

**THE DICHOTOMY OF THE SABARIMALA VERDICT AND ITS JUXTAPOSITION WITH THE
PRIVATE LAW, INDIAN SECULARISM AND WESTERN SECULARISM**

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In this paper, I aim to analyse what aspires the government and judiciary to interfere in certain religious matters while refraining from others, and how Indian secularism facilitates and at times justifies such interference and at others distance itself. This is to say, I look forward to the reignited debate on how Indian secularism deals with three issues which create confusion for those who see secularism solely as a hegemonic western concept and also fail to understand the distinctiveness of Indian Secularism. These are: First, “‘clash’ between fundamental rights under Articles 14 and 15 seem to be competing with those under Articles 25 and 26—Article 26 in particular.”¹ Second, “the paradox of non-interference is that the secular state cannot reform the orthodox traditions that function within it.”² Third, “the paradox of interference is that the secular state, by involving itself in reforming religious traditions, becomes a kind of religious authority itself.”³

The Supreme Court’s (SC’s) decision on allowing the entry of women of menstrual age in Sabarimala Temple⁴ again opened the floodgates for the debate on the issue of ‘essential religious practices’⁵ as a part of private law and fundamental rights granted by the Constitution of India (COI). The flagbearers of ‘Hindutva’⁶ tagged themselves as the easy scapegoats claiming that SC made a deliberate attempt to interfere with their religious practices, but at the same time took offense to shelter of private law on the issues like the Instant Triple Talaq

¹ Shaikh, M., 2018. *Mumbai’s Haji Ali Holds Mirror to Sabarimala*. India Today. Available at: <<https://www.indiatoday.in/mail-today/story/mumbai-s-haji-ali-holds-mirror-to-sabarimala-1373320-2018-10-23>> [Accessed 17 May 2020]; *But see* Bhatia, *infra*, note 13.

² Iwanek, K., 2018. *India’s Sabarimala Temple And the Issue of Women’s Entry*. Thediplomat.com. Available at: <<https://thediplomat.com/2018/10/indias-sabarimala-temple-and-the-issue-of-womens-entry/>> [Accessed 20 May 2020].

³ *Id.*

⁴ *Indian Young Lawyers Association vs The State of Kerala* 2019 11 SCC 1.

⁵ *Id.* In this case, devotees consider the deity of the temple, Lord Ayappa, to be celibate and therefore banned the entry of women between 10 and 50 years, as a part of the practice which is considered essentially religious. *See* Bhatia, *infra*, note 13.

⁶ It refers to both the hardliners blatantly backed by the Bhartiya Janata Party and the Congress with its diabolical standards witnessed often in the form of ‘soft’ Hindutva like, for example, Rajiv Gandhi’s role in Ayodhya Conflict and Rahul Gandhi’s visits to temples in Madhya Pradesh prior to state elections. *See* Jaffrelot, C., 2019. *The Fate Of Secularism In India - The BJP In Power: Indian Democracy And Religious Nationalism*. Carnegie Endowment for International Peace. Available at: <<https://carnegieendowment.org/2019/04/04/fate-of-secularism-in-india-pub-78689>> [Accessed 21 May 2020]; *See* Bhatia, *infra*, note 13; *See also* Ganguly, *infra*, note 28.

(ITT).⁷ Unsurprisingly, this verdict came to haunt SC again in the form of fifty review petitions seeking protection under Articles 25 and 26 of the COI.⁸

In cases like these, the arguments made on gender equality use grounds laid down under Articles 14 and 15 claiming—in the words of Dr. Noorjehan Niaz,⁹ “Those days are over when the agents of God dictated the terms of worship. People are breaking those barriers now.”¹⁰ By ‘agents’ she means men; taking this line of reasoning forward, are not all religions ‘man’ made?! And taking her reasoning to ad hominem levels would also mean “a woman favouring religion is like a chicken going to KFC.”¹¹ This takes us to the beautiful dissenting opinion of Justice Indu Malhotra in Sabarimala Verdict—

“[I]n a secular polity, issues which are matters of deep religious faith and sentiment, must not ordinarily be interfered with by Courts. The right to practise one’s religion is a Fundamental Right...without reference to whether religion or the religious practises are rational or not...judicial review under Article 14 to delineate the rationality of the religious beliefs or practises,...would be outside the ken of the Courts. It is not for the courts to determine which of these practises of a faith are to be struck down, except if they are pernicious, oppressive, or a social evil, like Sati.”¹²

Moreover, fundamental rights cannot be pitted against each other to justify a claim. The only restrictions under Article 26 of COI are on the ground of public order, morality and health. Restricting a certain gender to enter places of a religious denomination does not perpetuate any oppression on the restrictive grounds envisaged under Article 26, like, for example, in the case of Untouchability or ITT.

Articles 25 and 26 of COI ensure the religious freedom of individuals and groups and at the same time allow the state to regulate secular matters that might have a bearing on the internal autonomy of religious communities.¹³ Read plainly, these two articles seems conflicting

⁷ The statement made herein is to merely draw on the hypocrisy of political parties. I do not support Instant Triple Talaq in any form or manner. Marginalized minority Muslim women’s agency must be protected and should not be left at the mercy of elite Muslim men. I believe that “social evils” whether perpetrated by the religious majority or minority should not be allowed to wear the garb of private law.

