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Religious Tolerance in Multifaith Democracies: A Comparative Legal Study of Indonesia and India

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Abstract

This exploratory research Article, based on secondary sources, undertakes a comparative legal study of the Constitutional and statutory provisions as well as recent jurisprudential developments in India and Indonesia for the promotion of religious tolerance in the two diverse, multifaith democracies with a history of social conflict and highly contested religious politics. By adopting the functional method for the comparative legal analysis of the two jurisdictions from Civil Law (Indonesia) and Common Law (India) traditions, the implemental convergence and functional equivalence of the penal laws for preventing communalism and promoting inclusivity and religious amity among the different religious communities in the two States has been elucidated. At the same time, the conceptual and doctrinal differences in jurisprudential understanding of the content, extent, and mechanism for preserving inter-faith amity in the two jurisdictions have been posited to be the result of the divergences in the post-colonial historical trajectories of the two States.

INTRODUCTION

India and Indonesia are two Sovereign Republics in Asia which are rising economic powers and regional hegemons. Despite sharing an umbilical cultural

connection for millennia, the two States were colonised by different Imperialist European powers, and have consequently inherited the legal system of their respective coloniser Empires. While the Indian legal system is based on the coloniser British Common Law System, Indonesia adheres largely to its Dutch colonial heritage and its legal system may be classified as based on continental Civil Law.

The colonial history of the two States is a saga of socio-economic exploitation and political subjugation of the "natives" by the racist "White" European colonisers who systematically exacerbated the existing ethnic, sectarian, and communal divides of the extremely heterogeneous societies in the two States to obviate any unified resistance to their rule (Said, 1978). The legacy of this colonial policy of "divide and rule" resulted in the partition of British India on religious lines, and similarly aggravated communal mistrust in Indonesian society, the consequences of which continue to lacerate the collective conscience in both the Sovereign Republics more than seven decades after gaining Independence from colonial rule (Law Commision of India, 2017). The following discussion explores how the legal statutory framework in India and Indonesia shield religious tolerance and promote peaceful coexistence through penalisation of an affront to faith, and thereafter critically evaluates the contrastive Eurocentric critiques against the legal structures adopted by the two sovereign post-colonial States.

Post-colonial nation-building, especially in diverse and multifaith States is a challenge that confronts democracies even as increasingly confrontational electoral politics coalesces around fissiparous and disceptations' identities and psychological affiliations forged by political discourses and identities defined by ethnicity, language, regionalism but most of all, around religious or sectarian faith (Cikara et al., 2011). Religious and sectarian communalism has emerged as a toxic but potent pathway to real politick consolidation of vote-banks and often led to conflictual faceoffs for power, especially over scarce resources, in developing societies (Cherian, 2016). Law, as a tool of social engineering, backed by the coercive and punitive power of the State, is the primary mechanism by which religious tolerance despite differences, amity and respect for fellow citizens as basic and foundational democratic norms can be most effectively normative (Bhatia, 2016). India and Indonesia are two developing Asian States which are extremely diverse in their demographic composition, with multiple inter-sectionalities of identities, and grapple with the problem of preventing communal violence and developing a culture of amicable democratic contestation in their heterogenous multifaith societies.

Tolerance, as dealt with in this article, refers to the liberal rational consensus (Habermas, 1984) in diverse societies about the degree of respect accorded to individual and communitarian differences in opinion about ontic values, and resultantly the conscious forbearance (*verdraagsaamheid*) from normative condemnation (Vermeer & Van der Ven, 2012), of variation and deviations from standards accepted as preferential in society. Religious tolerance is just one specific element under the entire overarching dynamic, hermeneutic and phenomenological gamut of tolerance (Peck, 2006). The elements of tolerance as identified by various scholars include a

reasoned and rational acceptance of the right of alterity as an intrinsic human right (Leiter, 2012) and thereby respect individual and group diversity in *modus vivendi* (Grayling, 2009), irrespective of the differences (De Botton, 2012) in individual or communitarian deviation from dogmatism (Alford, 2009), based on respect without any preconditions (Van der Walt & Potgieter, 2012), for peaceful coexistence (Gray, 2009).

