact, no indication whatsoever was given that these proceedings would be accelerated.

The minority of the Supreme Court (J. Bharucha and J. Ahmadi) expressly dissented. The view of these judges on the Acquisition Act was much more damning: they held that its provisions "offend the principle of secularism, which is a part of the basic structure of the Constitution, being slanted in favour of one religious community as against another".

The Supreme Court was unanimous in its reaction to the reference by the central Government (formally the President) on the basis of the article 143 of the Constitution: the Supreme Court refused to give an answer. The minority held: "The Act and Reference ... favour one religious community and disfavour another; the purpose of the Reference is, therefore, opposed to secularism and is unconstitutional. Besides, the Reference does not serve a constitutional purpose." The majority expressed a more cautious view, but came to the same result: "In the view that we have taken on the question of the validity of the statute ... and as a result of upholding the validity of the entire statute, except Section 4(3) thereof, resulting in revival of the pending suits and legal proceedings wherein the dispute between the parties has to be adjudicated, the Reference made under Art. 143 (1) becomes superfluous and unnecessary." This judgment may be seen as clear rebuke to the central Government: its policy in relation to the major religious communities was less impartial and balanced than it pretended. The minority of the judges based themselves expressly on the principle of secularism, but the view of the majority too would seem to be implicitly based on this.

Numerous legal proceedings were instituted against the orders banning the Hindu fundamentalist organisations, and not all of them ended in victory for the Government.[40] The ban on the main organisation responsible for the destruction of the mosque - the VHP - was upheld by the relevant Tribunal. Such a ban applies only for two years. However, the

[40] The ban on the RSS and the Bajrang Dal was quashed by the competent Tribunal because the Government had insufficient proof that these organisations had been responsible for the destruction of the mosque (The Hindu Int. Ed., 12/6/1993).

renewed promulgation of the ban after two years was quashed by the Tribunal.[41] As far as the two proscribed Islamic organisations are concerned, the ban on one organisation was declared valid[42] and the other invalid.[43]

The BJP was not banned at all, although a few of its leaders were briefly detained after the Ayodhya incident.[44] It has already been pointed out above that the role of this party in both national and State politics is by no means played out. The demolition of famous old mosques in Varanasi and Mathura has now been advocated by Hindu fundamentalists as they are said to stand on the site of former Hindu temples. Although the leaders of the BJP have not yet repeated these demands in as many words, they have not repudiated them either. The position adopted by L.K. Advani is ambiguous; he has merely asserted that the question is not on the agenda of the BJP![45] Some Hindu fundamentalists even favour the demolition of 3,000 mosques to make way for Hindu temples.

7. THE MUSLIMS AND THE SECULAR STATE: CONCLUSION

The attitude of the Indian Muslims to the principle of the secular State is not clear. In the section on the Kashmir problem above, it was noted that the majority of the population of that State evidently still do not consider that they have an adequate connection with the remainder of the Indian population. This spiritual partition between Kashmir and the rest of

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[41] The Hindu Int. Ed., 12/6/1993 and 1/7/1995.

[42] This was the order of the Tribunal concerning the ban on the Islamic Seva Sangh (ISS), see The Hindu Int. Ed. 12/6/1993.

[43] In *Mohd. Jafar v. Union of India*, 1994 Supp. (2) SCC 1, the Supreme Court held that the Government had insufficient substantive grounds for an immediate ban on the Jamaat-E-Islami Hind. In Jamaat-E-Islami Hind v. Union of India, (1995) 1 SCC 428, the Supreme Court quashed the order of the Tribunal upholding the ban on the organisation, because the Tribunal had not critically reviewed the substantive grounds adduced by the Government.

[44] The former Chief Minister of the State Government of Uttar Pradesh, Kalyan Singh, was convicted of contempt of court by the Supreme Court in 1994 and given a symbolic sentence because in the summer of 1992 he had permitted certain building work in Ayodhya which had been prohibited by the courts (Mohd. Aslam v. Union of India, (1994) 6 SCC 442). Proceedings for contempt of court are also still pending against him in connection with the destruction of the mosque.

[45] *See* recently The Statesman Weekly, 11/3/1995.

India has various causes: purely nationalist sentiments, aversion to the unduly strong domination from New Delhi, as a result of which political life in the State does not function properly, anger at the excesses of the army and police, and so forth. One of the causes - and by no means the least important - is that the majority of the Kashmiri population are Muslim. Part of this majority is in favour of secession. Some of them wish to accede to Pakistan, officially an Islamic State, and others are striving for an independent Kashmir (a solution rejected by both India and Pakistan). To what extent an independent Kashmir should, in the eyes of these separatists, be an Islamic State is not clear. What is clear, however, is that separatists in general have little interest in seeing a secular Indian State.

For those Kashmiris who, despite everything, wish to remain part of India, the secular State is an essential precondition. The more the influence of Hindu fundamentalism increases and the greater the threat to the secular character of the Indian State, the less acceptable integration becomes to them. At present, it is not possible to determine how opinions are divided in percentage terms among the population of Kashmir.

It was stated in the section on personal and family law that the Muslim community regarded every effort to establish a uniform civil code as an attack on its religious freedom. In this area, the Muslim community has blocked progress towards the further expansion of the secular State. The central Government does not appear to be contemplating any action to draft a uniform civil code, but there are plans to do so in a number of States in which the BJP is in power. Pressure to introduce a uniform civil code is being exerted by the Supreme Court, which views this as necessary in order to achieve the constitutional ideal of a secular State. The Hindu fundamentalists advocate a uniform civil code for other reasons.