⁸ Dutta, P., 2020. *Gender Equality Or Religious Freedom, What Is More Basic Human Right? SC To Decide*. India Today. Available at: <<https://www.indiatoday.in/news-analysis/story/key-question-before-sabarimala-review-hearing-right-to-equality-versus-religious-freedom-1636498-2020-01-13>> [Accessed 21 May 2020].

⁹ She was one of the petitioners in the PIL to allow entry of women in Haji Ali Dargah. *Dr. Noorjehan Safia Niaz And 1 Anr vs State Of Maharashtra And Ors* [2016] SCC (Bombay High Court).

¹⁰ Shaikh, *supra*, note 1.

¹¹ This kind of reasoning can distort the other ultimate purpose of religion, that is, to realize human beings’ spiritual potential or to get closure in times of extreme sadness or hardships.

¹² *Indian Young Lawyers Association, supra*, note 4, 260.

¹³ Bhatia, G., 2016. Freedom from community: Individual rights, group life, state authority and religious freedom under the Indian Constitution. *Global Constitutionalism*, 5(3), pp.351-382.

because they attempt to simultaneously commit to community freedom and equality.¹⁴ This conflict is impossible to answer if we understand Indian secularism from the prism of western secularism. Religious practices and conducts must be interpreted on a ‘contextual’ basis in a way that “makes sense to the adherents given their lived experience contexts...[linked] to interpretive moments in daily life.”¹⁵

The founding fathers of India did not subscribe to secular principles as observed in, for instance, America.¹⁶ Like America, the complete separation of religion from politics is not an Indian model of secularism but rather a model that features a coexistence of multiple faiths.¹⁷ India’s way of living has historically been deeply religious alongside historical religious heterogeneity. Therefore, as per the Indian constitution-makers, even though in Indian secularism the state has no religion, it does not mean religion is a private matter of Indians, it is a part of the public domain wherein the state can get involved in it.¹⁸

Additionally, it is not even strict equidistance or neutrality as understood in the west.¹⁹ The reason behind that is the government applies different standards for different religious communities—

“[T]he dominant discourse in Indian politics is that there is only one path to being “Indian,” and that is decided by the ruling party of the day...given Indian society’s heterogeneity, it is impossible to separate state from society. A state’s actions are inherently political, and will have political consequences. This means that an even-handed approach to different communities is often unachievable; and even if it were possible, such an approach would impact each community differently.”²⁰

Moreover, to expect that constitutional concept and popular notion of secularism ‘transplanted’ from Europe will seamlessly work in India would be a great mistake.²¹ The western secularism

¹⁴ *Id.*

¹⁵ *Id.*; Lynch, C., 2009. A neo-Weberian approach to religion in international politics. *International Theory*, 1(3), pp.381-408. See also Bhargava, R., 2002. What is Indian secularism and what is it for?. *India Review*, 1(1), pp.1-32.

¹⁶ Gautam, V., 2017. Deconstructing Conceptual Framework of Indian Secularism *Asia Pacific Journal of Research*, 1(L11), pp.24-29.

¹⁷ *Id.*; In the Indian Constitution, Articles 15, 16, 25, 29 (2) vouch for disestablishment for religion whereas Articles 27 and 28(1) support strict separation, however, Articles 17, 25(1), 25(2)(d) and 30(1)&(2) significantly deviate from western secularism.

¹⁸ *Id.*

¹⁹ *Id.* Equidistance approach would mean either state equally interfere in every religion or let religious communities maintain the status quo with respect to customs by equally staying away from all the religions. See Iwanek, *supra*, note 2.

²⁰ Economics and Political Weekly. 2020. *Can Religion Be Separated From Politics?*. Available at: <<https://www.epw.in/engage/article/can-religion-be-separated-politics>> [Accessed 21 May 2020].

²¹ This is because there are no transplants, only derived inspirations, or “transfers”. A foreign idea or concept can only be successful if it is honed to the needs of locals it aims to cater to, or reclaimed or regenerated in a way where it finds suitability in the local socio-cultural and political context. Frankenberg, G., 2010. Constitutional

is a result of power tussle between the state and church which gave effect to the principles of strict separation and non-interference between the two with each having its own independent jurisdiction.²² In the Indian context, the principle of equidistance has been repeatedly broken, for example, post-independence when conservative Hindu temples were forced to rightly open the door for Dalits, the same was not done to for Hindu and Muslim shrines who prohibited entry of women.²³ The verdicts of Sabarimala temple and Haji Ali Dargah²⁴ are exceptions and signifies India not as a follower of equidistance principle.

