

Constructing Secularism: Separating ‘Religion’ and ‘State’ under the Indian Constitution

M Mohsin Alam*

The jurisprudence of freedom of religion under the Indian Constitution presents us with a muddled picture. With a complicated history of denominational religion and reform, these provisions have been seen to be the very root of the ‘social revolution’ which the Constitution intended to mark. At the same time, the restrictive interpretation of arts 25 and 26 of the Constitution, in the form of what I have called the doctrine of ‘essentiality’, has failed to gather enough attention. It is argued that this interpretation of freedom of religion was revolutionary from the point of view of the natural textual construction. Moreover, it is argued that this construction of the text re-aligned the constitutional conception of secularism, something that is not often noted. While this construction strengthened the power of the state to regulate denominational religion, it reduced ‘constitutional secularism’ to a concept antithetical to the individual’s right to freedom of religion.

‘Our tradition teaches tolerance; our philosophy preaches tolerance; our Constitution practises tolerance; let us not dilute it.’

Chinappa Reddy J in *Bijoe Emmanuel v State of Kerala* (1986) 3 SCC 615

The past couple of decades have given secularism not only a highly contested presence in the Indian polity, but have also turned it into a political homograph – used to legitimise divergent political acts by divergent political interests.¹ In this context, a discussion of the judicial definition of secularism may seem to be inadequate, or even superfluous. Significantly, however, while the politics of defining secularism have been incessantly fought in the theatre of electoral and power politics, it has been accompanied by each of the sides staking claim to the constitutional conception of secularism. Thus, in the middle of this scramble for constitutional legitimacy of political claims, it is important to know what this juridical construct of secularism within the Constitution actually means.

The aim of this article is limited, if seen in the context of the intensity and magnitude of this debate. Even though the Supreme Court has declared on numerous occasions the presence of ‘secularism’ within the domain of the text of the Constitution since its inception,² the Forty Second Amendment to the Constitution transformed secularism from a

predominantly political to a predominantly legal formulation, once and for all.³ In the process of constitutional adjudication, 'secularism emerges as an ongoing series of political and juridical constructions' (Baxi, 2007: 47). This construction of secularism is not always explicit, but is mostly implicit within the contours of judicial reasoning. Once uncovered, however, it reveals the perceptions of the court, and the way it has conceptualised this contested idea over decades.

The article will concentrate on what Baxi (2007: 48) characterises as 'rights-oriented secularism' (ROS).⁴ More specifically, the article will delve into the cases dealing with the constitutional freedom of religion provisions, arts 25⁵ and 26,⁶ and the Supreme Court's efforts at drawing the boundaries between 'religion' and 'state'. As will be elaborated further, the Supreme Court has, over a period of time, narrowed down the cover and protection of 'freedom of religion' under the Constitution to only those aspects of religion which it considers 'essential' to religion. Of the exceptionally vast literature on the subject,⁷ only a few have looked at this process of 'narrowing down' of protection critically (Rao, 1963; Luther, 1964; Smith, 1963; Ghose, 1973; Dhavan, 1987; Galanter, 1997; Mehta, 2008: 311–38), as a process reflecting the court's attempt at realigning constitutional secularism. None has looked at it from the angle of religious rights of individuals under the constitutional scheme.⁸ This article will try to show how the court's conceptualisation of secularism and its reading of 'freedom of religion' have interacted, and how the effect on the individual's right to religious freedom has been diminished. It will do so primarily through a study of Supreme Court decisions, and the literature on this subject. It will address the larger question of defining secularism from the specific question of freedom of religion provisions, and dwell on the effect on individual's right to freedom of religion.

Models of 'Freedom of Religion': Construction of the Wall between State and Religion

Judicial perspectives on secularism from the angle of freedom of religion emerge in three distinct, but related, models or versions. The difference between these three models primarily lies in the construct of the state vis-à-vis religion, and vice versa. As will be elaborated in detail in the next section, the approach of the court in these three models represents how the court perceives the constitutional philosophy of state intervention in the 'private' domain of religion.

