
SECULARISM IN THE CONTEXT OF JUDICIARY

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ABSTRACT

Secularism is a way for everyone to enjoy religious freedom. India is a multi-religious country whose constitution embodies the concept of faith and equality.

Although the term 'secular' has not been included in the Indian Constitution since its inception, it was incorporated in 1976 by the 42nd Amendment. However, in the spirit of secularism, the values of secular character were woven into the constitution of India.

From the very beginning, this aspect has been emphasized by the judiciary from time to time. Secularism is indeed one of the fundamental ideals of the Constitution and it can be safely asserted that it can never be changed. This paper shows whether the judiciary in India is secular through the outcome of various cases.

I. INTRODUCTION

The concept of "secularism" is difficult to define and therefore is not defined in the Constitution. Secularism has been included in the preamble to the Constitution (Forty-second Amendment) Act, 1976.¹

The concept is based on certain rules. Therefore, there is no official religion in India. Many fundamental rights guarantee freedom of worship and religion, as well as unlawful discrimination on the basis of religion, and thus, prevent the establishment of a theocratic state. The state does not identify itself or any particular religion. The state is required to treat all religions and sects equally.

The secularism in the preamble is reflected in the provisions prescribed in Article 25-30 of the Constitution and Article 51A of Part IV-A. Secularism means that the state should not have any religion of its own and people of different religions live in the whole country. Every person, regardless of their religion, should be assured by the state that they are free to practice their religion, practice it and propagate it, and that the freedom of conscience is freely protected by law.

The positive concept of secularism is seen in India. The Constitution of India embodies the positive concept of secularism, meaning equal respect for all religions or equal protection of all religions. Secularism is a fundamental fact of India's constitution, so any state government pursuing anti-secular politics is prosecuted under Section 356.

II. IS JUDICIARY SECULAR? Critical Analysis

i. Basic Structure doctrine

In *S.R. Bommai*,² Supreme court stated the secularism in the context of India. Religious tolerance and equal treatment of all religious groups and protection of their lives and property and their places of worship is an essential part of the secularism enriched by our constitution.

BP Jeevan Reddy J stated:

“ While the citizen of this country is free to profess practice and propagate such religion, faith or belief as they choose, so far as the state is concerned, i.e., from point of

¹ M.P. Jain, Constitutional Law of India, 8th edition, Page No.1781

² S.R. Bommai V. Union of India. AIR 1994 SC 1918

view of the state, the religion of the faith or belief of a person is immaterial. To it, all are equal and all are entitled to be treated equally”.³

Thus, in this case the Hon’ble Supreme Court held that, the concept of secularism is not only a passive attitude towards religious tolerance but also a positive concept of treating all religions equally. Thus, Secularism is Basic Structure of the Constitution of India. And therefore, Indian Judiciary is Positive Secular in nature.

ii. JUDICIAL INTERPRETATION TO THE CONCEPT OF SECULARISM IN INDIA

Supreme Court has time to time interpreted the secularism through the following cases:

a) *St. Xavier’s College Case*⁴ and *Atheist Society Case*⁵

In these cases, according to the petitioner's, the state is violating secular principles by allowing religious rituals such as breaking coconuts, worshipping and chanting mantras or sutras of various religions in government-owned institutions. Also, such encouragement by the state can lead to communal tensions and lead to communal riots which include massacres in different parts of the state. Displaying religious symbols at bus stops and on buses owned by the state and its enterprises, such as the APSRTC and the Electricity Board, should be prohibited as offensive to the secular features included in the constitution as they promote religious sentiments.

It was held by Supreme Court that; Secular country does not mean that the country is atheist. In Western countries, secularism means not accepting any religion, but in India, secularism means accepting all religions. Therefore, the practices of the people according to their religious beliefs without any harm to the society should be considered as acts done to promote their faith and belief and they should be allowed as in the present cases.

b) *Santosh Kumar vs Secretary, ministry of HRD*⁶

This is the landmark case related to Sanskrit teaching at the institutes. In this case The Supreme Court has said that secular state is not hostile to religion but neutral in matters of religion. Para 19 and 20 of the said judgment are more illustrative in this regard.

