# *BOOK REVIEW*

FILING RELIGION: STATE, HINDUISM, AND COURTS OF LAW (2016). Edited by Daniela Berti, Gilles Tarabout and Raphael Voix. Oxford University Press, YMCA Library Building, Jai Singh Road, New Delhi. Pp. 358. Price 1095/-

THE BOOK under review[1] contains important contributions on the issues of religion, secularism and their judicial treatment in the South Asian context. This book is not just another item in the laundry list of saleable commodities. Rather, some of the contributions, such as Srimati Basu's on personal laws and Chiara Letizia's on Nepalese secularism, to mention only two, can be recommended readings for any student of religion and law or comparative constitutionalism. What follows is an attempt to highlight, somewhat critically where possible, the important issues raised by the contributors on the judiciary's attempts to understand secularism and religious freedom in the South Asian context.

Section I deals with 'Secular Issues and Court Practice'. Here, Gilles Tarabout analyses the judicial approval of the appointment of priests belonging to non-Brahmin castes in temples of Kerala. He delves into the logic of the court which defines "priesthood in terms of technical procedure performed by experts but *secular*…employees selected solely on merit."[2] The essay in a comprehensive survey deals with cases that came up before the courts where 'merit' triumphed over birth caste of the priests. His argument is that such legal interpretations cannot be fully grasped without appreciating the political environment. The phenomenon which seems to be an innocuous attempt to 'purify present-day Hinduism' is also strategically promoted by the Hindu nationalists. Tarabout discusses the 'initiation ceremonies' performed in majority of the cases whereby non-Brahmins were transformed into Brahmins in order to eliminate the bane of the caste system. He argues that "rather than opening up the priesthood to all castes, the de facto process has been to Brahmanize the persons concerned- leaving open the question regarding their future…of caste relationships."[3] The essay thus raises the question of the political context in the birth *versus* merit debate in the appointments of temple priests in Kerala.

Chiara Letizia's essay, on the one hand, is an ethnographic account of the two public interest litigations (PIL)[4] that were filed to challenge ancient religious customs,

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1 Daniela Berti, Gilles Tarabout, *et. al.* (eds.)*, Filing Religion: State, Hinduism, and Courts of Law* (Oxford University Press, New Delhi, 2016).

2 *Id.* at 3.

3 *Id.* at 30.

4 Public interest litigation is a part of Constitution of Nepal since 1990, Constitution of the Kingdom of Nepal, 2047. The year designates the calendar of Bikram Samvat era followed in Nepal.

and on the other, a brief historiographic sketch of Nepal's struggle from Hindu monarchy to democratic secularism. Letizia outlines the complexities of the advent of secularism in Nepal. The essay discusses two PILs one of which questioned the ancient Hindu practice of goddess Kumaris. They were 'chosen as early as age of two from the Newar Buddhist caste…[u]ntil her first period she is considered to be a living goddess and conducts a life of ritual.'[5] The petitioner never pleaded for the abolition of the 'cult of Kumaris' but advocated for its reformation. The restrictions which were put on the girls' movement, schooling, clothing *etc.*, were challenged as violating the rights of women and children.[6] Newar community, on the other hand, claimed that the tradition depicted religious identity and did not jeopardise the rights of the girl child. The court struck a balance between the arguments of the petitioner and the community. The judgment "avoided labelling the Kumari tradition as discriminatory"[7] and described it as a religious activity. However, the court mandated 'eventful reforms' in the practice of the tradition. An expert committee was set up to conduct an in-depth study in order to promote the interests of Kumaris and suggest reforms.

The second PIL was related to the appointment of priests at Pashupatinath temple. The Maoist government interfered with the tradition-bound practice of appointing only south Indian priests for the worship in the inner sanctorum of the temple. It was both unique and paradoxical that the petitioners invoked secularism "in order to protect an important Hindu tradition from the new secular state led by Maoists."[8] The idea of secularism thereby was employed, ironically, against the party which had campaigned for a secular republic to come to power. Secularism, as non-interference of state in affairs of religion, was entangled with the right to religion against the state's intrusion in temple practices. This curious struggle for secularism in order to safeguard religion from the Maoist government, with which the Supreme Court of Nepal agreed, provides novel ways in which secularism as a signifier can find new forms. This forms an important vantage point for comparative analysis in south Asia in order to understand the complexities of secularism without essentially falling into the Euro-western framework. The essay illustrates how secularism "ascribes to the state and to the courts an active role in both supporting and reforming religious traditions. It contrasts with the neutral stance that is generally seen as a mark of secularism in the West and points to the Indian model of secularism."[9] Certainly, this essay is an important contribution in the emerging and nascent formulation of Nepalese

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5 *Supra* note 1 at 44.

