



STATE AND RELIGION IN INDIA: DRAWING THE LINE

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This paper seeks to examine the essence of Freedom of Religion and Secularism, vis a vis the role and reach of the Judiciary in the same. It also aims to explore to what extent the state's interference is valid or acceptable. The paper shall be divided into four parts – the first part shall deal with the introduction of all the relevant concepts and articles of the Constitution of India, the second part shall deal with the various aspects of religion and law (their individuality in a secular India and correlation with each other), the third part shall deal with judicial intervention in religious matters with case law/studies (a critical analysis of the decisions) and the fourth and final part shall deal with suggestions and concluding remarks of the research scholar.

Introduction

The right to religion or religious freedom entails a notion that supports an individual's or community's right to express religion or belief in public or private, via teaching, practise, worship, and observance. It also means the freedom to alter one's faith or beliefs, as well as the "right not to proclaim either religion or belief" or "the right not to follow a religion." Many individuals and most states regard religious freedom as a basic human right. In a nation with a state religion, religious freedom is commonly understood to mean that the government allows religious practises of sects other than the official religion and does not persecute

adherents of other religions (or those who do not have or follow a particular belief or practice a particular faith).

Traditionally, freedom of religion was characterised as tolerance of many theological systems of belief, whereas freedom of worship has been regarded as freedom of individual activity. To differing degrees, all of these have existed. While many governments have recognised some type of religious freedom, it is frequently constrained in practise by punitive taxation, harsh social regulations, and political disenfranchisement, but what really shapes religious freedom in present-day democracies is not any of the abovementioned; for most part, it is *judicial decisions through intervention in religious matters*.

In the Indian context, a very tolerant, so to say, religious environment has been witnessed since time immemorial - edicts on religious freedom have been discovered written during the reign of Ashoka the Great in the third century BC. In modern India, the freedom to practise, preach, and spread any religion is a fundamental right. The list of national holidays includes most of the important religious festivals of the various communities. This shows the level of inclusivity and acceptance in the religious context. Despite having a majority following of Hinduism, India remains a largely secular country, in its own peculiar way. It has no *state religion*.

The Constitution of India guarantees to all its citizens the right to Freedom of Religion under articles 25 through 28. Article 25 guarantees to all citizens, the freedom of *conscience, free profession, practice and*



propagation of religion which means it gives every person the right to profess and practice their choice of religion, or no religion at all. It also allows propagation of religion and includes/gives protection to all those activities which are essential in the profession of such religion(s). Article 26 gives people the freedom to manage the religious affairs of the religion which they follow; this includes the construction and maintenance of religious institutions and charitable organisations for religious purposes. It also has within its ambit the right and freedom to manage its own affairs in the matter of religion. Article 27 states that there may be no taxes whose earnings are used only to promote and/or maintain a specific religion or religious sect; and Article 28 allows religious groups to offer religious teaching through educational institutions, but at the same time, restricts all state-run institutions to refrain from providing any religious instructions.

Articles 25-28 provide all the necessary freedoms with regard to religion and religious affairs in India; however, it is important to note that all these articles and their contents are *subject* to certain restrictions, which are – public order, health and morality. This reduces the scope of freedom and the expanse of right to religion. It also brings us to question the parity and standing of this particular fundamental right with its other counterparts as laid out in Part III of the Indian Constitution. The Preamble to the Constitution of India proclaimed that India is a secular republic with the Forty-second Amendment to the Constitution of India enacted in the year 1961. However, in the 1994 decision *S. R. Bommai v. Union of India*, the Supreme Court of India determined that India has been secular from

its founding. The ruling recognised that the state and religion are separate. "Religion has no place in concerns of state," it added. And, since the State is required to be secular in conception and conduct by the Constitution, political parties are required to be secular as well. Mixing religion with state authority is not recognised or permitted by the Constitution.