³ M.P. Jain, Constitutional Law of India, 8th edition, Page No. 1298

⁴ The Ahmedabad St. Xavier’s College v. State of Gujarat & Anr AIR 1974 SC 1389

⁵ Atheist Society of India v. Govt. Of Andhra Pradesh AIR 1992 AP 310

⁶ Santosh Kumar vs Secretary, ministry of HRD AIR 1995 SC 293

Para 19 is that *“Form what has been stated above, we entertain no doubt in our mind that teaching of Sanskrit alone as an elective subject can in no way be regarded as against secularism. Indeed, our Constitution requires giving of fillip to Sanskrit because of what has been stated in Article 351, in which while dealing with the duty of the Union to promote the spread of Hindi it has been provided that it would draw, whenever necessary or desirable, for its vocabulary, primarily on Sanskrit. Encouragement to Sanskrit is also necessary because of it being one of the languages included in the Eighth Schedule.”*⁷ And;

Para 20 is that *“We, therefore, conclude by saying that in view of importance of Sanskrit for nurturing our cultural heritage, because of which even the official education policy has highlighted the need of study of Sanskrit, making of Sanskrit alone as an elective subject, while not conceding this status to Arabic and/or Persian, would not in any way militate against the basic tenet of secularism. There is thus no merit in the first objection raised by the Board.”*⁸

Thus, the inclusion of Sanskrit language in the educational curriculum is not against the concept of secularism because language is related to the place where you live and not to a religion.

c) *Aruna Roy v. Union of India*⁹

The issue in this case was that, Is religion or religious education a violation of Article 28 of the Indian Constitution?

Petitioner's counsel argued that the course was in violation of Article 28 of the Indian Constitution. The part in the Curriculum saying “Apart from this today’s requirement is not religious instructions but education about religion, their basics, the values inherent therein and also a comparative study of the philosophy of all religions.” violates Article 28. Advocates have also argued that Sanskrit language has been unjustly imposed on them like Vedic astrology, Vedic mathematics and by declaring Hindu festivals as national festivals they are violating constitutional provisions.

Since religion is the basis of moral values, the three-judge bench agreed on the need for religious education, and the court answered all of them, and all religions ultimately convey the message of social harmony. Therefore, through religious education, students can get information about all religions, how they are all equal and thus peace will be established in the

⁷ <https://indiankanoon.org/doc/1305668/> Para 19

⁸ <https://indiankanoon.org/doc/1305668/> Para 20

⁹ AIR 2002 SC 3176

society. It will help the students to inculcate moral values from the beginning because teaching about religion is not against the secularism but religious teaching is definitely against the secularism.

In this way the above cases had clearly explained that our Indian judiciary is Positive Secular in Nature.

iii. Constitutional Morality in Secularism

Constitutional morality is the adherence to the basic principles of constitutional democracy. It means effective coordination between the conflicting interests of different people and administrative cooperation to solve problems without conflict between different groups. It is a feeling rooted in the mind of a responsible citizen, but it should be encouraged by an independent judiciary embodied in values and ethics.

iv. Cases related to Constitutional morality

1. Mohd. Ahmed Khan v. Shah Bano Begum¹⁰

This is known as 'Shah Bano Case'. Related to women's right to maintenance. In this case the following issues were raised:

- a) Does the '**wife**' given in section 125 of the CrPC include a Muslim woman?
- b) Should Section 125 CrPC is to be given preference over personal laws?
- c) Does the obligation of a Muslim husband to maintain a divorced wife arise conflict under Section 125 CrPC and in the Muslim Personal Law and the?

In this case the Supreme Court held that, the issue of inclusion of Muslim wives in the meaning of wife (Article 125 of the CrPC) would be valid. This section does not confine itself to wives of a particular religion but lies with a broad definition to motivate all wives. The Hon'ble Supreme Court refrained from stating that in case of conflict, Article 125 of the CrPC would violate individual laws. The court rightly held that where a Muslim wife could not support herself, a Muslim woman could resort to law under section 125 of the CrPC. In this present case, Shah Bano was clearly unable to take care of herself, therefore, her husband had to support her.