Both the States have Constitutional provisions that mandate religious tolerance as well as Penal Laws that penalize deviance from the prescribed norms of religious tolerance and social amity. There has, however, been persistent and trenchant criticism, usually by authors analysing the issues from a predominantly Eurocentric perspective, of the legal and normative structures in India and Indonesia which are pivoted on a retributive criminalisation of affront to faith (Crouch, 2012). These criticisms of "Blasphemy Laws", as they are termed by the Western scholars, and the penal provisions of the politically sovereign and democratic States of India and Indonesia, ignore the endemic relativism that inheres the social realities which the developing post-colonial multifaith States must grapple with as they progress on the path of democracy after centuries of colonial domination which has left their societies divided. In its pontificating homogenised view of "Individual Rights" especially of the oft-quoted "Right to Freedom of Expression" (Gelber, 2011), Western Eurocentric scholarship has largely overlooked the tenuous legal path that post-colonial multifaith States must negotiate in their quest to build an overarching national identity that subsumes, but nourishes, the subnational identities and the freedom of religion even in democratic systems characterised by vehement antagonism, which is possible only through the instrumentalization of criminal law (Stuntz, 2001).

This Comparative Law Article seeks to prove a hypothesis that the legal provisions of two post-colonial Sovereign States which follow different legal systems (India being a Common Law State and Indonesia largely influenced by the Civil Law system), nevertheless address the issue of maintaining religious tolerance in their extremely diverse multifaith societies through doctrinally and jurisprudentially discrete, but functionally equivalent, and effectually convergent legal provisions, as they struggle to address similar issues. While there are foundational divergences in the legal conception of religious and sectarian pluralism within the two States, these distinctive differences are more a function of their tumultuous historical experiences, largely catalysed by the vagaries of Colonialism rather than an "inferior culture" of structural intolerance of the religious minorities. As a critique of, and a response to the supercilious attempts at Eurocentric misappropriation of the discourses on democratic nationalism, individualisation of the locus of rights, and elevation of freedom of expression over social animosity (Buchhandler, 2015), this Article seeks to justify the relativistic path chosen by post-colonial developing States to address religious and sectarian friction and preserve the Unity and integrity of the State based on tolerance and respect.

METHOD

This exploratory research Article, based on secondary sources, adopts the functionalist method for comparative legal analysis on the subject to avoid phenomenological casuistry (Reimann, 2003). It attempts factual scrutiny of the practical effects of statutes and their implementation rather than focussing on the doctrinal judicial deliberation by which these real-life impacts of law are effectuated across legal systems. The functionalist methodology is, therefore, more evaluative of the result of the application of municipal laws across the different jurisdictions being compared, rather than establishing the theoretical grounding which informs the distinct national juridical interpretation of statutes or jurisprudence resulting in the legal implications of those laws (Zweigert & Hein, 1998).

The research is predicated on legal realism which acknowledges law as a sociological functional imperative, which is shaped by society, while simultaneously being instrumental in preserving or reengineering the society itself (Dagan, 2005). This realist social need-based anchoring of the functionalist comparative legal analysis for the resolution of social issues facilitates rationalisation through deductive explanatory anchoring for convergences and divergences in the legal jurisdictions being compared thereby explicating the prescriptivity of the Aristotelian *telos* of legal norms for nation-building countermanding communal sectarianism in the post-colonial States. Since *stare decesis* and decisions of the Courts take precedence over *Opinio Juris* in Common Law, the analysis of Indian jurisprudence is based primarily on case laws, rather than references to jurists' scholarly comment on the subject.

RESULTS AND DISCUSSION

Indian Legal Structure for Religious Freedom

The Republic of India is a result of British imperialist consolidation, through military conquest, of the territories of the numerous independent Princely States which existed before Independence. The Constitution of India, 1949 is the *grundnorm* and *suprema lex* of India. The Preamble to the Indian Constitution describes India as a "Secular Republic", which the Supreme Court of India in its Common Law role as the sole explicator of the meaning of the content of the legal provisions, in *Bal Patil and Another v Union of India* has interpreted to be an absolute prohibition on any State Religion or even identification or influence of any particular religion, sect or faith on policies of the Indian State, with the maintenance of equidistant neutrality from all religions, and equal State protection and respect to the Individual rights of religious practice of all the different faiths in India.

