

RESEARCH ARTICLE

Unravelling the Indian Conception of Secularism: Tremors of the Pandemic and Beyond

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The State's engagement with religion has formed one of the recurring themes of conflict in India's democratic experiment. The Indian model of secularism, which evolved in an attempt to resolve this conflict, has distinguished itself from separation-model secularism. This paper seeks to analyse the impact of the measures undertaken during the COVID-19 pandemic on the Indian understanding of secularism. To this end, it provides an overview of the nature and evolution of Indian secularism. Thereafter, it encapsulates the steps taken by the State to meet the exigencies of the present contagion and attempts to gauge the impact of the said steps on the jurisprudence on religious freedoms. It then seeks to contextualise this impact by using it to inform the Indian conception of secularism and, thereby, promote a richer, more holistic understanding of how a deeply divided society has functioned as a secular State for seven decades.

1 Introduction

Religion has frequently formed the bone of socio-political contention in India; a country whose social milieu is characterised in equal parts by its multicultural diversity and inter-religious strife. The word 'secular' may not have been inserted in the Constitution of India until the Constitution (42nd Amendment) Act in 1976 but secularism as a legal concept has existed in India since colonial times.¹ Chandrachud (2020, xviii) argues that secularism was "imposed by the colonial power on a conquered people". India, owing to its peculiar socio-cultural realities and political history, sought to reject the stereotypical Western model of secularism upon becoming an independent State (Munshi 1967, 309). Instead, by virtue of the contents of its written constitution (Constitution of India 1950, Arts. 25–30), subsequent legislations and judicial decisions (Padhy 2004, 5027), India has evolved its own unique brand of secularism (Bhargava 2006, 20). This brand has arguably shaped by an enmeshment of social realities, constitutional ideals and the vicissitudes of time. This "*sui generis*" model (Pantham 1997, 523–525), in turn, has been subject to manifold interpretations by scholars, which will be dealt with in the subsequent section of this paper. Regardless of its evaluation, it cannot be denied that the Indian model of secularism is one that has attempted to meet the unique demands of the world's largest democracy. However, the already contentious relationship between State and religion has recently been flung into uncharted territory by virtue of a global exigency. The COVID-19 pandemic, which has plunged

much of the globe in crisis, chaos and panic, has not left India untouched. The pandemic is not only a public health crisis of monumental proportions but has had cascading effects on almost all aspects of public life across the globe (UNDP Regional Bureau for the Asia and the Pacific 2020). Religion, too, has not been left untouched by the novel coronavirus pandemic. The numerous social distancing regulations and lockdowns, which have become the bedrock of governmental agencies' attempts to control the contagion, have augmented the State's control on religious life (Kraveltovi and Özyürek 2020). Inarguably, the State's increasing control over religion appears unexceptional if viewed in light of the fact that the State has had increasing occasion to regulate most facets of public life due to the pandemic. However, it represents an interesting departure from the special treatment accorded to religion in the Indian constitutional set-up owing to its unique social and cultural significance. Other civil liberties have historically been the subject of much conflict between the State and its citizenry; however, until this point, the State had maintained a "principled distance" (Bhargava 2006) from religion.

This paper seeks to analyse the impact of India's response to the COVID-19 pandemic on its engagement with religion and, thereby, the Indian understanding of secularism itself. To this end, firstly, an attempt has been made to encapsulate the nature and evolution of secularism in India. At the outset, it may be said that in doing so, the authors do not intend to prepare an exhaustive work on Indian secularism as a concept but merely paint as holistic a picture as possible to provide the context for the rest of this work. Thereafter, the authors have collated the measures adopted by the State and its functionaries to meet the challenge presented by the novel coronavirus pandemic, inasmuch as they relate to the religious

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life of its citizens. The authors have then sought not only to examine the extent to which these measures have impacted the religious freedoms guaranteed to individuals by the Constitution of India but also to locate the newly imposed restrictions within the existing jurisprudence evolved by the constitutional courts of the country to adjudicate the said religious freedoms. The COVID-19 pandemic represents the first large-scale public health crisis in the history of independent India; a situation exacerbated by the fact that the Constitution of India only provides for the proclamation of emergency in cases of threat to national security, whether by way of war, external aggression, or armed rebellion. As such, the pandemic represents a situation wherein the State has been forced to clamp down on individual liberties without adhering to the constitutional safeguards that are the logical corollary of a proclamation of emergency. This creates a crucible for tension between the State's regulatory functions and the constitutionally guaranteed right to religion. It is, therefore, of interest to examine whether the existing notion of Indian secularism has endured this recent turmoil or whether it has been forced to undergo a paradigm shift. To that end, the authors lastly examine whether the steps taken by the State in light of the COVID-19 pandemic are in consonance with the existing understanding of Indian secularism or whether they constitute a departure from the same.

2 The Nature and Evolution of Indian Secularism

In order to provide the necessary context for analysing the measures taken in relation to religion by the State in light of the COVID-19 pandemic, it becomes essential to firstly elucidate the evolution of Indian secularism and locate the same within the existing scholarly understandings of secularism. To this end, this chapter has been divided into two parts; the first explores how secularism has evolved as a concept in India whereas the second appraises this evolution and attempts to understand its conception.

2.1 Indian Secularism: Roots, Underpinnings & Substantive Aspects

Chandrachud (2020) argues that secularism, as a concept, was introduced in British India although this form of secularism differs significantly from the model adopted in independent India. The "colonial secularism" of the British officials in India essentially entailed, *inter alia*, that the colonial regime would not endorse any of the local religions in India or involve itself in administering any of the local religions and their institutions. He further argues that the secularism of the colonial regime was not free from contradictions; Christian missionaries were passively encouraged by the colonial state and minorities were accorded special protection by various modes including separate electorates (Chandrachud 2020). Lastly, he mentions that upon becoming independent, India sought to move away from colonial secularism and carve out its own version of secularism. It is this version or brand or model of secularism that we are concerned with for the purposes of this paper.