¹⁰ AIR 1985 SC 945

2. Triple Talaq case¹¹

In this case Shayara Bano was married to Rizwan Ahmed for 15 years. He divorced her through instant triple talaq (Talaq-e-Biddat). She filed a writ petition in the Supreme Court and the issues before the Supreme Court are that, the Validity of triple talaq and is triple talaq an essential religious practice?

A five-judge bench of the Supreme Court declared it as its verdict in the triple talaq case and declared that the practice was unconstitutional by a 3:2 majority and the court directed Parliament to take statutory measures against the practice of triple talaq.

On July 30, 2019, The Parliament of India declared the practice of triple talaq as illegal, unconstitutional and enacted a penal law with effect from 1st August 2019 which is believed to be in force from 19th September 2018.

3. Shabnam Hashmi vs. Union of India & Ors¹².

In this case the main issue was discussed that Can the right to adopt and the right to be adopted can be recognized as a fundamental right under Part III of the Indian Constitution?

The decision of Shabnam Hashmi provided the fundamental right of adoption. Under the Juvenile Justice (Care and Protection of Children) Act, 2000, a person can adopt a child regardless of religion. Shabnam had only custody of the girl adopted by the court as under Muslim law, adoption was not allowed. She claims that adoption should be granted for humanitarian reasons and also as a fundamental right. The final outcome of this case, the decision allows all future parents to go through the adoption process under the Juvenile Justice (Child Care and Protection) Act, 2000 (children can be adopted) regardless of religion. The law is secular in nature for the purpose of adopting children according to the prescribed procedure.

In these above cases the Supreme Court has always shown that, the constitutional morality is always greater than the religious morality and also the public morality. Hence Indian Judiciary is Positive Secular.

v. RESTRICTIONS ON RIGHT TO FREEDOM OF RELIGION IN INDIA

¹¹ Shayara Bano vs Union of India AIR (2017) 9 SCC 1

¹² Shabnam Hashmi vs. Union of India & Ors. AIR 2014 SC

India is completely neutral, impartial and unbiased when our religious beliefs are used. The Constitution ensures that no citizen shall be deprived of this right to peacefully adopt the religion of his choice within Indian borders. The concept of secularism is highly valued in the Constitution. Secularism is very important and it is respected even in the eyes of the law.

i. Article 25 of the Indian Constitution - A person can exercise his religious freedom so long as it does not come into conflict with the exercise of Fundamental right of others and that's why Article 25 starts with "Subject to public order, morality and health and to the other provisions of this Part...."

ii. Doctrine of Essentiality¹³ -

- a) The word "religion" includes all the "indivisible" rituals and practices of religion.
- b) He took upon himself the responsibility of determining the essential and essential practices of religion.
- c) The principle of urgency / integrity has taken the court to an area beyond its capacity.
- d) Judges are also empowered to decide on purely religious issues.

iii. Mohd. Hanif Quareshi v. State of Bihar¹⁴ - Cow sacrifice has been held to be not an obligatory overt act for a Muslim to exhibit his religious beliefs and ideas on Bakr Id day.¹⁵

vi. ADVERSE IMPACT OF JUDICIAL DECISIONS

Although the Supreme Court has so far given a good introduction to secularism in its, there are some exceptional judgments which, in my opinion, are not in favor of secularism.

1. The State of Bombay vs Narasu Appa Mali¹⁶

The central question in this case was related to the validity of the *Bombay Prevention of Bigamous Hindu Marriage Act, 1946*. The primary contention against the law was that it

¹³ <https://www.micsias.in/2018/10/05/the-essentiality-doctrine/>

¹⁴ AIR 1958 SC 731

¹⁵ M.P. Jain Constitutional Law of India, 8th edition, Page No. 1302

¹⁶ AIR 1952 Bom 84

violated Article 14 (right to equality) and Article 15 (prohibition of discrimination), as the law discriminated between (and lack of) their respective rights to engage Hindu and Muslim men in polygamy. Article 25 (Right to Freedom of Religion) was also argued to violate the right of Hindus to polygamy, which was argued to be a part of Hindu custom.