The first important case that allows us to visit the court's construct is the Bombay High Court decision, *State of Bombay v Narasu Appa Mali* MANU/MH/0040/1952 (*Narasu Appa*), on the validity of the Bombay Prevention of Hindu Bigamous Marriages Act, 1946. Two distinct

perspectives emerge, in the form of the opinions of Chagla CJ and Gajendragadkar J. Chagla CJ upheld the legislation primarily on the dichotomy of protection given to religious 'belief' and 'practice' under the Constitution.⁹ According to him:

A sharp distinction must be drawn between religious faith and belief and religious practices. What the state protects is religious faith and belief. If religious practices run counter to public order, morality or health or a policy of social welfare upon which the state has embarked, then the religious practices must give way before the good of the people of the state as a whole ... (*Narasu Appa* at 5)

For him, the question of polygamy being a 'recognised institution of Hindu religious practice' does not take away from the state the power to legislate on social reform under art 25(2)(b) of the Constitution (*Narasu Appa*, 7).¹⁰

Gajendragadkar J takes a starkly different approach¹¹ and does not draw a distinction between religious belief and practice. He holds

[If the] religious beliefs or practices conflict with matters of social reform or welfare on which the state wants to legislate, such religious beliefs or practices must yield to the higher requirements of social welfare and reform.

The absence of a distinction between belief and practice attains a higher significance with the subsequent methodology of the judge. Gajendragadkar J does not stop at upholding the law purely on the point of the overriding power of the state to enact social reform legislation. He goes on further and says:

But apart from that, I am not prepared to hold that the impugned Act infringes upon the religious beliefs or practices of the Hindus. I do not deny that marriage under Hindu law is a matter of sacrament and I concede that the Hindu texts have emphasised the importance of a son for the purpose of spiritual benefit. *But it must be remembered that the ancient Sanskrit texts made no distinction between religion and its practice on the one hand and matters of positive or civil law on the other ... It is, therefore, necessary to distinguish between matters which legitimately fall within the ambit of religion and its practice and those that do not ...* even from the strictly orthodox point of view bigamy was never a matter of obligation; it was permissive and permissive under certain conditions and for a certain object. If the principal object of permitting polygamy was to attempt to obtain a son, the same object could well be served by adoption. (*Narasu Appa* at 29, emphasis added)

Thus, Gajendragadkar J indulges in a construction of the 'legitimate' belief and practice of the Hindu religion. Distinct from Chagla CJ's approach,¹² Gajendragadkar J allows himself to look at the religious texts and interpret them as an insider. For him, the state seems to have a power of

allowing itself into the domain of religion, into its inner chambers, and reform its belief and practice.

The third model is suggested by a line of three cases: *The Commissioner, Hindu Religious Endowments, Madras v Sri Lakshmindra Thirtha Swamiar of Sri Shirur Mutt* MANU/SC/0136/1954 (*Shirur Mutt*); *Ratilal Panachand Gandhi v State of Bombay* MANU/SC/0138/1954 (*Ratilal*); and *Sri Venkataramana Devaru v State of Mysore* MANU/SC/0026/1957 (*Devaru*). These cases represent the approach of the Supreme Court during the early phase of social reform. Most of these cases dealt with constitutional challenges for violation of the right of religious denominations under art 26, but since they involved individual rights of heads of religious denominations, the court considered the validity of the enactments from the prism of both the individual right under art 25 and the denominational rights under art 26 (see *Shirur Mutt* at 15). Thus, the textual distinction between the individual right and denominational right was extinguished.¹³

In *Shirur Mutt*, Mukherjea J construed the scope of religious freedom of religious denominations widely. With respect to the right of religious denominations to manage their own affairs in 'matters of religion' under art 26(b), the judge held that as compared to the right to administer property under art 26(d), it had been placed on a different footing. He held that the former 'is a fundamental right which no legislature can take away' while the later 'can be regulated by laws which the legislature can validly impose' (at 17). Of course both were limited by the textual exceptions of 'public health, morality and order'. This seemingly unrestricted protection to 'matters of religion' was supplemented by a wide reading of 'religion'. While rejecting the narrow definition proposed in *Vide Davis v Beason* 133 US 333 at 342, the Justice defined religion beyond a 'belief' in the 'Creator', in fact, beyond belief itself, and included within it numerous practices, such as rituals, observances, ceremonies and modes of worship. Thus for him, the guarantee under the Constitution also protected 'acts done in pursuance' of religious belief (*Shirur Mutt* at 18). And who decides whether these acts are religious in nature? Mukherjea J is categorical when he says:

Under Article 26(b), therefore, a religious denomination or organisation 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 23, emphasis added)

Note the unambiguous nature of the wall separating religion and state: the state has no authority to enter the domain of religion and the scheme of the Constitution does not allow any outside interference. Thus for