2.1.1 Secularism in the Constituent Assembly

Towards the end of the colonial regime, in December 1946, the Constituent Assembly of India was convened and tasked with drafting the Constitution of India (Austin 1972). The Constituent Assembly Debates (CAD) relating to the issue of secularism shed light on the constitutional vision that the draftspersons of the Constitution had for the concept. On October 17, 1949, the Constituent Assembly devoted a significant amount of discussion on incorporating the principle of secularism in the Preamble of the Constitution (CAD 1986, vol. 10, 432–447). It has been suggested that the views espoused during this round of discussion are reflective of those held by the Members of the Constituent Assembly during the previous three years as the Preamble was discussed in one of the Assembly's final sessions (Jha 2002, 3175). An amendment proposed by H.V. Kamath, which sought to begin the Preamble of the Constitution with the words "In the name of god", was defeated (CAD 1986, vol. 10, 439). It is noteworthy that this constituted one of the only instances when the Assembly actually divided by a show of hands, with the Ayes losing 41 to 68 (Rao 1968, 131). Noteworthy amongst the voices opposing the amendment was Pandit Kunzru, who stated that invoking the name of god was inconsistent with the freedom of faith guaranteed in the Constitution and amounted to showing a "narrow, sectarian spirit" (CAD 1986, vol. 10, 441). However, an amendment proposed by Brajeshwar Prasad seeking to begin the Preamble with the words "We the people of India, having resolved to constitute India into a secular cooperative commonwealth to establish socialist order and..." was also defeated, without much debate (CAD 1986, vol. 10, 447).

Although there was broad consensus that secularism was a "fait accompli" for India to be a democracy, the Constituent Assembly was faced with the unique issue of creating a secular constitution for a deeply religious people (Jha 2002, 3176). It was for this reason that individuals such as Munshi (1967, 309) buttressed the need "to evolve a characteristically Indian secularism". Amidst serious contention and debate, Articles 25 to 28 of the Constitution of India, all of which are facets of the freedom of religion, were incorporated in Part III of the Constitution of India and thereby, became fundamental rights.² Likewise, Articles 29 and 30, which provided certain cultural and educational rights to minorities, were also incorporated in Part III of the Constitution.³ Jha (2002, 3176) argues that the Constituent Assembly, whilst adopting some of the aforesaid provisions, had relied upon an "equal-respect" theory of secularism; one that entailed the State basing its dealings with religion on an equal respect to all religions.

Secularism, as a theme, permeated not only through the debates relating to the aforementioned Articles but also other aspects of the Constitution such as citizenship, parliamentary procedure, etc (Jha 2002, 3176). However, the said discussions, whilst of significant academic value, cannot be dealt with here for the sake of brevity.

2.1.2 Religion and the Part III of the Constitution of India

Seervai (1993, 1259) categorised India as "a secular but not an anti-religious State" owing to the fact that the Constitution guarantees the freedom of religion. The fundamental

rights guaranteed in the Constitution of India included a chunk of provisions pertaining to religious freedom and an allied dyadic of Articles pertaining to minority rights. The contents of these and the nature of rights guaranteed by them assume significance whilst assessing Indian secularism. Articles 25 and 26 have occupied a place of particular significance insofar as the constitutional provisions pertaining to the freedom of religion are concerned (Sen 2016, 885). Article 25 of the Constitution of India, on the one hand, provides for equal entitlement to the “freedom of conscience and the right to freely profess, practise and propagate religion” but on the other hand, it allows the State to regulate or restrict “economic, financial, political or other secular activity” associated with religious practice. As will be seen in the subsequent parts of this paper, the distinction drawn up by Article 25 between the religious and secular aspects has given rise to considerable litigation over the years. Article 26 provides every religious denomination with, *inter alia*, the freedom to manage its religious affairs. It will be seen in later portions of this paper that the issue of what constitutes a religious denomination has been frequently adjudicated upon by Indian constitutional courts. Article 27 provides that no person shall be compelled to pay taxes “the proceeds of which are specifically appropriated...for the promotion or maintenance of any particular religion or religious denomination”. Article 28 provides, *inter alia*, that no religious instruction may be imparted in educational institutions maintained wholly out of State funds. The issue of what kind of education may be imparted in relation to religion has also formed part of a significant chunk of litigation (Aruna Roy v. Union of India (2002) 7 SCC 368). Article 29 guarantees any section of citizens having a distinct language, script or culture the right to conserve the same. Article 30, which provides minorities with the right to establish and administer educational institutions, states that such minorities may be based “on religion or language”. The foregoing Articles have been collectively referred to by Sen (2019) as the “articles of faith”. Other constitutional provisions, in one way or another, also relate to religion and shall be dealt with as and when required in the subsequent parts of this paper.

2.1.3 Secularism in Independent India: The Early Years (1950–1975)

It has been brought out earlier that the draftsmen of the Constitution of India sought to formulate a uniquely indigenous conception of secularism. Following the coming into force of the Constitution of India on January 26, 1950, the three organs of government were tasked with implementing this vision. The role occupied in this regard by the constitutional courts assumes particular significance for a multitude of reasons. Firstly, the Supreme Court India, which has been referred to as playing a “promiscuous role in Indian democracy”, is engaged not only in interpreting the law but also “actively promoting values” (Mehta 2015, 233); as such, it has played a dominant role in shaping Indian secularism. Secondly, since constitutional courts act as arbiters of the legality and constitutionality of legislative and executive action, their decisions provide a more holistic overview of the

conflicts and contentions in a democracy. Thirdly, it has been argued that India has adopted the path of “judicialisation” for the purposes of managing religion, with the courts assuming a dominant role in dealing with issues of religion (Sezgin and Kunkler 2014, 448).

This section seeks to examine the court’s engagement with religion and secularism during the first 25 years of the newly founded Republic. The rationale behind identifying this period is that it precedes the 42nd Amendment to the Constitution of India, whereby the word “secular” was added to the Preamble. As such, an attempt has been made in the subsequent paragraphs to analyse India’s secularism jurisprudence at a time when the word “secular” found no formal mention in the text of the Constitution. It is of particular interest that the term was used judicially during this period despite not featuring in the Constitution *per se* (Padhy 2004).