Part III of the Constitution of India, 1949 enumerates the Fundamental Rights which are guaranteed to citizens as well as non-citizens within the territory of the Republic of India. Article 13 of the Constitution of India declares any Legislative Act or Executive decree which is violative of Part III the Constitution to be void. Article 14 lays down that no person (citizens, non-citizens as well as entities with legal personality) can be denied equality before the law as well as equal protection of the law. Article 21 of the Constitution mandates that no person should be deprived of life

or liberty except according to the procedure established by law, and since freedom of religion is a basic liberty recognised by law, this provision thereby incidentally forbids any action, such as incarceration by the State expressly, meant for restricting practise of religious faith. Article 29 mandates that the State must make no distinction whatsoever in extending the ambit of Constitutional equality and prohibits any preference or discrimination based on grounds of religious faith, or lack thereof, in the exercise of any freedom recognised by the Constitution, any Rights granted by law, or in access to any Office under the State. Religion, in India, as in Indonesia, is neither a barrier nor even a consideration for appointment to the Office of the President, nor any other office or employment under the State and this non-discrimination has been emphasised as a Fundamental Right by the Supreme Court in M Ismail Faruqui v Union of India.

Clause 1 of Article 25 of the Indian Constitution assures a Fundamental Right to every person the freedom of conscience to profess, practice and propagate the religion of his choice. This Fundamental Constitutional Right to profess, practice the rites, rituals and worship, as well as propagate own religion through peaceful proselytization and conversion, is available to all persons, including foreign nationals and not only Indian citizens, as has been upheld by the apex court in *Ratilal Panchand Gandhi and Others v State of Bombay*. An important point to note here is that "Religion" has not been defined by the Constitution of India, but the Supreme Court of India in *Commissioner, Hindu Religious Endowments v Sri Lakshmindra Thirtha Swamiar of Sri Shirur Mutt* has clarified that religion is a matter of subjective individual faith for ethico-moral and spiritual choices and cannot be limited to specific churches, dogmas or creeds, and even need not necessarily be theistic, but the protection of law extends to all faiths.

Thus, in contrast to Indonesia, Indian Law does not specifically recognise any particular religions, but is equally applicable to all forms of belief (and disbelief) including and not limited to atheism, agnosticism, and sectarian heterodoxy abjured by mainstream religions, all of which are also recognised as freedoms of conscience in India (Bhaskar & Kumar, 2018) and afforded similar protection as religions and atheism by Article 25 (1) which has been judicially affirmed in the case *Ahmedabad St. Xavier's College Society v State of Gujarat*. Thus, the concept of freedom of religion in India goes further than religion and can be described as freedom of not only inter-religion non-discrimination but also of intra-religion denominational sectarian faith, and atheism or rejection of theism as well. Heterodoxy and radical departure from established mainstream religious doctrine in matters of faith are also Constitutionally protected in India and explicated in the decision of the Supreme Court in *Central Board of Dawoodi Bohra Community v State of Maharashtra and Another* wherein the Apex Court ruled that religious faith of even a small minority of individuals pitted against their Clerical religious authority due to conceptual differences, or even contradictions with the practises, dogmas and doctrines of the established religious community, falls within the purview of Right to Freedom of Religion and is amenable to equal protection by the State against any violations or restrictions.

Article 26 of the Constitution of India recognises the corporate nature of religious practise and guarantees every religious denomination the right to manage its affairs including the right to acquire, own and administer moveable and immoveable property as per law for corporate religious practise including building places for worship. The Supreme Court of India in *Indira Nehru Gandhi v Raj Naraian* has explained "Secularism" as envisaged in the Constitution of India to mean that the Republic of India shall not have any State religion and shall ensure that all persons are equally entitled to the freedom of conscience, and the exercise of their fundamental right to profess, practise and propagate their religious faith. While religious prayers of any particular religion are forbidden in Government Schools run by the State, the Supreme Court in *Aruna Roy v Union of India* has held that an "academic study of religions in public educational institutions" is not against the tenets of Constitutional Secularism and may even be considered essential for preventing fanaticism and communalism.