Apparently, secularism has always been the driving force behind contemporary India. India's secularism, on the other hand, does not totally divorce religion and state. The Indian Constitution allows the government to meddle in religious matters to a large extent. The meddling or interference and the extent (of the acceptability of the same) is what we shall examine in this study.

Religion and Law

"Law" and "religion" refer to large imperial domains that are, for most part, regarded to be fully defined and self-contained. On closer scrutiny, these concepts appear to be strangely vague and difficult to define. It is also, in today's idiom, a creation of modernity in its own right. When the two concepts are combined, just like in "law and religion," the ambiguities are exacerbated. The historical roots of these two concepts, the definitional problems involved with using both cross-culturally, and, above everything, the problematic sense of "modernity" they convey are only a few of the obstacles that make a study of their relationship challenging.

The narrative synchronizations of law and religion are perhaps most visible in what is sometimes referred to as "religious law," which refers to such parts of many religious



customs that administer and govern code of behaviour, as embedded, for example, in such references as the Ten Commandments (Exodus 20), the Shariah, and the Hindu Laws of Manu, and which include several aspects of conduct that are now covered by secular law. The lack of a distinct or secular name for "law" in several pre-modern legal systems emphasises the link between law and religion. In Hinduism, for example, the term dharma encompasses not just "law," but also "religion," "right conduct," and other concepts.

Religious, or pre-modern, law, in general, differs from the types of law that have become commonplace in modernity. Many religious laws veer away from this standard in one or more ways, if we obey the legal positivists and describe law as a standard of broad or even consistent applicability espoused by the nation and imposed by its sanction. They may not be universal in other circumstances. Several religious laws lack a meaningful, state-enforced punishment or sanctions as well.

Religious laws differ from secular laws in terms of its sources of authority, conflict settlement systems, and enforcement mechanisms. The deity or the earliest ancestors are frequently cited as the source of religious law's authority. One of the distinguishing features of law in contemporary democratic societies is that it is solely the responsibility of a democratically chosen legislature to make laws, subordinate in many cases to a more foundational constitution, which is also held to encapsulate the popular will and may be restricted by universal secular norms. Religion and law both have focused on how people should spend their lives. Sin is seen as

a transgression of the order of the universe in religious law. Punishments or atonements may be used to bring order and purity to a person or a society. The distinction between crime and sin was often blurred in the early days of the criminal justice system. This is how extensively correlated and if intended to and properly planned, then harmoniously constructed religion and law can be, whether completely secular or sans absolute secularism. The reason behind this is that the main aim of both religion and law, has been to combat violence, unrightful means and actions and injustice. However, the coming together of many religions in one place or territory has caused a certain mismatch or imbalance of these two aspects because not all religions follow same or similar methods, means or beliefs to reach these goals. This is why democratic nations ideally choose to be identified as *secular*.

But does this secularism fare well for the sanctity of religion and does it uphold its meaning in the true sense today? This has to be examined through analysis of various judicial decisions on the subject which can help us form an understanding on how far the state intervention has gone in order to promote secularism and whether it is ideal and acceptable or not and if yes, then to what extent?

In the case of India, it has as always pretty evident, accommodated all religions with no exceptions even when the rest of the world was not open to them or welcoming them, including Judaism and Zoroastrianism. Not to mention that even those religions which were sort of forced into the Indian fabric, through foreign invasions, have also thrived in India, probably even better than their home countries i.e., nations which have that



particular religion as their state religion.

Indian secularism is also peculiar in nature as compared to other secular states in practice. In India, secularism indicates that the state remains impartial to all religious organisations but is not necessarily separate, unlike in the West, the state is independent from the operation of all religious institutions and groups. In India, the notion extends beyond the topic as to how religious groups should be accommodated. Instead, the core of secularism is the establishment of a constructive interaction between the religion and state, while in other secular systems, the state engages in absolute non-interference with religion. The state has the authority to limit people's rights if religion interferes with the operation of the state. In India, all expressions of religion are supported equally by the state, but the West notion of secularism doesn't really believe in a public display of faith with the exception of places of worship.