One of first times the Court considered the scope of the rights guaranteed under Articles 25 and 26 of the Constitution was the case of *Commissioner, Hindu Religious Endowments, Madras v. Sri Lakshmindra Thirtha Swamiar of Sri Shirur Mutt* AIR 1954 SC 282 (hereinafter, *Shirur Mutt*) which has since become a leading authority on the subject (Seervai 1993, 1260). In *Shirur Mutt*, the *mathadhipati* (the head or superior) of the ‘*Math*’ (a religious institution) challenged the constitutionality of the Madras Hindu Religious and Charitable Endowment Act, 1951 (hereinafter referred to as the ‘Act of 1951’) on the basis, *inter alia*, that the law, by regulating the formulation of a scheme for administration of the ‘*Math*’, was in direct contravention of Article 26 of the Constitution of India (*Shirur Mutt* at para.4). Rejecting the definition of ‘religion’ in the American case of *Davis v. Beason* 133 US 333 (1890), Justice BK Mukherjea, sought to evolve a working definition by laying reference to the Australian judgement in *Adelaide Company v. Commonwealth* (1943) 67 CLR 116. The said definition laid emphasis on the fact that the Constitution of India sought to protect not only the freedom of religious opinion or belief but also “acts done in pursuance of religious belief as part of religion” (*Shirur Mutt* at para. 18). Thereafter, the Court stressed that the essential aspects of a religion had to be determined by having reference to the doctrines of the religion in question (*Shirur Mutt* at para. 20). The Court went on to state that, vide Article 26(b), “a religious denomination or organization enjoys complete autonomy in the matter of deciding as to what rites and ceremonies are essential according to the tenets of the religion they hold and no outside authority has any jurisdiction to interfere with their decision in such matters” (*Shirur Mutt* at para. 23). However, the Court also noted that under Article 25 (a), the State could “regulate or restrict any economic, financial, political and other secular activities which may be associated with religious practice”. Further, under Article 25 (b), the State had the power to enact legislations “for social welfare and reform even though by so doing it might interfere with religious practices” (*Shirur Mutt* at para. 19). On the issue of the validity of the Act of 1951, the Court held a large chunk of the impugned sections to be constitutionally valid (*Shirur Mutt* at paras. 24–40, 51–52). In doing so, the Court approved the first State legislation seeking

to regulate Hindu religious institutions and laid down the template to be followed in subsequent cases involving similar enactments (Sen 2016, 889). Furthermore, the Court arguably indicated a trend of giving significant autonomy to religious denominations (Sen 2019). In the years following *Shirur Mutt*, although the Court adopted the essential practices doctrine, it departed from the practice of giving religious denominations autonomy to decide the ceremonies they deemed to be essential to their religion. In cases such as *Sri Venkataramana Devaru v. State of Mysore* AIR 1958 SC 255, the Court delved into the issue of whether certain practices were essential or not, by looking into religious texts. As such, it became clear that it was the Court that would ultimately decide whether a practice was one that was essential to the religion (Sen 2019, 53).

A change of guard led to a consequent shift in the Court's approach towards questions of religion. The 1960s saw Justice Gajendragadkar, who would go on to become the Chief Justice of India, emerge as one of the apex court's most powerful voices (Tripathi 1966, 479). Justice Gajendragadkar's legacy was arguably marked by a zeal for social reform, particularly in relation to matters concerning religious freedoms (Tripathi 1966, 488). Amongst the judgements of Justice Gajendragadkar, the most significant in the context of religion would be *Durgah Committee v. Syed Hussain Ali* AIR 1961 SC 1402 (hereinafter, *Durgah Committee*), wherein the vires of the Durgah Khwaja Saheb Act, 1955, were challenged by the nine *khadims* of the tomb of Khwaja Moin-ud-din Chishti of Ajmer on the ground that the same was in contravention of the rights guaranteed to them by, *inter alia*, Articles 25 and 26 (*Durgah Committee* at para. 1). It was claimed by the petitioners that *khadims* were descendants of Khwaja Syed Fakhuruddin and Sheikh Mohammad Yadgar, two 12th century followers of the Khwaja Saheb who looked after his grave and attended to the needs of pilgrims. As such, the *khadims* claimed to be in the occupation of service of the tomb for several generations. Further, the *khadims* claimed to be members of a religious denomination or section known as '*Chishtia Soofi*' (*Durgah Committee* at para. 5). Abandoning the approach of making reference to scriptures (Sen 2016, 890), Justice Gajendragadkar instead surveyed the shrine's history and concluded that the Durgah endowment, which included movable and immovable property, did not appear to have been treated as owned by the denomination and its administration had always been left in the control of a State-appointed official (*Durgah Committee* at para. 22). Despite assuming that the *Chishtia Soofies* constituted a religious denomination (*Durgah Committee* at para. 26), the Court ultimately upheld the validity of the Durgah Khwaja Saheb Act, 1955 (*Durgah Committee* at para. 48). Perhaps the most significant portion of the judgement, which has been credited for pushing the essential practices doctrine in a new direction (Sen 2016, 891), was as under:

Similarly, even practices though religious may have sprung from merely superstitious beliefs and may in that sense be extraneous and unessential accretions to religion itself. Unless such practices are

found to constitute an essential and integral part of a religion their claim for the protection under Article 26 may have to be carefully scrutinised; in other words, the protection must be confined to such religious practices as are an essential and an integral part of it and no other (*Durgah Committee* at para. 33).

Sen (2019, 55) argues that the foregoing passage entailed a change in the Court's role: it now had to separate superstition from "real" religion. The judgement had a ripple effect, characterised by another of Justice Gajendragadkar's judgements, namely, *Tilkayat Shri Govindlalji Maharaj v. State of Rajasthan* AIR 1963 SC 1638 (hereinafter, *Tilkayat*), wherein the *Tilkayat* (spiritual head) of the Nathdwara Temple challenged the validity of the Nathdwara Temple Act, 1959. The *Tilkayat* contended that the idol in the Nathdwara Temple and all the property pertaining to it were his private properties and, therefore, the Legislature was not competent to pass the impugned Act. The *Tilkayat* further contended that even if the temple was held to be a public one, he had a beneficial interest in the office of the high priest as well as the properties of the temple. The *Tilkayat's* case was supported by the members of the *Vallabha* religious denomination, of which he was the head (*Tilkayat* at para. 2). The Court undertook an appraisal of *Vallabha* philosophy as well as the temple's history, including an order of the pre-independence ruler of Udaipur, which stated the *Udaipuri Darbar* (royal court) had the absolute right to not only supervise that the property dedicated to the shrine is used for legitimate purpose of the shrine but also remove the *Tilkayat* from his position if necessary (*Tilkayat* at para. 31). Consequently, the Court upheld the impugned Act (*Tilkayat* at para. 78), whilst holding that the *Tilkayat* could not claim the right to property under Articles 19 (1) (f) and 31 (2) of the Constitution (*Tilkayat* at para. 43). Sen (2016, 891) points out that whilst the judgement is unexceptional in terms of its outcome, the significance of the judgement lies in the fact that Justice Gajendragadkar emphatically stated that it is the Court that would have to decide whether a particular practice was religious in nature and constituted an essential facet of the religion in question, i.e. the claims of a denomination or community could not always be accepted or taken at face value. Sen (2016, 892) argued that whilst the case laws on religious freedoms have increased exponentially in volume over the subsequent years, the essential practices doctrine has been "hardly ever reconsidered".