Despite the provisions related to absolute non-discrimination, in acknowledgement of the fact that more than eighty per cent of the citizens of India profess one particular religion, the Constitution of India in Article 30 seeks to protect religious (and other) minorities from extinction by recognising as fundamental, their Constitutionally protected right to not only establish and also administer institutions for education but also mandates that the State is prohibited from discriminating against any educational institution managed by a minority. In *SR Bommai v Union of India* the Supreme Court, while upholding the dismissal of four provincial Governments for dereliction of duty in the aftermath of the demolition of a historic mosque by a communal mob, reasserted that India as a Secular State implies not only the absence of State religion and absolute neutrality between different religions by the State but also the protection of those faiths, sects and beliefs which may face any threat on account of their distinctiveness or numerical minority. The Supreme Court of India in *Lata Singh v State of Uttar Pradesh* has held that societal barriers which prohibit and prevent inter-caste, inter-denominational and interfaith marriages are against Constitutional Secularism and mandated that all marriages made under the Special Marriage Act, 1954 (which is a civil registered marriage between citizens irrespective of their religious faith or social background) should be promoted, protected and conserved by the State to promote secularisation and social fraternity.

While the individual and group Right to Freedom of Religion and conscience is well entrenched in the Constitution and hedged jurisprudentially by decisions of the Supreme Court, it is not an unfettered Right in India. The Constitution itself empowers the State to regulate, proscribe and prohibit the freedom of religion. While Article 25 (1) enshrines the Right to Freedom of Religion as a Fundamental Right, Article 25 (2) empowers the State with sweeping powers called "reasonable restrictions on Fundamental Rights" to legislatively interfere, restrict, or even prohibit the exercise of religious freedom in India in the interest of "Public Order, Health and Morality". These specified grounds on which the Government can place restrictions on freedom of religion are broad and generic thereby bestowing the Executive with an almost untrammelled authority to interpret which religious practices threaten public order.

Similarly, morality, which sociologically speaking is contextual, fluid, subjective, and evolutionary, cannot be objectively ascertained. By giving the State the right to define morality and use that definition to restrict freedom of religion, the Constitution has placed immense regulatory authority in the Government.

In the recent case *Konan Kodio Ganstone v. State of Maharashtra* the State sought to prosecute foreigners (including some Indonesian Citizens) associated with the Tablighi Jamaat Congregation for violation of Government Orders during COVID 19 pandemic, under the pretext of exercise of freedom of religion, (demonstrating the deployment of law as a restrictive regime over religious freedom through the penal securitisation of health concerns). Further, a distinction has developed jurisprudentially between Constitutional restraints on the Government concerning the profession of Freedom of Religion and essential practises as pertains to faith. The Government asserts full powers of regulation with all political, economic, financial and secular activities, (which are themselves determined by the Government) to be not a religious nature, which even though associated and incidental with religious institutions are deemed to be within the secular ambit of laws. For example, the Foreign Contributions Regulation Act, 2010, enacted in the aftermath of terrorist attacks in 2008, financing of which was traced to have been channelled through certain religious organisations, ostensibly to ensure that foreign powers do not use financial intrusion to destabilise the State, mandates that any funds received by any religious institution (among others) must be declared and subject to audit and inspection by Indian authorities. Further, the Constitution empowers the State to undertake all measures in the interest of Social Justice especially regarding the elimination of the abhorrent social practice of Casteism by the reformation of the Hindu religion and prohibiting all Hindu temples from restricting admission. Thus, while religious freedom is Constitutionally guaranteed in India, there are also structural restrictions on its absolute expression.

Indonesian Legal Structure for Religious Freedom

Indonesia, an archipelagic State emerged from Dutch Colonial Rule in 1945 when it enacted the Constitution of Indonesia, 1945 as the formative document for the establishment of the Republic. Indonesia, though extremely diverse is predominantly Islamic although the State is pluri-religious and religious tolerance and fraternity are defining features of Indonesian society (Mydans, 2007). Despite being the State with the World's largest Muslim population, legally Indonesia is neither an Islamic State nor does it draw from any single religious precept (Ministry of Religious Affairs of Republic of Indonesia, 2013). Indonesia is a Constitutional Republic based on Rule of Law as explicitly enunciated in Article 1 (3) of the Constitution of Indonesia, with the Constitution as the Supreme Law of the Land that defines the institutional structure, aspirations, and framework of nation-building (Farida, 2005). The Constitution of Indonesia defines, empowers, and circumscribes the power of the Government vis-a-vis the citizens for the equitable realisation of self-actualisation of all citizens (Djafar, 2010). The Constitution of Indonesia guarantees all basic rights and freedoms to all its citizens irrespective of their religion (Asshiddiqie, 2009).