Most importantly, there is no obvious boundary between government and religion in India even now, although there is a clear divide between state and religion in most other secular states.

Although the law applies to all residents, many personal laws, such as marriage and property rights, differ from one municipality to the next. However, under the Indian Penal Code, they are all given equal regard, although in other secular nations, they are not. To administer justice, regardless of religious affiliation, a single standard code of law is adopted. Many debates and discussions over having and implementing a Uniform Civil Code in India have been going on since the longest time but to no

avail.

With changing times, conflicts have risen, not just inter-religion but also intra-religion in India and the secular as well as religious fabrics are not just being questioned but also eroded to quite an extent, especially with constant intervention of the state through the judicial mechanism. This creates a puzzling confusion as to the fact that whether the state intervention, which is quite necessary to draw the line between right and wrong and here, religion and secularism, has done an overreach on its part and in the carrying out of its duty.

State Intervention through Judiciary

The very provisions of the Indian Constitution allow the state to intervene in religious matters since the Right to Freedom of Religion despite being a Fundamental Right, is not absolute in nature and allows the state to interfere in religious affairs for reasons and issues or concerns pertaining to *public order, health and morality*. These terms are loosely defined and, in some cases, not defined at all, which means the biggest problem is with the areas in which the state shall interfere and the extent to which they can mould, modify or change the religious rules or norms via the power conferred upon them. A lot of times, this unfettered power, can become a cause of concern for religious preservation since there are no clear lines upon which the judiciary can rule in such matters.

Public Order

The phrase "public order" has a broad sense and is seen as a basic necessity in every structured society. It denotes a tranquil



condition of general public in which people may go about their daily lives. Public order has a smaller scope and can be affected by just those violations that have an impact on the community or the general populace. The steady pace of life of the society leading the nation as a whole rather than even a specific location is referred to as public order. When ruling on the validity of a religious practise and its security under Article 25, the affordances or degree of such practise to disrupt the even pace of life in the community, which makes it harmful to the preservation of public order, must be examined.

Public Morality and Constitutional Morality

Morals and values regulate the whole community in a country such as India. Each person is guided by their decisions and morals, but what society as a whole perceives as morality must be considered. Only when the bulk of society or the public proposes a behaviour or ideal as a code to be followed can it be considered moral. For such a rule to be followed, it must be prudent and have a logic. Simply stating the code is insufficient; the code must be recognised and obeyed. What society considers to be bad is not always legally unlawful, and vice versa. As a result, when public morality is taken into account, the question of how it should be regarded emerges. The concept of morality is ambiguous, giving it a broad connotation. The term morality, as used in Article 25(1) of the Constitution, cannot be interpreted through a limited lens, limiting

the realm of morality's meaning to what an individual, a sector, or a religious group perceives the phrase to imply.

The state has the authority to interfere and control religious freedom and activities. The parliament has established a number of laws governing various religious practises. Personal law is related with religious activity. However, because personal law exists under the control of legislation rather than religion, it may always be replaced or supplemented by laws. Article 25 empowers the state to control secular religious activities.

The Indian judiciary must play an unavoidable role in filling gaps in religious legislation. It is clear that too that the State can only control secular actions, but the Indian Constitution protects religious acts from state intrusion. Finally, only the Judiciary has the authority to intervene in questions of religion and religious activities. The *ERP (Essential Religious Practice)* examination is among the advances of the Indian judiciary in this subject. Because of the ambiguity in the Shirur Mutt¹ case, the Essential Religious Practice test evolved in India. The Supreme Court abolished the assertion test, under which the sole foundation for proving a specific conduct was not secular was the 'assertion' of a high Catholic priest expressing the same. As a successor for this test, the Essential Religious Practice test was introduced.

Let us have a look at some major pronouncements of the important case laws on this subject in India.

¹ The Commissioner, Hindu Religious Endowments, Madras v. Shri Lakshmindra Tirtha Swamiar of Shri Shirur Mutt, 1954 AR 282.