In the subsequent decade came a judgement that "altered the judicial and political landscape of the country" (Datar 2011, 159): *Kesavananda Bharati v. State of Kerala* (*Kesavananda Bharati* (1973) 4 SCC 225 (hereinafter, *Kesavananda Bharati*). By virtue of this case, which has since been said to have become "the bedrock of constitutional interpretation in India", a majority of seven out of a record thirteen-judge-bench held that a constitutional amendment could not alter the basic structure of the constitution (Austin 1999, 258). Thus, the 'basic structure doctrine' was laid down in a historical verdict. The thirteen judges gave a total of eleven opinions; and

even the majority were not uniform as to their views on what the basic structure of the Constitution entailed. This judgement becomes a matter of interest for this paper owing to two of the judgements forming a part of the majority: (i) Chief Justice Sikri and (ii) Justice Shelat and Justice Grover. Justice Sikri, in his judgement, stated that the “Secular character of the Constitution” was one of the features that formed part of the basic structure of the Constitution of India (*Kesavananda Bharati* at para. 292). Justice Shelat and Justice Grover, in their judgements, not only stated that the “Secular and federal character of the Constitution” formed part of the basic structure of the Constitution but also reiterated the following position:

India is a secular State in which there is no State religion. Special provisions have been made in the Constitution guaranteeing the freedom of conscience and free profession, practice and propagation of religion and the freedom to manage religious affairs as also the protection of interests of minorities... According to K.M. Pannikar, “it may well be claimed that the Constitution is a solemn promise to the people of India that the legislature will do everything possible to renovate and reconstitute the society on new principles” (*Kesavananda Bharati* at para. 487).

2.1.4 A “Sovereign Socialist Secular Democratic Republic” (1976–2019)

The 42nd Amendment to the Constitution of India replaced the words “Sovereign Socialist Republic” with “Sovereign Socialist Secular Democratic Republic” (Constitution (42nd Amendment) Act 1976, cl. 2(a)). The Amendment itself was a contentious one, with rather dubious origins. It was passed during a state of national emergency with no changes by an overwhelming majority of 190 to nil in the Rajya Sabha and 366 to four in the Lok Sabha (Austin 1999, 338). The draft of the Amendment was prepared “out of the public view” by Law Ministry officials acting on policy content prepared by Prime Minister Indira Gandhi, then at the height of her powers, and her select few supporters (Austin 1999, 374). The provision amending the Preamble constituted just a small part of the 58-odd sections of the 42nd Amendment. Owing to a shift in political circumstances, which shall not be detailed in this paper, a new Government came into power in the subsequent months, placing the 42nd Amendment’s fate in jeopardy. The 43rd Amendment deleted Articles 32A, 131A, 144A, 226A and 228A (Constitution (42nd Amendment) Act 1976, cl. 2(a)), which had been inserted by the 42nd Amendment.

Subsequently, the 44th Amendment came into being, with a two-fold objective: “to provide adequate safeguards against the recurrence” (Constitution (44th Amendment) Act 1978) of the situation that had arisen during the Emergency imposed by the previous government headed by Indira Gandhi and “for removing or correcting distortions that came into the Constitution by reason of amendments enacted during the period of the Internal Emergency” (Constitution (44th Amendment) Act, 1978, cl. 8). The word “secular” survived both of these Amendments

unscathed. However, an attempt to define the term “secular” in the 45th Amendment Bill, which eventually became the 44th Amendment, failed and the term remains undefined in the text of the Constitution till date (Seervai 1991, 277). The term was sought to be defined as “the expression ‘REPUBLIC’ as qualified by the expression ‘SECULAR’ means a republic in which there is equal respect for all religions” (Constitution (45th Amendment) Bill, 1978, cl. 44).

The subsequent decade witnessed a case that revealed a new facet of the apex Court’s religious freedom jurisprudence, namely, *Acharya Jagdishwaranand Avadhuta v. Commissioner of Police* (1983) 4 SCC 522 (hereinafter, *Acharya Jagdishwaranand*). The petitioner in this case was a monk of *Anand Marg*, a socio-spiritual organisation founded in 1955 (*Acharya Jagdishwaranand* at para. 3). One of the daily rituals to be performed by an *Anand Margi* was the *Tandava* dance, which was to be performed with a skull, a small symbolic knife and a *trishul* (trident). This practice had been introduced by the founder of *Anand Marg* in 1966. The petition had been filed so that the Court might issue a direction to the Commissioner of Police, Calcutta and the State of West Bengal to allow the *Anand Margis* to congregate in public whilst performing the *Tandava* dance (*Acharya Jagdishwaranand* at para. 1). Although the Court held that *Anand Marg* satisfied the criteria for being considered as a religious denomination (*Acharya Jagdishwaranand* at para. 11), it refused to hold that the performance of the *Tandava* dance in procession or in a public place was an essential religious practice (*Acharya Jagdishwaranand* at para. 14). One of the reasons for arriving at this conclusion was that *Anand Marg* was “a religious order of recent origin” and that the *Tandava* dance as a religious rite was “even more recent”; as such, the Court stated that it was doubtful whether it could be taken to constitute an essential religious practice (*Acharya Jagdishwaranand* at para. 14). According to Sen, this finding of the Court points to its reluctance towards accepting practices of religious groups of recent origin (Sen 2016, 893).