6 Nepal is a signatory of UN Convention on the Rights of the Child, 1989.

7 *Supra* note 1 at 50.

8 *Id.* at 56.

9 *Id.* at 60.

secularism which needs careful engagement to appreciate the non-western complexities of this conception.

Section II titled 'God's Affairs' is tightly structured. However, there is not a single intertextual reference which makes each essay stand-alone and isolated from other contributions. In the first essay of this section, Daniela Berti analyses languages of rituals and how they get transformed when disputes come before courts. The essay analyses the conflict between two factions of religious supporters-*Shringa Rishi* and *Balu Nag*-during the Dusserra procession in Himachal Pradesh in India. A careful and meticulous analysis of the case file follows where the administration's decision to ban the procession was challenged. The thrust of the essay deals with the effects of 'judicialization' of ritual disputes. The essay points out the failure of the court to adjudicate the dispute; paradoxically, the court ended up reverting the dispute "to the administrative office against which the case had been filed."[10] It is submitted that there is a perspectival lack in the analysis offered by the author, despite thepromising introduction of the essay.

Deepa Das Acevedo in her essay deals with the doctrine of 'essential practices' in the context of Sabarimala controversy which relates to the restrictions placed on menstruating women from entering the temple. The essay aspires to analyse the "Indian judiciary's striking relationship with Hinduism"[11] through the category of 'essential practices' in the two decisions of the Kerala High Court. In an all-too-brief overview of the essential practices test, Das associates it with the colonial legacy which was "anxious to identify the true tenets of native religions."[12] She observes that an overt emphasis on sacred texts is the hallmark of the doctrine.[13] Das further discusses the mythology associated with Lord Ayyappan and the unusual nature of the pilgrimage: "Sabrimala admits all men of all faiths and actually houses a Muslim shrine on its grounds." However, the Lord has a "discomfort with female fertility"[14] which, the devotees explain, has little to do with misogyny. The rest of the essay discusses the application of essential practices test in the absence of a clear textual tradition. If the

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10 *Id.* at 97.

11 *Id.* at 103.

12 *Id.* at 105.

13 Das usefully points out the fact that the case of *S. Mahendran* v. *Secretary, TDB* AIR 1993 Ker 42, first "established the ban on women as essential practice of Ayyappan worship, contains no reference whatsoever to the Malayalam-language texts associated with the deity." This is despite the fact that 'Ayyappan' "narratives can only be found in vernacular texts" and not in Sanskrit. This signals the juridical limitations to believe that "textual support for Hindu practices derives from 'classical' canons or not at all."

14 *Supra* note 1 at 107.

discussion on the 1993 high court case is marked by clarity and precision, one can say that the discussion of the 2011 judgment is obscure and lacks clarity.

Ute Husken's essay deals with a religious dispute in Tamil Nadu relating to initiation ceremony of temple priests. It outlines how what constituted relevant legal evidence became the way of redefining religion itself. The religious institutions followed a text based approach as forming the source of true Hinduism. This process mirrored the colonial legacy and its deep acceptance within the emerging religious sphere. The essay outlines the transformation in the languages of religion when they get involved in the disputes in a secular courtroom.

Section III titled 'Ascetics and the Law' includes four essays. It is perhaps the weakest section of the book. Raphael Voix's analysis of the *tandav* dance tradition of *Anand Margis* makes a simple point regarding the use of essential practices test but in a convoluted manner. The only interesting part of the essay is the brief insight into how the head of the religious denomination made amendments in its precepts to make *tandav* dance an essential practice. The Supreme Court rejected such circumventing of the law. Perhaps, the methodology of the essay -partly discursive analysis of judgments and partly an anthropological account- obfuscates the narrative. France Bhattacharya analyses the trial of a lustful *mahant* (head priest) in the late 19th century who was accused of seducing a married Bengali woman. The essay is an attempt to foreground "the way colonial justice dealt with cases involving Hindu religious personalities."[15] It discusses how the popular local sentiments allied with the colonial pedigree employed by the British judges. Malvika Kasturi analyses the *math* property and its treatment in the civil law of the time in the colonial courtrooms. This essay, the best contribution in this section, clearly outlines the historical debates surrounding the *math* property.