Mukherjea J, what the Constitution, even under the social welfare and reform provision of art 25(2)(a):

contemplates is not regulation by the state of religious practices as such, the freedom of which is guaranteed by the Constitution except when they run counter to public order, health and morality, but regulation of activities which are economic, commercial or political in their character though they are associated with religious practices ... (*Shirur Mutt* at 20)

This approach was continued in *Ratilal*.¹⁴ In this case, Mukherjea J reiterated that:

Religious practices or performances of acts in pursuance of religious belief are as much a part of religion as faith or belief in particular doctrines. Thus if the tenets of the Jain or the Parsi religion lay down that certain rites and ceremonies are to be performed as certain times and in a particular manner, it cannot be said that these are secular activities partaking of commercial or economic character simply because they involve expenditure of money or employment of priests or the use of marketable commodities. No outside authorities has any right to say that these are not essential parts of religion and it is not open to the secular authority of the state to restrict or prohibit them in any manner they like under the guise of administering the trust estate. (*Ratilal* at 14, emphasis added)

The judge accepted that 'religion' had been left undefined under the Constitution, but clearly he took it to be wide enough to cover all acts in pursuance of a belief (at 12). And in cases where the distinction between religious and secular acts is not clear, he suggested that 'the court should take a commonsense view and be actuated by considerations of practical necessity' (at 15).

In the third case, *Devaru*, the plot thickened. Venkatarama Aiyar J accepted the wide scope of protection for religion in *Shirur Mutt* (*Devaru* at 14). But whether the religious character of acts in question is to be 'ascertained with reference to the doctrines of that religion itself' (*Shirur Mutt* at 20) or whether they would 'include even practices which are regarded by the community as part of its religion' (*Devaru* at 15) was left unclear (Tripathi, 1966b: 183).

The question in *Devaru* was regarding the constitutionality of the Madras Temple Entry Authorisation Act, which provided for the opening up of temples to the lower castes, who had been excluded for centuries. Opening up of temples was an avowed objective of the Constitution, which provided specifically for it under art 25(2)(b), which states:

(2) Nothing in this article shall affect the operation of any existing law or prevent the State from making any law:

- (b) Providing for social welfare and reform or the throwing open of Hindu religious institutions of a public character to all classes and sections of Hindus.

Among other issues, two relevant questions raised were whether the denomination had a right to exclude certain castes and, if they did, was the law prohibiting such exclusions valid? On the first question, Venkatarama Aiyar J held that 'religion' in the constitutional sense is wide enough to include the choice of the religious community to restrict access to temples. He held that:

Under the ceremonial law pertaining to temples, who is entitled to enter into them for worship and where they are entitled to stand and worship and how the worship is to be conducted are all matters of religion ... (*Devaru* at 18)

They are thus protected by art 26(b). Significantly, the Justice observed that 'if the rights of the appellants have to be determined solely with reference to Article 26(b), then section 3 [of the Act] should be held to be bad as infringing it' (at 18). But the Justice did not hold the law to be bad. He held that the effect of art 25(2)(b), which provided for the opening up of temples to all sections of Hindus, would be to restrict the autonomy of the religious denomination to restrict entry of excluded castes. It was argued by the petitioners that the conflict between arts 26(b) and 25(2)(b):

could be avoided if the expression 'religious institutions of a public character' is understood as meaning institutions dedicated to the Hindu community in general, though some sections thereof might be excluded by custom from entering into them, and that, in that view, denominational institutions founded for the benefit of a section of Hindus would fall outside the purview of Article 25(2)(b) as not being dedicated for the Hindu community in general. (*Devaru* at 19)

But the Justice refused to read down art 25(2)(b). Applying the rule of harmonious construction, he held that:

If the contention of the appellants is to be accepted, then Article 25(2)(b) will become wholly nugatory in its application to denominational temples, though, as stated above, the language of that Article includes them. On the other hand, if the contention of the respondents is accepted, then full effect can be given to Article 26(b) in all matters of religion, subject only to this that as regards an aspect of them, entry into a temple for worship, the rights declared under Article 25(2)(b) will prevail. While, in the former case, Article 25(2)(b) will be put wholly out of operation, in the latter, effect can be given to both that provision and Article 26(b). We must accordingly hold that Article 26(b) must be read subject to Article 25(2)(b). (*Devaru* at 29)

Thus, even though under their right under art 26, the denomination 'would be entitled to exclude all persons other than Gowda Saraswath

Brahmins from entering into the temple for worship' (*Devaru* at 19), the social reform provision of art 25(2)(b) would override this autonomy.