There is no law in Indonesia which prohibits access to even the highest office of the President on religious grounds. Similarly, Article 28D assures the right of equal opportunity in political participation to all citizens irrespective of religion (Nasution, 1992). These Constitutional guarantees are meant to be extended through all subordinate legislation for the protection of human rights. The constitutional guarantees of religious freedoms are further bolstered by the Judiciary of Indonesia. Article 24 (1) mandates Judicial Independence while Article 24A (1) bestows upon the Supreme Court of Indonesia, the power of judicial review of all legislative laws and executive orders to determine if they are against the Constitution. Similarly, Article 27(1) mandates equality in treatment before the law to all citizens, in access to justice and their rights concomitant to the status as a citizen of Indonesia. Article 28E guarantees the freedom to every person for practice of the religion of choice, as well as of the expression of views, assembly, and association. Article 28I recognises the right to freedom of religion as a non-derogable basic human right and prohibits discrimination on any grounds. Article 29 (2) reiterates the Constitutional guarantee of freedom of religion to all persons.

The recognition and promotion of the values of "Unity in Diversity" decreed by Article 36 A of the Constitution of Indonesia further exemplified in the national motto, precludes any attempt at forcible homogenisation of the intrinsic pluralism of the population. Inter-faith marriages (based on the Colonial *Regeling op de Gemengde Huwelijken, 1898*), though not explicitly promoted by Government policy, are legally valid in Indonesia when registered under Sections 57 to Section 62 and Section 66 of the Marriage Law, 1974 as explained further by Section 35 (a) of Law 23 of 2006 (Susanto & Zhang, 2017). Moreover, interfaith marriage has also been given recognition promulgated by Law 22 of 1946 which mandated civil registration and extended throughout Indonesia vide Law 32 of 1954. These constitutional guarantees and institutional safeguards of religious freedoms in Indonesia are not absolute. Article 28J imposes a duty upon every person to respect the similar rights of others for the preservation of Social and Statist order. The same article also empowers the State to impose legal restrictions solely for ensuring respect for the rights and freedoms of all others and in the interest of morality, religious values, security, and public order. As can be seen from the above compilation, the constitutional framework for the freedom of religion in Indonesia is comprehensive and incorporates provisions for the recognition and protection of the rights of the religious minorities (Indiyanto, 2013). It is important to note here that constitutional or legal definition of terms like "Religion", "Morality", "Religious Values", "Security and Public Order" etc. are neither in the Constitution of Indonesia nor in any subordinate legislation (Hurd, 2015).

Freedom of Religion as guaranteed by the Constitution of Indonesia is subject to certain limitations which have been severely criticised by Western Scholars (Butt, 2016). Firstly, Indonesia vide Presidential Decree 1965 (which was later passed by the Parliament into a Statute in 1969), officially acknowledges, and thereby extends legal protection only to six religions afforded recognition, to the exclusion of all other faiths.

These religions are Islam, Hinduism, Buddhism, Protestantism, Catholicism and Confucianism.

The Government of Indonesia has also been severely criticised for its earlier disregard for the several other indigenous faiths which are prevalent among the different ethnic communities of Indonesia which range from animism, shamanism, ancestor worship and other proto-religious practices governing social mores and affiliations of entire indigenous communities, by reducing them to the status of cultural norms or social practises rather than religious faith, despite the Constitutional recognition in Article 18B and Article 28I, of "traditional communities" and their cultural identities and rights within the Republic (Picard & Madinier, 2012). Secondly, the Pancasila, which is the national unifying ideology of Indonesia, has a reference to monotheism as a foundational principle which has been interpreted by some scholars as a discriminatory constraint on the Freedom of Religion of essentially polytheistic religions like Hinduism, or non-theistic faiths like Buddhism, apart from Atheist and Agnostic creeds (Brown, 1987). Thirdly, interfaith marriages in the Republic of Indonesia face hurdles since Section 2(1) of the Marriage Law, 1974 specifies that the legality of interfaith marriage is valid only when done according to the law of the respective religions, thereby subjecting the civil union of marriage (as contemplated in the *Burgerlijk Wetboek*) to the approval of often regressive fundamentalist religious authorities and increasing vulnerability of interfaith couples to social sanctions, which has been critiqued by scholars as "differential unification" (Anshori A G, 2012). The approval of the Islamic Law Compendium through Presidential Decree Number 1 of 1991 is deemed contradictory to the recognition of interfaith marriages as civil unions by the Marriage Law of 1974 since it gives primacy to the clerical interpretation which treats differences in faith as a ground for nullity of marriage (Karsayuda, 2006).