In 1994 came a case that solidified the position of secularism in India’s constitutional framework, namely, *S. R. Bommai v. Union of India* (1994) 3 SCC 1 (hereinafter, *S. R. Bommai*). In this case, the Court has deliberated painstakingly on the Indian model of secularism, sought to locate it within the constitutional schema and given a decision that has granted it significant legal importance. The most significant contribution of the judgement was holding in no uncertain terms that secularism is a part of the basic structure of the Constitution (*S. R. Bommai* at paras. 29, 153, 186). The judgement goes on to hold that not only is the encroachment of religion in secular activities of the State prohibited but also that:

...religious tolerance and equal treatment of all religious groups and protection of their life and property and of the places of their worship are an essential part of secularism enshrined in our Constitution. We have accepted the said goal not only because it is our historical legacy and a need of our national unity and integrity but also as a creed of

universal brotherhood and humanism. It is our cardinal faith. Any profession and action which go counter to the aforesaid creed are a prima facie proof of the conduct in defiance of the provisions of our Constitution (*S. R. Bommai* at para. 151).

The turn of the century has witnessed the apex court applying the principles that have been evolved over the five preceding decades. The Court has continued to apply the 'essential practices' test on numerous occasions (*Indian Young Lawyers Association v. State of Kerala*, (2017) 11 SCC 577), though its conception has been altered in some instances. For instance, whilst considering the aforementioned issue concerning the *Anand Margis* in 2004, the Court narrowed down the ambit of 'essential practices' by stating:

Essential part of a religion means the core beliefs upon which a religion is founded. Essential practice means those practices that are fundamental to follow a religious belief. It is upon the cornerstone of essential parts or practices that the superstructure of a religion is built, without which a religion will be no religion. Test to determine whether a part or practice is essential to a religion is to find out whether the nature of the religion will be changed without that part or practice (*Commissioner of Police v. Acharya Jagadishwarananda Avadhuta*, (2004) 12 SCC 770, para. 9).

At this juncture, prior to undertaking an analysis of the nature of Indian secularism, it may be appropriate to point out that scholars have opined that discernible patterns are difficult to locate in the court's findings and much is dependent on context rather than time (Sen 2019; Padhy 2004, 5031).⁴ Nonetheless, the foregoing discussion clearly establishes that it is primarily the apex court that has been tasked with implementing the constitutional vision of secularism and navigating the precipitous relation between State and religion in India; a task that it has fulfilled with varying degrees of success.

2.2 The Conception of Indian Secularism

The term 'secularism' as an abstraction has been subject to a significant amount of academic scrutiny and discussion. However, the same is not the concern of this paper. Instead, the authors are in agreement with the views of Yildirim (2004, 901–902), who believes that rather than discussing secularism in a vacuum, it ought to be seen from the perspective of the law, whose form it takes in reality. As such, an attempt will be made in the subsequent paragraphs to bring out the nature of Indian secularism in the context of the foregoing discussion on how it has been shaped over the last seven decades. Whilst this paper does seek to make normative comments on the nature of Indian secularism, it will not delve into the issue of whether secularism is desirable or not.

The French model of secularism is of the view that the State must be separate from religion whilst having the power and authority to interfere in it, if need be; however, religion has no say in matters of the State (Bhargava 2013,

79–81). The American model of secularism views religion and the State as being mutually exclusive; neither can interfere in the affairs of the other (Bhargava 2013). Both of these models, which may be regarded as the archetypes of Western secularism, rest on an understanding of secularism that is rooted in separation between the State and religion; be it one-sided as in the French model or mutual as in the American model. As has been stated earlier, the draftsmen of the Indian Constitution recognised the need for India to evolve its own brand of secularism. This was due to India's peculiar social fabric as well as the circumstances surrounding its nationhood. Firstly, individuals such as Munshi (1967, 309) believed that Indians were "a people with deeply religious moorings" and as such, the American model of secularism could not be transplanted in India. Secondly, owing to the partition of India and Pakistan on religious lines, as a result of the Muslim League's demand for a separate nation, the Indian National Congress embraced 'secularism' with a view to do away with any misgivings about the fate of Muslims who chose to remain in India (Rao 2006, 47). This approach was exacerbated, and acquired a sense of urgency, due to the violent turn taken by the Indo-Pakistan partition (De Roover 2002, 4047). As such, it becomes clear that, from the very inception, the Indian model of secularism was sought to be one that was distinct from the available western models. We have already explored how this model developed over the decades. However, the model must now be examined from the lenses adopted by scholars whilst viewing it from their distinct perspectives.

In evolving its own "distinctive" model of secularism, Bhargava (2006) argues that the State has maintained a "principled distance" from religion in place of a strict separation. According to Bhargava (2013, 86), this "principled distance" means that whilst the State maintains a separation from religion at the level of ends and institutions, it must engage with it at level of law and policy. Bhargava's argument can be supported in the following ways: (i) the ends of the Indian State observe a strict separation from religion as the Directive Principles of State, as enunciated in Part IV of the Constitution, are not religious in character, (ii) the State, despite the absence of an explicit non-establishment clause maintains institutional separation from religion, i.e. India has no official religion and religious functionaries, by virtue of their position, do not play a role in running the State machinery and (iii) by engaging in law reform (such as the throwing open of Hindu temples to former untouchables) and by regulating the secular aspects of religion (such as the legislations governing the administration of religious endowments), the State engages with religion at the level of law and policy. However, Bhargava's (1994, 1784) notion is flawed inasmuch as it leaves the level of interference with each religion through the instrumentality of law and policy to the discretion of the State and, thereby, makes it unequal. Bhargava's rejection of a "god's eye view of impartiality" cannot negate the fact that "principled distance" leaves room for both minority appeasement and religious persecution by the State. This criticism has also been levelled by Deepa Das Acevedo (Acevedo 2013, 138, 157–158), who states that Bhargava's model relies heavily on not one but

two layers of expediency for justification: (i) community-specific practices, which need to be tackled one at a time, and (ii) the State need not deal with all social evils at the same time.

Jha (2002, 3176) has argued that rather than distancing itself equally from all religions, the State has adopted the “equal-respect theory” and thereby, respected all religions equally. The equal-respect theory is grounded in the fact that religion constitutes an integral part of life in India and, as such, rather than staying away from religion altogether, the State would base its dealings with religion on an equal respect to all religions (Jha 2002). According to Sen (2016, 902), Jha’s formulation of the equal-respect theory is nothing but the Nehruvian conception of secularism. However, the equal-respect theory becomes questionable given the reformist tendencies of the Indian State: is it possible to accord equal respect to all religions even though the State may choose to reform them to different extents?