The Supreme Court held that, personal law is not 'law' or 'law enforcement' under section 13, and it is assumed that immunising practices deprive the Constitution of its supremacy. And personal laws are not to be seen in the eye of Article 13 of the constitution.

It means that the personal laws of minorities are not to be challenged. And this is against the secularism.

Later while delivering shabrimala judgement, Justice D.Y. Chandrachud, in his separate opinion, held that ***“the reasoning given in the Narasu Appa Mali judgment of the Bombay High Court in 1951 was based on flawed premises. Immunising customs and usages, like the prohibition of women in Sabarimala, takes away the primacy of the Constitution.”***¹⁷

2. Sardar Syedna Taher Saifuddin vs The State of Bombay¹⁸

In this case the apex court quashed the law which declared the practice of boycott of Dawoodi-Bohra chief Syedna illegal, going beyond the provisions of Article 25 (2) (b) of the Constitution. The majority judged that Sayyidna could not only exclude members from the religious life of the community, but that the loss of certain civil rights of an excluded member was acceptable as a "necessary consequence of exclusion". The court further held that "the fact that the exercise of fundamental rights under Article 26 (b) affects the civil rights of an individual has no effect."

It means that the head of religion can boycott the peoples from his religion. If a person wants to speak against religion, then he will be boycotted and then the government will not be with him and if the government is in favor of religion, then how can the country be secular?

3. Manohar Joshi vs Nitin Bhaurao Patil & Anr¹⁹

In this case the court examining the question regarding the scope of corrupt practices mentioned in sub-section (3) of Section 123 of the 1951 Representation of People Act and its

¹⁷ <https://www.thehindu.com/news/national/justice-chandrachud-ends-the-unchallenged-reign-of-a-bombay-hc-verdict/article25074175.ece>

¹⁸ AIR 1962 SC 853

¹⁹ 1996 AIR 796, 1996 SCC (1) 169)

interpretations. The Court in its ruling found that that statement by Manohar Joshi that “First Hindu State will be established in Maharashtra did not amount to appeal on ground of religion”.

The court had held that seeking votes in the name of Hinduism is not a “corrupt practice” under Section 123 of the Representation of the People Act; and, it would not result in setting aside the election of winning candidates.

This ruling delivered in 1995 which earned the nickname ‘Hindutva judgement’ held that ‘Hindutva/Hinduism is a way of life of the people in the sub-continent; it represents the culture of India, and of all people of India, whether Hindus, Muslims, Sikhs, Christians, etc.; and ‘is a state of mind’.

And, the Judgement concluded that ‘Hinduism’ was “indicative more of a way of life of the Indian people and is not confined merely to describe persons practicing the Hindu religion as a faith”.

In effect, the 1995-Verdict was taken to interpret that seeking vote in the name of ‘Hindutva/Hinduism’ did not prejudicially affect any candidate²⁰

With few exceptions abovementioned, the Supreme Court of India has seen always been Positive Secular in nature.

III. Conclusion

We want to be secular but our cultural issues are those that discriminate between men and women. Many Hindu people say that Shabarima should not be filed in the Supreme Court but the same people say that in Shah Bano and Shaira Bano supreme court should speak. So, Muslim people say that whether we maintain our women or not, no matter how we divorce, the Supreme Court should not interfere in our religion. Hindus say that if women are allowed to enter the Sabarimala temple, then women should also be allowed to enter the mosque and be given equal treatment and opportunities. Why are maulvis or priests only men and not women?

As secularism grows, so do the religious traditions, and the traditionalists suffer greatly. But it is natural to get upset whenever a bad practice is modified. But in the future, when we look back, we will see that those traditions did not really exist then, but rather equality, freedom,

²⁰ <https://indiankanoon.org/doc/1215497/>

justice and faith.

And from time to time the Supreme Court, with its skillful style, has done the work of keeping the society permanently Positive secular by giving due justice.