When the Ayodhya incident was discussed above, it was pointed out that the Supreme Court is championing the interests of the secular State in this field as well. The Supreme Court aided the Muslims in their response to the attack of the Hindu fundamentalists and the rather ambiguous position of the central Government. The incident in Ayodhya did of course not concern just that one mosque, just as the matter now at issue is not simply the preservation of the other threatened mosques. What is in fact at issue is the rights of the Muslim community in India. The secular State and the protection of the Supreme Court would seem to be of essential importance to the future of this community. It is noteworthy that the Supreme Court is entirely consistent in its case law: regardless of whether or not the Muslims see this as being to their advantage in a particular case, the Supreme Court constantly advocates the importance of the secular State. A good case could be made for saying that the Muslim community would be well advised to pay a certain price for the secular State, namely an adjustment of their

personal and family law. The only Muslims to whom this would not apply are the Kashmiri separatists.

The secular nature of the State is not only in the interests of the Muslims; the same applies to India as a whole. The greatest threat to the stability and cohesion of India is posed by the religious divisions of the population. Nonetheless, the ideal of the secular State is by no means unanimously advocated by the Hindu majority. Hindu fundamentalism, which has always been present, rejects the secular State as a matter of principle. The influence of the fundamentalists has increased in recent years, and the possibility cannot be excluded that they will also come to power in the central Government, or will help to determine policy either as a coalition partner or by providing external support to a minority Government. The main opponent of the BJP is still Congress (I), which has been in power in New Delhi since 1991. This party supports or in any event pays lip service to the preservation of the secular State. Nonetheless, it too has sacrificed the rights of the Muslims to the sentiments of the Hindu majority of the population in the Ayodhya question. Furthermore, in the cynical jungle of Indian politics in which the most unexpected political alliances are possible, even the possibility of a coalition between Congress (I) and the BJP cannot be entirely excluded.[46]

If the influence of the BJP on the central Government were to increase further, the secular character of the Indian State might be undermined by administrative and legislative measures. However, abolition of the secular State, or a far-reaching infringement of it, would require a revision of the Constitution. It would be necessary that "the Bill is passed in each House (of Parliament) by a majority of the total membership of that House present and voting" (article 368 of the Constitution).[47] This seems to be a stringent requirement, but in practice it is less onerous than it might seem: since the Constitution was enacted in 1950 there have been no fewer than 76 constitutional amendments! At least as important as this procedural barrier is the monitoring function which the Supreme Court has taken upon itself. In 1973 the Supreme Court ruled that a constitutional amendment which infringes the "basic structure of the Constitution" is invalid.[48] This

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[46] In October 1995 a collection of poems by the leader of the opposition, Vajpayee, was inaugurated by Prime Minister Narasimha Rao. On this occasion, the parliamentary leader of the BJP was referred to by Narasimha Rao as his "guru" (The Hindu Int. Ed., 28/10/1995).

[47] In some cases, "the amendment shall also require to be ratified by the Legislatures of not less than one-half of the States" (article 368 of the Constitution).

[48] *See* Kesavananda Bharati v. State of Kerala, (1973) 4 SCC 225.

standard judgment has since been upheld on various occasions.[49] The Supreme Court expressly regards secularism as belonging to the "basic structure of the Constitution", as previously mentioned.[50] Legally speaking, the Supreme Court is therefore able to afford a measure of protection. However, whether this protection is provided and, if so, whether it is actually effective depends on numerous circumstances.[51]

Finally, it should be noted that although the threat which the Hindu fundamentalists pose to the Indian constitutional system should not be underestimated, it should certainly not be overestimated either. As long as India has been independent, commentators have been expressing their concern about its stability, but Indian democracy has nonetheless proved to possess considerable vitality and durability. The division of the Indian population into religions, castes and ethnic groups may cause tensions, but in some ways it also provides a guarantee that no single group can completely gain the upper hand and dominate the rest of the population. Furthermore, one may well wonder whether the BJP, if it were to gain power in New Delhi, would still be interested in undermining the secular nature of the State; perhaps it would be, in line with long-established Indian usage, more interested in appropriating and dividing the spoils of office instead!

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[49] Including: *Indira Nehru Gandhi v. Raj Narain*, 1975 Supp SCC; *Minerva Mills Ltd. v. Union of India*, (1980) 2 SCC 591 & (1980) 3 SCC 625; *Waman Rao v. Union of India*, (1980) 3 SCC 587 & (1981) 2 SCC 362; *Sanjeev Coke Mfg. Co. v. Bharat Coking Coal Ltd.*, (1983) 1 SCC 147; *Kihoto Hollohan v. Zachillhu*, 1992 Supp (2) SCC 651; *Raghunathrao Ganpatrao v. Union of India*, 1994 Supp. (1) SCC 191; *R.C. Poudyal v. Union of India*, 1994 Supp. (1) 324.

[50] *See S.R. Bommai v. Union of India.*

[51] Two Supreme Court judgments of 11 December 1995 have caused some disquiet. According to press reports the Court has decided that "Hindutva", the war cry of the Hindu fundamentalists, should not be understood in a narrow religious sense, but as a way of life. On this ground advocacy of "Hindutva" is not a "corrupt practice" under the Representation of the People Act, 1951, which forbids appealing to any religion in the course of election campaigns. Even a speech by a Siv Sena leader that "the first Hindu State will be established in Maharashtra" did not constitute such "corrupt practice". A.G. Noorani commented in The Statesman Weekly of 6/1/1996: "The ruling - uncalled for and untenable - deserves a speedy burial before its consequences lead to the burial of whatever remains of Indian secularism".