There are, of course, scholars such as Acevedo (2013, 138) who have opined that the Indian State is not secular to begin with; these are primarily those who subscribe to separation-model secularism.⁵ On the other hand, Dhavan (2001, 301, 311) conceptualises Indian secularism as a trinity: (i) religious freedom, which has been discussed in depth in the foregoing section of this paper, (ii) celebratory neutrality, which alludes to a “participatory secular state which would neutrally assist and celebrate all faiths and generally not discriminate between them”, and (iii) regulatory and reformatory justice, which espoused the Constitution being “self- professedly regulatory and reformatory in nature”.

Tripathi postulated that Indian secularism was a by-product of India’s unique social experiences (1966, 27). He goes on to state that whilst the draftsmen of the Constitution did not contemplate a State that was anti-religious, they also did not wish to “arm religion with the power to do to the individual what neither the state nor any other organized authority could be permitted to” (1966, 27). He further buttresses that it was social reform that lay at the heart of the constitutional provisions relating to secularism and that the constitutional vision even required that the State “take initiative rather than sulk or lie indifferent beyond a “wall of separation.”(1966, 28). Tripathi’s (1966) views read in consonance with the foregoing section, reveals a unique dichotomy: Indian secularism reveals a State with a reformist zeal, saddled with the mandate of equally respecting all religions. It would not be out of place to state, particularly in the context of the reasons furnished for evolving an Indian model of secularism, that the former was the result of a need to evolve a working version of secularism that was palatable to the general populace. It may be argued that the newly formed State could not risk a legitimacy crisis, and in an attempt to subvert the possibility of the same, it struck a compromise between the reforming vision of its founding fathers and the political realities that it was bound to. The same bolsters and contextualises Acevedo’s (2013) aforementioned critique of Bhargava’s (2013) “principled distance” model.

Regardless of the disagreements and commonalities between the aforementioned views, the common thread that connects them all is the perception that the Indian

model of secularism is unlike any of the prevailing models; that it belies a precise, formulaic definition. It was perhaps this character of Indian secularism that led Pantham (1997) to refer to the “*sui generis* nature of Indian secularism”. An overview of the State’s engagement with religion over seven decades of independence reveals that the apex court has, to an extent by relying on the provisions of the Constitution itself, carved out a jurisprudence on religious freedoms that has resulted in the formation of a unique, stand-alone model of secularism, i.e. a *sui generis* model of secularism.

3 COVID-19, India & Religion: An Appraisal of the State’s Response

The COVID-19 crisis has forced governments across the world into unfamiliar terrain. It has been argued that religious life is “one of the most compelling areas for social inquiry” insofar as the pandemic is concerned (Kraveltovi and Özyürek). Owing to the contagious nature of the pandemic, States have been compelled to enforce lockdowns and stringent social distancing measures. The word “enforce” would entail backing the said measures with the threat of sanction. Ensuring compliance insofar as religion is concerned is a particularly precarious responsibility and represents a head-on confrontation between religious freedom and public health concerns. As such, the response of States, both secular and non-secular, has evoked interest and attention. It is in this context that we seek to examine the Indian government’s response to the COVID-19 pandemic, and the ramifications thereof on the religious freedoms guaranteed to its citizens.

3.1 An Overview of the State’s Measures

The Ministry of Home Affairs of India released its first circular on COVID-19 on March 24, 2020. The said Circular states that COVID-19 has been declared as a pandemic worldwide and therefore, the National Disaster Management Authority is satisfied that India is threatened by this virus. Based on the powers provided by the Disaster Management Act, the Circular directed the Central and State governments to take effective measures for limiting the spread of the virus (Government of India: Ministry of Home Affairs, Ministry of Home Affairs Order No. 40-3/2020-DM-I (A)). It also issued certain guidelines which were to remain in force for the next 21 days (Government of India: Ministry of Home Affairs, Annexure to Ministry of Home Affairs Order No. 40-3/2020-D: Guidelines on the measures to be taken by Ministries/Departments of Government of India, State/Union Territory Governments and State/Union Territory Authorities for containment of Covid-19 epidemic in the country). The guidelines included, *inter alia*, that “all religious worship places shall be closed for public. No religious congregations will be permitted, without any exception” (at cl. 9). Further, all religious and cultural gatherings were barred (at cl. 10). In case of funerals, congregations of no more than 20 persons were to be permitted (at cl. 11). Certain authorities were given the task of monitoring a strict application of these guidelines and any person violating containment measures was to be liable for punishment under the Disaster Management Act (at cl. 14–17). Subsequent

orders have extended the lockdown, and it continues to remain in force in containment zones as of October 15, 2020. Effectively, places of public worship across the spectrum were forced to remain closed. On June 4, 2020, the Ministry of Health and Family Welfare issued a Standard Operating Procedure (SOP) on preventive measures for containing the spread of the COVID-19 in places of worship. The said SOP stated that places of worship would remain closed to the public in containment zones. However, religious places outside the containment zones were allowed to open up, subject to standard preventive measures such as social distancing, hand-washing, etc. It also prohibited large gatherings and religious congregations. On September 1, 2020, the government of the state of Tamil Nadu issued a Standard Operating Procedure (Tamil Nadu SOP) for reopening of religious places. The Tamil Nadu SOP fixed norms for the number of people allowed inside the religious enclosure. It also mentioned that there would be no offering of *prasadam* or serving of the Holy Communion. Furthermore, even the touching of idols or Holy Books while offering prayers has been disallowed under the Tamil Nadu SOP.