In the Bijoe Emmanuel² case, three Jehovah's Witnesses children were suspended from school for refusing to perform the national anthem, alleging that it violated the teachings of their faith. The court ruled that expulsion violates fundamental rights and the right to religious freedom.

In the Acharya Jagdishwaranand³ case, the Supreme Court held that *Ananda Marga* is a religious denomination rather than a distinct religion. Furthermore, doing *Tandava* on public streets is not a required or essential practice of Ananda Marga and therefore, not an essential religious practice at all.

In the Ismail Faruqui⁴ case, an issue pertaining to offering of *namaaz* was addressed by the Supreme Court and it was held that for the same, going to the mosque is not essential and therefore, it not being an essential practice of Islam, a Muslim can offer his *namaaz* anywhere, even in the open. The Supreme Court in Ramji Lal Modi⁵ case held that Section 295 is constitutional and is compatible with Article 25, where in his case, the petitioner challenged the constitutionality of Section 295 of the IPC, which prohibited insulting a religion or religious convictions of a class of individuals.

In the Durgah Committee Ajmer⁶ the petitioners argued that the Durgah Khwaja Saheb Act of 1955, breached Articles 25 and

26, which required the election of Hanafi Muslims to the Committee, none of whom belonged to the Chishti sect. The Court ruled that while the Chishti faction is a religious denomination, the act does not infringe the right to religious freedom since the Chishti Sufis never had the authority to control the Durgah endowment. The secular element of reason was introduced to the essentiality test by Justice P B Gajendragadkar. The Durgah Committee disputed the legitimacy of behaviours that, while religious, may have emerged from essentially superstitious beliefs and so be superfluous and unnecessary accretions to religion itself.

In the famous cow slaughter case⁷ the Supreme Court ruled that the restriction on cow slaughter does not violate Muslims' freedom of religion and that cow slaughter is not even an important element of the faith. In such instance, it became hard to distinguish between a secular deed and a religious activity.

The Triple Talaq case⁸ where the Apex Court held the practice of instantaneous triple talaq to be unconstitutional; On the surface, the Court's ruling appears to be correct, but the techniques taken by the majority justices appear to differ, sparking a dispute over how to handle personal law in a secular society like India. It begs the question of when it is legitimate for judges to rule on the legitimacy of an uncodified procedure like triple talaq.

² Bijoe Emmanuel & Ors. v. The State of Kerala & Ors., 1987 AIR 748.

³ Acharya Jagdishwaranand Avadhuta v. Commissioner of Police Calcutta & Anr., 1984 AIR 512

⁴ Dr. M. Ismail Faruqui v. Union of India & Ors. AIR 1995 SC 605 A.

⁵ Ramji Lal Modi v. The State of Uttar Pradesh 1957 AIR 620.

⁶ The Durgah Committee, Ajmer & Anr. v. Syed Hussain Ali & Ors. 1961 AIR 1402.

⁷ Mohd. Hanif Qureshi v. The State of Bihar 1958 AIR 731

⁸ Shayara Bano v, Union of India AIR 2017 9 SCC 1 (SC).



The Sabarimala case⁹ also created a lot of uproar about state intervention in religious affairs. Here, the petitioners filed a PIL under Article 32 contesting the Sabarimala temple's practise of not allowing women between the ages of 10 and 50 to enter. In a 4:1 decision, the Supreme Court ruled that the limits on the admittance of women between the ages of 10 and 50 into the Sabarimala temple were unconstitutional and invalidated Rule 3(b) of the KHPW Act. The Court also issued instructions to guarantee the safety of female pilgrims accessing the temple. The majority found that devotees of Lord Ayyappa did not amount a new religious denomination and were part of the Hindu faith, and that the exclusion of women could not be regarded an important religious practise in the lack of biblical or textual evidence establishing the same.