Like India, the Right to Freedom of Religion is neither absolute nor unfettered in Indonesia. It is subject to control by the State as Article 28 J of the Constitution of Indonesia specifies that exercise of the freedom of religion must be within the legal prescriptions to ensure that it does not interfere or impede the rights of others. Moreover, Freedom of Religion may also be restricted legally for the security of democracy and maintaining public order and "morality" which in the Indonesian context has been interpreted to mean religious values. Parliament Decree XVII/MPR of 1998 which gave legal recognition to human rights in Section 36 explicitly mentions moral consideration, apart from security and public order as restrictions on religion despite its acknowledgement of the Freedom of Religion as a basic human right.

Furthermore, Section 23 of the Law on Human Rights, 1999 adds "religious values" as an additional criterion for imposing legal restrictions on practise of religion, apart from the afore referred three grounds of National Security, Public Order and Morality, which are affirmed in Section 73 of the Law. This has been cited by some scholars as evidence of the appeasement of the dogmatic orthodoxy of the recognised religions of Indonesia, and not only denial of freedom of religion but also covert suppression of all strains of religious heterodoxy (such as the Ahmaddiyas, Hare Krishna and Mormons), as well as atheism and agnosticism, which are considered

heretical or deviant, (Annual Report, 2009) (Atkinson, 1983). Religious freedom has followed a trajectory in Indonesia, from the liberal permissiveness under Sukarno's liberal "Old Order" regime, to the severe restriction of politicisation of religion (rather contradictorily coupled promotion of personal religious piety) and the politically motivated proscription of atheism (to counteract the Communist Revolutionary threat) under the Militarist "New Order" regime of Suharto (Kim, 1998). The transition to democracy in 1998 which ushered in the *reformasi* period of Indonesian politics commenced with unprecedented freedom of religion after the restrictive three decades under Statist Militarist New Order (Rudnyckyj, 2010).

This initial unconstrained liberty found expression in expressions of religious heterodoxy (Ibrahim, 2018) and emergent challenges to established religious dogmas of the legally recognised religions (Howell, 2005) and politicisation of the issue. Protests by the politically dominant conservative religious groups against "deviant" religiosities of the heterodox sects (Ihsan, 2018) intensified and became politically relevant when the assertion of religious freedom by some groups found consonance and was conflated with, demands of political secession, threatening the integrity of the State. This threat to national security prompted a reactive legislative enactment and reappropriation of regulatory authority and strict control over religion and its expression, by the Parliament in its quest for stability and insulation of society from religious radicalism and secessionist anti-Statist extremism (Telle, 2018) through a reversion to strict Statist control of religious freedom, best exemplified by the legal interdiction against *Hizbut Tahrir Indonesia* by the Government (Fealy, 2017). This has prompted some Western Scholars to opine that Indonesia does not have substantive freedom of religion, but rather is a State with "governed religion" (Hurd, 2015) with no possibility of "real" religious freedom (Sullivan, 2005).

While it is true that there are areas wherein there is scope for improvement in religious egalitarianism, there has been substantial progress made in Indonesia in the past two decades especially after the incorporation of Human Rights into the Constitution in 2000, and the establishment of the Constitutional Court in 2003 (Fatwa, 2009). Civil Administration Law number 23 of 2006 permits those who do not fall within the six recognised religions to leave the column of Religion blank in the National Identity Card of Indonesia (Sapiie, 2017). These developments in favour of freedom of religion seem to indicate an "evolving pluralism" in Indonesia (Hefner, 1999). Constitutionality and legality based on Statist citizenship and equality rather than religious identity and dogma have been affirmed as the basis of the Indonesian State by Constitutional law scholars (Asshiddiqie, 2006) and this optimism has been borne out by decisions of the Constitutional Court. The judicial refusal to accept religiously permissible polygamy in Constitutional Court of Republic of Indonesia in a 2007 case ref 12/PUU-V of 2007, the rejection of Islamisation of Criminal Law along with the rejection of the extension of the scope of religious law beyond family laws in Constitutional Court of Republic of Indonesia in a case decided in 2008 ref. 19/PUU-VI of 2008, and refusal to extend the ambit of the penological definition of adultery and homosexuality in Constitutional Court in its pathbreaking 2016 decision ref.