3.1.1 The Tablighi Jamaat Congregation

Whilst examining the response to these measures, one event must be highlighted for two reasons: (i) its contribution to the discourse on Indian secularism and (ii) the governmental response to the said event. Members of the *Tablighi Jamaat*, an Islamic organisation, organised a congregation of several thousand individuals at its headquarters at *Nizamuddin*, which is located in the national capital (Mander 2020). The congregation, which consisted of both Indian and foreign nationals, has arguably created the single largest transmission chain for COVID-19 in India (George 2020). When news of the congregation came to the fore, against the backdrop of growing pandemonium relating to the novel coronavirus pandemic, the Government evacuated and quarantined the 2000-plus members who were still in the *Markaz* (mosque) at *Nizamuddin*. Subsequently, it was reported that the Home Ministry of India was set to blacklist several hundred foreign members of the *Tablighi Jamaat* (Government of India: Press Information Bureau 2020); to this end, it wrote to the governments of all states and union territories in India, asking them to identify, screen and quarantine the said individuals (Singh 2020). The *Tablighi Jamaat's* congregation set off a chain reaction of hate speech and Islamophobia across the nation, with media outlets and social media buzzing with an anti-Muslim rhetoric (Mittal 2020). Despite the same, a Health Ministry spokesperson went on record to say, "If it were not for the congregation, India's rate of doubling— that is in how many days the cases have doubled — would have been at 7.4 days" at a point in time when the doubling rate was 4.1 days, thereby officially affixing responsibility on the *Tablighi Jamaat's* congregation (Kaul 2020). The Government of the National Capital Territory of Delhi went further and classified cases against individuals who had attended the congregation as "Markaz Masjid cases" (Gupta 2020). Meanwhile, Shivraj Singh Chouhan, the newly sworn-in

Chief Minister of the State of Madhya Pradesh, made a statement blaming individuals participating in the congregation for the rise in COVID-19 cases in his state (Niazi 2020). Furthermore, the Mumbai police registered First Information Reports (FIRs) against 150 individuals alleged to have attended the gathering (Press Trust of India 2020).

The governmental response to the said congregation has attracted criticism on numerous grounds: (i) that the State had engaged in selective testing and did not subject the participants of large congregations of other religions to the same level of scrutiny, (ii) that the governmental response amounted to racial profiling and (iii) that the government had tried to blame a particular religious community for the exponential increase in COVID-19 cases in the country (Jain 2020). Ultimately, the Ministry of Health issued an advisory in relation to the social stigma associated with COVID-19 (Government of India: Ministry of Health and Family Welfare, Addressing social stigma associated with Covid-19 2020). Nonetheless, the incident, and the response thereto, has attracted significant attention.

Three judgements, of three different High Courts, represent isolated yet valuable attempts on part of the judiciary to counter the narrative being advanced by the executive. For instance, the Bombay High Court, in *Konan Kodio Ganstone v State of Maharashtra* 2020 SCC OnLine Bom 877 (hereinafter, *Konan*), whilst quashing the First Information Reports (FIRs) registered against foreign nationals who had participated in the *Tablighi Jamaat*, observed that "continuation of prosecution...would be an abuse of process of Court". The Court noted that there was a "smell of malice to the action taken against these foreigners and Muslims for their alleged activities". Likewise, the Karnataka High Court in *Farhan Hussain v. State* Criminal Petition No. 2376/ 2020, quashed the FIRs registered against nine foreign nationals who were a part of the *Tablighi Jamaat* subject to the condition that they leave the country immediately and not visit India for the next ten years. However, unlike the Bombay High Court, the Karnataka High Court rejected the contention that the prosecution was due to media-generated prejudice. The Madras High Court, in the case of *Md. Kameual Islam v. State* 2020 SCC OnLine Mad 1171, granted bail to foreign nationals who had been arrested on the ground that they had engaged in religious activities breaching their visa conditions. The words of Nalawade, J. of the Bombay High Court best sum up the steps that had been taken against the individuals forming part of the *Tablighi Jamaat*:

There was big propaganda in print media and electronic media against the foreigners who had come to Markaz Delhi and an attempt was made to create a picture that these foreigners were responsible for spreading covid-19 virus in India. There was virtually persecution against these foreigners. A political Government tries to find the scapegoat when there is pandemic or calamity and the circumstances show that there is probability that these foreigners were chosen to make them scapegoats. (*Konan* at para. 27)

3.1.2 The Rath Yatra

One of the biggest festivals in India is the Rath Yatra (Chariot procession) where three Hindu Gods are taken out of their temples in a colourful procession to meet their devotees. The largest chariot procession in the world, the Rath Yatra gets millions of devotees annually to watch the 'king' sweep the road with a golden mop and three massive 18-wheeled chariots bearing the deities make their way through massive crowds. Before the festival begins, the chariots are constructed manually over 42 days with approximately 4000 pieces of wood. The annual ceremonial process takes place throughout the country; however, the biggest chariot processions are carried out in the eastern state of Orissa and the western state of Gujarat.

Considering the restrictions laid down by the Central Government to curb the spread of COVID-19, large gatherings were not allowed as it would, inevitably, disrupt the efforts of social distancing. Although the central government had through MHA Orders barred the gatherings and put severe restrictions on religious gatherings, the State Government of Orissa wanted to proceed with the Rath Yatra. For this reason, the government approached the Supreme Court of India to ask for leave to proceed with the chariot procession. The State government assured the Court that the procession will be carried out with minimal public attendance, keeping in mind the hygiene and social distancing regulations. At the outset, the Supreme Court in the case of *Orissa Vikash Parishad v. Union of India & Ors.* 2020 SCC OnLine 533, through its Order dated 18th June 2020 restrained the Central and the State governments to carry out the procession. The court also opined that in the past where measures were not taken, the Rath Yatra was responsible for the spread of Cholera and Plague. However, after constant persistence by the State government, the Supreme Court, a few days later, through its Order dated 22nd June 2020 reversed its position on the Rath Yatra and allowed the government to carry out the same in "a limited way without public attendance", whilst respecting the social distancing guidelines. Evidently, the Rath Yatra was a huge failure with people flouting the social distancing guidelines, primarily, due to lack of enforcement by the State government. This eventually resulted in a massive spike of cases in the State of Orissa a few days after the Rath Yatra concluded.

Whilst some blamed the Supreme Court of India for its unilateral approach to appease the Hindu majority at the cost of right to life (Khemka and Jadhav 2020), others were quick to fault the Orissa government for its lack of testing and enforcement during the Rath Yatra (Das 2020). Meanwhile, the State of Gujarat, already reeling under the severe pressure of rising COVID cases, wanted to conduct its own Rath Yatra. However, the High Court of Gujarat through its decision in *Mahant Akhileshwardasji Ramlakhandasji v. State of Gujarat* 2020 SCC OnLine Guj 917, was quick to step-up and restrain the government from carrying out the Rath Yatra. In the State of Gujarat, the chariot procession has a gathering of around 600,000 to 800,000 people every year and the chariot covers a total passage of 15 kms. The High Court of Gujarat believed

that it would be impossible to carry out the Rath Yatra whilst maintaining social distancing.