However, Justice Indu Malhotra dissented from the majority opinion on the constitutional bench and this showed the divide in opinion an understanding not just on the part of the public at large, but also the judges. In her dissenting decision, she stated that the case should be dismissed due to the Petitioners' lack of standing. She further claimed that Ayyappans, or Sabarimala Temple devotees, met the definition of a religious denomination and hence qualified for the safeguards afforded by Article 26. She also ruled that the minimal limitation on women's admittance would not violate Part III of the Constitution.

The latest stir in religious matters and state's involvement in the same has been seen in the Hijab ban case. In this case, the Karnataka

High Court ruled that the religious headscarf that Muslim women wear, known as the *hijab* is not an essential religious practice and therefore, cannot be allowed to be worn in classrooms as that would be giving religious colour to educational institutions. The cases explained above are just a few examples of the many cases where state intervention in religious matters and the failure of the state to bring a uniform manner in which the ERP test can be applied is seen. It is not wrong to say that in majority cases, the court's interpretation though based solely on law and constitution, has not appealed to the public and has hurt religious sentiments span religious communities. This shows the need for reform in this system and the manner in which religious and secular matters are being or rather, should be dealt within India.

Conclusion

The manner in which the interference of state has been seen in matters pertaining to religion and secularism, depict very clearly the fact that there is no clear-cut demarcation between religion and secularism, which fails the entire purpose of the state's intervention. In fact, the way in which it has been dealt with by the judiciary, it may even look as if its decisions are diluting both secularism as well as religious sanctity, both at the same time.

The main reason behind this dissatisfaction with the work of the Indian state in religious affairs is that because it claims to be secular, it has all the more the duty to *not* intervene (unnecessarily) in religious affairs and definitely not to the extent that it hurts the

⁹ Indian Young Lawyers Association v. The State of Kerala 2019 (11) SCC 1.



fundamentals of religions. Mahatma Gandhi said that if he were a dictator, state and religion would be separate; he would swear by his religion and even die for it, but that would be his personal affair and the state would have nothing to do with it. Rather, the state would look after the secular welfare of the people. Religion is a personal space for every religious person. And this is very rightly said too.

From this it can be aptly inferred that a distinction must be made between religious and secular activities, and the courts must ensure that they do not overstep their bounds in exercising the religious freedom afforded to the people of India. Unity in variety is a slogan that is recognised across the world as one of the most remarkable and distinctive qualities of Indian land. Despite various obstacles caused by diversity, the Indian subcontinent manages to stand higher than many monolithic countries. Keeping an eye on the Indian judiciary and the cases that will be heard in the future, it is high time to reflect on the fact that India's secular nature and distinctiveness should not be overlooked.

For making this distinction, it is suggested that authentic and real religious heads and knowledgeable persons, having in depth understanding of their respective religion(s), should be made part of every matter that has any religious colour attached to it whatsoever; provided that the matter be taken into the hands of the court in the first place, since the state should avoid as much as it can, intervening in religious matters, until and unless there is gross violation of fundamental rights of Indian citizens due to any matter related to or connected with religion. Committees headed by religious

heads should be formed and maintained and they should be approached and involved in the decision-making and scrutiny process of such cases; just as the judges know law, the religious heads know the nuances of religion and therefore, they may turn out to be better judges in these cases.

The courts ought to remember to not use their power and not be influenced by political or media pressure in such cases and must keep the interest of the public (more importantly, the religious community in question). No doubt, the judiciary is an indispensable tool in the process of a better governed and equal society, but it too, must be aware and if not, then reminded time and again, of its limitations as well as the major responsibility that comes along with its power in deciding religious/secular disputes. A nation must move hand in hand with changing times and advancements in all spheres are instrumental to overall growth of a society, but it must also be remembered that a tree stands strong because of how strongly rooted it is, and similarly, a nation stands strong and independent as long as it is connected to its roots. Roots here, mean, to quite an extent, religion and culture, especially in a colourful and diverse nation like India. This religious freedom and the sanctity that comes into question along with it, must be respected and protected at all costs and no feeble waves of modernism should shake the foundations of the nation, a lot of which lie in religion and its related aspects.



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