However, with respect to minority rights, it is imperative that India constantly strives to provide liberal conditions to pave a way for internal reforms within religious community to promote gender equality and freedom,²⁵ It is equally important that religious minorities are given a greater voice in Indian politics because not doing so would de motivate them from making positive changes. For instance—

“[d]uring the *Shah Bano* case the Union Government gave in to Muslim protests and legislated against the court’s decision to award her alimony beyond the pittance she had received from her husband as *mehr*, there was a hope that the community would work towards reforms internally. But nothing happened because debates over personal law illustrate the absence of Muslim politics and therefore any motive for change.”²⁶

Although even in the absence of such circumstances the government and judiciary should not preclude itself from making positive changes in minority religious communities with respect to curbing practices that are outright and downright oppressive, pernicious, or social evil (same as it does with the majority religion), because not doing so would further create what I call ‘sub-marginalization’ in an already marginalized community. Moreover, abstinence from reforming minority rights could create more problems. For example, when Sharia law was

transfer: The IKEA theory revisited. *International Journal of Constitutional Law*, 8(3), pp.563-579; See Bhatia, *supra*, note 13; See Tundawala, M. and Choudhuri, S., 2017. *Exploring The Individual Vs Community Debate On Triple Talaq And Privacy*. The Wire. Available at: <<https://thewire.in/law/instant-triple-talaq-right-to-privacy-individual-community>> [Accessed 10 May 2020].

²² Swarajyamag.com. 2020. *Hinduism Is Convenient, Hindus Are Expendable: A Look At Why Secularism Failed Us*. Available at: <<https://swarajyamag.com/blogs/hinduism-is-convenient-hindus-are-expendable-a-look-at-why-secularism-failed-us>> [Accessed 15 May 2020].

²³ See Iwanek, *supra*, note 2.

²⁴ *Dr. Noorjehan Safia Niaz And 1 Anr*, *supra*, note 9.

²⁵ Bhargava, R., 2010. *The Promise Of India’S Secular Democracy*. Oxford University Press, p.161. See also Khan, B., 2019. *Minority Rights, Gender Justice And ‘Disciplining’ Muslim Community*. Countercurrents. Available at: <<https://countercurrents.org/2019/01/minority-rights-gender-justice-and-disciplining-muslim-community>> [Accessed 20 May 2020].

²⁶ Devji, F., 2017. *After The Talaq*. Open Magazine. Available at: <<https://openthemagazine.com/essay/after-the-talaq/>> [Accessed 8 May 2020].

invoked as a template by Congress in 1984 in the aftermath of Shah Bano case²⁷ to mollify Indian Muslims—a political strategy that completely backfired—enabled Hindu Fundamentalist to perpetuate communal tensions by tagging Congress pseudo-secular which overtime gained continual political momentum.²⁸

“[A] secular state must also inhibit and regulate the continuing attempt by the high priests of religion to impose their views and norms on ordinary men and women ... The strength of Indian secularism—its defence of minority rights—is easily made to appear as its weakness and the burden of its defence, rather than be shared by all citizens, falls on the minorities and “pro-minority” secularists.”²⁹

Indian secularism will have to go beyond protecting ‘all’ minority rights.³⁰ The religious communities (majority or minority) must be protected from the religious elites of their own communities who may propagate social oppression.³¹ This approach would provide more specificity and concreteness to the distinct nature of Indian Secularism.

“Indian secularism is a complex and multi-value doctrine”³² It entails principled distance, contextual secularism and community-specific rights.³³ Due to its religious diversity, the emphasis is more on religious practices than belief, and it also results in both conflict and cooperation among different religions.³⁴ The majority Hindu religion has never had any organized institution like Church, while there are socially oppressive practices in various religions which form intra-religious dominance.³⁵ In such a scenario, it becomes imperative that state as an independent institution remove communal and hierarchical conceptions of intra-religious domination as well as reform inter-religious disparity of socially oppressive nature³⁶ by engaging with religion through law and policy.³⁷ Thus, COI devised a distinct secular

²⁷ Mohd. Ahmed Khan v. Shah Bano Begum And Ors AIR 1985 SC 945.

²⁸ Jaffrelot, C., 2019. *The Fate Of Secularism In India - The BJP In Power: Indian Democracy And Religious Nationalism*. [online] Carnegie Endowment for International Peace. Available at: <<https://carnegieendowment.org/2019/04/04/fate-of-secularism-in-india-pub-78689>> [Accessed 16 May 2020]. See also Ganguly, S., 2003. The Crisis of Indian Secularism. *Journal of Democracy*, 14(4), pp.11-25.

²⁹ Bhargava, R., 2017. Nehru against Nehruvians. *Economics&Political Weekly*, 52(8); See also Economic and Political Weekly, *supra*, note 16.

³⁰ Economics and Political Weekly, *supra*, note 20.

³¹ *Id.*

³² Gautam, *supra*, note 16; Bhargava, *infra*, note 33.

³³ Bhargava, R., 2007. The Distinctiveness of Indian Secularism. *Critique Internationale*, 35(2), pp.121-147.

³⁴ *Id.*; Rai, D., 2018. Book Review: Romila Thapar, Indian Society and the Secular: Essays. *Indian Journal of Public Administration*, 64(1), pp.135-141.

³⁵ *Id.*

³⁶ Gautam, *supra*, note 16.

³⁷ Bhargava, *supra*, note 33.

structure which is an amalgamation of liberty of individuals and religious communities with the ability of state intervention on the grounds of justifiability and fairness.