Section IV of the book deals with personal laws and has contributions from Jean-Louis Halperin and Srimati Basu. This section is of immense contemporary relevance due to the resurgence of the debates on personal laws. Halperin's contribution leaves much to be desired both in form and content despite his attempt to raise an important and underworked issue. He foregrounds a unique controversy around the Hindu Marriage Act, 1955 in cases where one of the parties was a converted Hindu at the time of marriage. The question was: what would be the status of such a marriage? Would such a marriage require a documentary proof of conversion? The question 'how to *prove* conversion prior to marriage' is central to Halperin's essay.[16] The courts preferred a liberal approach and 'open-mindedness' in matters of proof of religious

15 *Id.* at 197.

16 *Id.* at 294.

conversion. Adoption of Hindu faith 'accompanied by consistent conduct' of living like a Hindu would be sufficient proof of conversion. However, in the two-judge bench decision of *Gullipilli,* the Supreme Court converted the test into a rigid framework of proof, failing which the marital bond became void in law.[17] The trend was followed in the later cases. This led to the emergence of bureaucratic and documentary proof related obstacles in the cases of mixed marriages which in the previous law were allowed "if it appeared that the non-Hindus had accepted all the consequences of a presumed conversion."[18] This interesting mapping of law from 'presumed conversion' to rigid and orthodox measures raises many issues of increasing religious orthodoxy in courts and politics. However, the essay entirely leaves out these discussions as untenable 'hypothesis'. In the tone of celebration, the author cited judgments where "the Supreme Court justified death penalty- as in the rarest cases according to case law- to condemn 'barbarous and feudal' murders."[19] This pro-death penalty stance against 'honor killing' is seen by the author as emancipatory without going into the nuances of the debates surrounding such decisions.

Srimati Basu takes up the issues of polygamy and adultery in Indian personal laws. In an anecdotal form of writing, she foregrounds the anxieties of how Muslim men can be legally polygamous or "get to have more sex…than Hindu men."[20] This is the basis of the indictment of the state for its insufficient control over Muslim men's sexuality. In her lucid style of writing, she makes the important point of how the argument of "beleaguered majority groups and pampered minority groups" mirrors the post-partition Hindu resentment of being governed by "secular and egalitarian code" as opposed to their Islamic counterparts. She opens the issue of vulnerability and how such discursive construction equates Muslim women and Hindu men as victims.[21] In what follows is a feminist critique of the notion of protectionism imagining "gender in terms of greater fragility, ultimately inscrib[ing] women with lesser subjectivity."[22] She further critiques the punitive adultery section as a law rendering women "as currency in transactions between men." Discussing 'love jihad' and Muslim polygyny as 'specter of envy', she almost moves towards a psychoanalytic understanding of personal laws. She accounts for subversive possibilities within the limits of existing legal regime, for instance, using the "public discourse against evils of bigamy to their

17 *Gullipilli Sowria Raj* v. *Bandaru Pawani* (2009) 1 SCC 714.

18 *Supra* note 1 at 295.

19 *Id.* at 299.

20 *Id.* at 302.

21 For an excellent theoretical supplement to Basu's point see Judith Butler, Z. Gambetti *et al.* (eds), *Vulnerability in Resistance* 1-27 (Duke University Press, London, 2016).

22 *Supra* note 1 at 308.

strategic advantage, making use of patriarchal notions of sexual exclusivity to negotiate."[23] By using simple case studies, she establishes how the threat of criminality in adultery cases can provide a leverage for better economic settlement for women. Drawing comparision with the law for Muslim women in Bangladesh, the essay provides useful insights for better understanding of Muslim personal laws in India. The essay is an illustration of the use of Foucauldian methodology to understand the multi-pronged nature of power.[24]

Overall, one can discern a lack of coherence in the book. There is no cross referencing despite related topics. Definitely better editorial labour could make the book holistic and seamlessly connected. Nevertheless, a few essays of the book are valuable for the researchers in the field. Although political context informs the contributions largely, the absence of Ayodhya dispute and electoral politics around religion, especially in the Indian context are conspicuous in their absence.

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23 *Id.* at 315.

24 See generally, Michel Foucault, *Power/Knowledge: Selected Interviews and Other Writings*, 1972-1977 (Vintage, 1980).

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