46/PUU-XIV of 2016, show the propensity of the Indonesian jurisprudential interpretation to be moving away from religion centric towards being Statist.

Penalisation of Intolerance:

One of the most persistent issues, which has plagued both India and Indonesia, is the challenge of transcending sub-national identities, consolidating national identity which coheres with the Unity and Integrity of the State while nurturing the intrinsic diversity of its people. The Preamble to the Constitution of India describes the purpose of the Constitution as securing Justice, Liberty, Equality and Fraternity for the citizens, and equally the preservation of the Unity and Integrity of India. The duty to preserve fraternity among Indians irrespective of religious and other differences, and to value and preserve the rich heritage of the "composite culture" of India is incumbent on every citizen of India vide Article 51 A (f) of the Constitution of India. Several legal and penal provisions have been enacted to effectuate violations of this Constitutional mandate for tolerance and fraternity. Dialogue and mutual respect for differences, social cooperation, and critical engagement despite variations in values are crucial for developing tolerance and fraternity transcending the fragmentation of religious identities. Tolerance necessitates nationalist inclusion and abjures religious exclusion (Fios & Gea, 2013). Violation of these fraternising Constitutional objectives, and mutual acceptance of the right to corporate and individual freedom (Rahman & Khambali, 2013), by promoting sectarian communalism threatens the stability and legitimacy of the State and therefore affords the legal logic for criminalisation as an effective deterrent across the world (Webb, 2011).

India and Indonesia have enacted statutes or included provisions in the Penal Code for criminalising Communalism and incitement against other religious faiths (Law Commision of India, 2017). The Indian Penal Code, 1860 in Section 153A, makes *inter alia* the promotion of enmity between different groups based on religion, a cognizable criminal offence punishable with imprisonment up to three years and fine, while Section 153B makes such assertions prejudicial to national integration which if made in a religious place of worship or before congregants, punishable up to five years. Section 295A makes deliberate or malicious acts designed to outrage religious feelings of any community or insulting religious beliefs punishable by up to 3 years imprisonment.

Similarly, Section 298 makes the utterance of words with deliberate intent to hurt the religious feelings of any person a non-cognisable compoundable offence punishable by up to one-year imprisonment. While Section 153 and 295 are in the context of communities and hence have higher penalisation, Section 298 is relatable to only an individual's sense of outrage, and hence is comparatively lenient. Section 505 of the Indian Penal Code provides punishment for publishing or circulating any rumour or report that can cause ill will. Section 69 and 69A of the Information Technology Act, 2000 prohibit and penalise online hate speech. Any such publication which promotes communal conflagration can be seized and destroyed by the Government under Section 95 of the Indian Code Criminal Procedure, 1973. Section 155 of the Criminal Procedure Code empowers the Police Officers to arrest hate mongers without a warrant. Section 144 empowers the executive magistrate to impose prohibitory orders to prevent communal violence within his jurisdiction while Section

107 authorises him to order the preventive detention of any person who may violate public tranquillity.

There are civil laws which also seek to promote tolerance by dissuading communalism in India. Communal incitement is prohibited by Section 123 A and Section 125 of the Representation of the People Act, 1951 and any politician indulging in it is automatically disqualified from contesting elections vide Section 8. Section 3 (g) of the Religious Institutions (Prevention of Misuse) Act, 1988 as a civil corollary to Section 153 B of the Indian Penal Code, prohibits the use of any religious structure to malign, promote disharmony, hatred, or ill will against any religious or sectarian group. Section 5 of the Cable Television Network Regulation Act, 1995 and Section 5B of the Cinematograph Act, 1954 prohibits the transmission of content that may incite communalism. These Statist restrictions, while designed to prevent communalism and penalise it, are reactive rather than proactive. Western scholars have criticised India as a State with Blasphemy Laws which restricts the freedom of expression and criminalises criticism of even regressive practises disguised as religion (Cozad, 2005). They rue the "overcriminalisation" of freedom of speech as a poorly suited policy for political ends (Kadish, 1967).