3.2 Religion under Lockdown: Analysing the Impact of the Government's Measures

The State's response to the COVID-19 pandemic is noteworthy for a multitude of factors. Firstly, the State has abandoned its traditional "equal-respect" approach and, instead, adopted a separation-model of secularism by putting a blanket ban on religious congregations and events. The traditional distinction between 'religious' and 'secular' aspects of religion appears to have been all but abandoned for the time being; every aspect of public religious life, regardless of how "essential" it is, has been subjected to the lockdown and social distancing measures. Restrictions impinging on the "religious" reveal an unspoken hierarchy between the rights guaranteed under Part III of the Constitution of India, with the right to life guaranteed under Article 21 being given precedence over the "articles of faith". At this juncture, it is worth noting that unlike all the other Articles in Part III of the Constitution, Articles 25 and 26 enunciate the limitations to the rights guaranteed thereunder prior to the substantive contents of the said rights; all other fundamental rights begin with a recital of what the right entails (Tripathi 1966, 117). This harkens back to the approach in the early years of the Republic, as seen in the *Shirur Mutt* case, wherein the apex court had emphasized the tension between social welfare and reform on the one hand, and religious freedoms on the other. However, the scope for bias that was highlighted in Bhargava's model of "principled distance" has not disappeared; the State does appear to have interfered more in the affairs of the Muslim community than any other, for reasons that may or may not be justified. On the other hand, it has espoused the cause of the Hindu majority albeit in a limited manner, during the Rath Yatra. Secondly, it is the executive, rather than the judiciary and legislature, which has occupied centre stage during this time, marking a shift from historical trends that have existed even during a state of national emergency (as evidenced by the tussle between Parliament and the Supreme Court that formed the central theme of the Emergency of the 1970s) (Austin 1999, 371–374). Thirdly, it has exposed certain endemic fissures in Indian society that exist even during a public health crisis of monumental proportions (Varghese 2020). It is perhaps this 'endemic', deep societal divide that catalysed the evolution of the Indian model of secularism in the first place.

By and large, an appraisal of the State's response to the COVID-19 pandemic reveals three things: (i) the State has been forced to effect a temporary shift towards separation-model secularism, (ii) the alleged biases in the State's dealings with religion appear unaltered and (iii) the social realities circumscribing the evolution of Indian secularism seem clearer than ever.

4 Indian Secularism: What Does The Current Crisis Tell Us?

Coming to central thesis of this paper, it must now be examined how the aforesaid observations change or rein-

force our understanding of Indian secularism. It becomes amply clear from the discussion in the foregoing section that the measures adopted by the State constitute a sharp and marked departure from what scholars believe constituted Indian secularism. If we are to accept that Indian secularism is *sui generis*, then it must also be accepted that the current crisis has all but turned that model of secularism, so assiduously evolved over the last seven decades, on its head. From defying Western secularism, India appears to have been compelled to embrace, at least temporarily, a separation-model of secularism. The only constants appear to be the alleged biases informing governmental action and the societal divide that has plagued India for centuries. Even a *sui generis* model of secularism must adhere to certain fundamental tenets and boundaries. The present crisis marks a noticeable divergence from the same. The very beginnings of Indian secularism are a result of compromise between constitutional vision and social realities, between transformative constitutionalism and need-based adaptations. The apex court, acting as both an adjudicator and policy-maker, has further evolved a jurisprudence that is not entirely rooted in the vision of the founding fathers of the Constitution of India. To complicate matters further, religious fundamentalism has been on the rise in India since the demolition of the Babri Masjid in 1993, leading to contemporary Indian politics being increasingly informed by religion (Engineer 1995, 2726). Ultimately, we argue, that a combination of these factors has resulted in the creation of a *sui generis* model of secularism, which, in turn, has not been conformed to, in the face of the COVID-19 pandemic. Whether this change in approach is temporary or constitutes a permanent paradigm shift remains to be seen.

5 Conclusion

From the very outset of its tryst with democracy, India sought to reject the available western models of secularism and evolve its own unique version of secularism. The constitutional developments beginning with the Constituent Assembly and germinating in a vast jurisprudence on religious freedom, secularism and the limits of State action, inform us of an uneasy truce between ideology and reality. An appraisal of these developments presents us with the inference that the secular model adopted by India, despite its contradictions, is a *sui generis* one that is bound by certain principles. It is one that has evolved as a compromise in response to competing forces. It must be noted, however, that the COVID-19 pandemic has compelled the State to make a sharp departure from the *sui generis* model of secularism, leaving it with the unhappy legacy of the flaws that permeate through the said model. Whilst the *sui generis* form of secularism may have been the result of an uneasy truce between opposite forces that are a *fait accompli* of life in independent India, it nonetheless constitutes a unique doctrine of constitutional common law. However, the present circumstances have raised questions about its durability in the face of a crisis that may change the landscape of the legal systems in the world in an unprecedented manner.

Notes

- ¹ The Forty Second Constitutional Amendment inserted the word 'secular' in the Preamble of the Constitution.
- ² Constitution of India, 1950, Art. 25 (Freedom of conscience and free profession, practice and propagation of religion), Art. 26 (Freedom to manage religious affairs), Art. 27 (Freedom as to payment of taxes for promotion of any particular religion), Art. 28 (Freedom as to attendance at religious instruction or religious worship in certain educational institutions).
- ³ Constitution of India, 1950, Art. 29 (Protection of interests of minorities), Art. 30 (Right of minorities to establish and administer educational institutions).
- ⁴ For Sen, 2019, no linear movement can be discerned from the court's rulings; For Padhy, 2004, at 5031 the context takes centre-stage in decisions.
- ⁵ For Acevedo, 2013, raises concern that if what lies at the heart of secular governance is the desire to separate religion and state rather than the fact or manner of separation, it is clear that the Indian state is not secular.

Competing Interests

The authors have no competing interests to declare.

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