Section 156 (a) of the Indonesian Penal Code makes it punishable by five years of imprisonment if any person deliberately abuses a religious faith for causing enmity or prevents a person from the exercise of his freedom of religion. Indonesian Law on Prevention of Misuse and/or Defamation of Religion, No. 1/PNPS/1965 has been upheld as legally valid by Constitutional Court in its 2009 decision ref. 140/PUU-VII/2009 on the case, with the juridical explication that penalisation under the law is a punishment for violation of "*negara hukum*" by hostility against any of the recognised religions of Indonesia in *forum externum* which threatens the *rechtstaat* and Rule of Law, rather than the subjective, unexpressed *forum internum* of individual beliefs which are indeterminate (Crouch, 2013). The decision reaffirms the freedom of religion and the power of the State to regulate religion if it intrudes or impedes similar rights of others, or for protection of public safety and security, health safety and morals. In exercise of this authority the Government power to proscribe publications was upheld by the Constitutional Court of the Republic of Indonesia in a landmark decision ref. 140/PUU-VII/2009 rendered in 2010, but this power cannot be exercised arbitrarily and must meet the due process requirements emphasised by the Constitutional Court of the Republic of Indonesia in its 2009 decision ref. 133/PUU-VII/2009, and the right to a fair hearing and equality before the law as laid down in Constitutional Court of Republic of Indonesia ref. 140/PUU-VII/2009 in 2014 (Maarif, 2017). Despite these progressive jurisprudential developments, Eurocentric scholars have persistently portrayed Indonesia as a State with retrogressive laws, which are influenced by Islam, because of Article 29 (1) of the Constitution of Indonesia (Fiss & Kestenbaum, 2017). The deployment of criminal law to address communalism is criticised by western scholarship as "overcriminalisation" (Luna, 2005).

As can be seen from the foregoing discussion, India as a Constitutionally Secular Democracy, and Indonesia as a pluri-religious Republic exhibit differential Constitutional conceptions and approaches to achieve religious tolerance. While India, theoretically, maintains equidistance from all religions while promoting social interfaith miscegenation legally, Indonesia is pivoted on Statist control of religious faith and

practise through recognition and regulation, and a legal propensity to avoid conflict that may result from interfaith matrimony.

However, the comparative analysis of the practical outcomes of the legal regimes in both the States reveals the convergence of functionality. India and Indonesia both gravitate towards a middle path wherein India shows increased statutory regulation of religion while the Jurisprudence emerging from the Constitutional Court of Indonesia shows increased recognition of religious freedom by the Judiciary. The convergence is most apparent in the Penal provisions related to communalisation and religious polarisation. The statutes of both the States functionally converge on promoting tolerance through the punishment of intolerance. These relativistic differences from Eurocentric expectations in India and Indonesia can only be comprehended through an appreciation of the factum of colonial policies and post-colonial experiences of the two States. While India had to deal with the trauma of religion-based partition and chose the path of secularism, Indonesia faced Communist Revolutions, allegedly orchestrated by external powers, which threatened not on the integrity of the State, but also the fabric of Indonesian society, and hence chose to regulate religion while excluding the atheistic threat associated with Communism (Crouch, 2012). The legal structures and statutory provisions related to religious tolerance in India and Indonesia reflect their struggle to maintain the integrity of the State while building nationalism without destroying the diversity of the people. These challenges of State building cannot be appreciated without reference to historicism and colonialism. Eurocentric criticisms of Indian and Indonesian laws related to religious freedoms suffer from the myopia of critiquing from a specious point of view assesses Indian laws from the British legal standards and Indonesian Laws from the standards of the Dutch legal system, while overlooking the realities of legal cultural relativism that the States have had to deal with in the aftermath of centuries of colonial exploitation and policies of repression and division.

CONCLUSION

Based on the results of the research and the explanation above, it can be concluded that:

The comparative legal analysis of laws related to the promotion of religious tolerance in India and Indonesia shows functional convergence around the *tertium comparationis* of penal regulation of deviance despite foundational doctrinal differences of the conception of the relation between the State and Religion in the legal jurisprudence of the two Republics.

The criticisms by western scholars, of the "deficit" of religious freedom in India and Indonesia and the legislatively enacted legitimate statutes which are pejoratively referred to as "Blasphemy Laws", are flawed as they fail to take into account the prevailing socio-political situation in the post-colonial electoral democracies, and seek to apply a Eurocentric analytical framework which is unrealistic and inadequate to fully explain the reasons for the adoption of penal legal structural efforts as a means of ensuring religious tolerance in India and Indonesia.

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