The fidelity of the court to social reform of the Hindu religion is unquestionable. The methodology, though, is noteworthy. The court defines religious freedom widely, and this definition is left to the believers. That does not stop it from holding valid enactments calling for reform, but they are valid due to the overriding power of the state to enact such laws, and not because the court construes the practices not to be 'religion'.¹⁵

It is necessary to observe the direction the court was taking. The Constitution had left 'religion' undefined and the court had left its definition to the religious. But that did not mean that any or all acts would be religious in character. In *Shirur Mutt*, Mukherjea J accepted the argument that protection of arts 25 and 26 would cover those acts which would constitute an essential part of religion (at 19). But this 'essentiality' would be determined in the context of the doctrine of the religion (at 20). At the same time, it must be remembered that 'essentiality' in *Shirur Mutt* was accepted in the context of distinguishing 'secular' acts from 'religious' acts, and not generally to determine the protection of freedom of religion. This was reiterated in the subsequent cases of *Ratilal* and *Devaru* (see *Ratilal* at 14 and *Devaru* at 14 (while quoting *Shirur Mutt* approvingly)).

The 'Essentiality' Redux

These three interpretations of the wall separating 'state' and 'religion' under the Constitution, clearly, are at loggerheads. The *Shirur Mutt-Ratilal-Devaru* line evidently widened the definition of religion and the scope of its protection. But the most remarkable feature of this line was the level of autonomy retained by the religious denominations. The 'state' was not only rendered an outsider, but even its interference into religious practice was weakened as it was left to the religious denomination to determine what was 'religion' and what was not. What Tripathi (1966b: 183) calls the 'doctrine of autogeneses of the powers of denominations' threatened the fate of social welfare legislation.

An expression of this threat was *Sardar Syedna Taher Saifuddin Saheb v State of Bombay* MANU/SC/0072/1962 (*Excommunication* case). The case dealt with the constitutionality of the Bombay Prevention of Excommunication Act, 1949, which outlawed the practice of excommunication in the small Dawoodi Bohra Muslim community. The obvious challenge was that the enactment violated the freedom of religion rights under arts 25 and 26. Speaking for the majority, Das Gupta J reiterated that both belief and acts pursuant to that belief are protected under the Constitution, and that the doctrine of the faith will determine the essential aspects of religion (at 39).

True to this, Das Gupta J looked at the history of excommunication in Islam and the Dawoodi Bohra community (43–4). After this analysis, Das Gupta J agreed with the petitioners, who claimed that excommunication did, in fact, form an integral part of the Dawoodi Bohra faith (43–4), and that too much interference with it would amount to interference with the right of the religious denomination to manage its own affairs in ‘matters of religion’ under art 26(b) (at 45). The judge held that autonomy in ‘matters of religion’ is unrestricted apart from the textual limitations of public health, morality and order under art 26. The only other limitation would be art 25(2) as held on *Devaru*. Even here, the judge held that the practice of excommunication could not be held to be ‘economic, financial, political or other secular activity’ (under art 25(2)(a)) nor was it a measure of social welfare (*Excommunication* case at 50). This was because, as Das Gupta J held:

The barring of excommunication on grounds other than religious grounds say, on the breach of some obnoxious social rule or practice might be a measure of social reform and a law which bars such excommunication merely might conceivably come within the saving provisions of clause 2(b) of Article 25. But barring of excommunication on religious grounds pure and simple, cannot however be considered to promote social welfare and reform and consequently the law in so far as it invalidates excommunication on religious grounds and takes away the Dai’s power to impose such excommunication cannot reasonably be considered to be a measure of social welfare and reform. (Excommunication case at 50, emphasis added)

This was a strange proposition. Did the judge mean that only those matters that lay outside the domain of religion could be encroached upon by the state for the purposes of ‘social welfare and reform’? Were not the questions of refusal of entry of untouchables into temples open for the state to enact reform legislations? Or did the court hold that the state did not have the power to restrict the ‘essential’ parts of religion? Perhaps the last is true; Das Gupta J goes on to hold that:

As the Act invalidates excommunication on any ground whatsoever, including religious grounds, it must be held to be in clear violation of the right of the Dawoodi Bohra community under Article 26(b) of the Constitution. (Excommunication case at 50)

It was this non-abrogability of the ‘essential’ parts of religion which threatened the reform legislation. And it was this threat that pushed a process of the narrowing down of the protection of freedom of religion under the Constitution.¹⁶ I will resist from introducing a meta-narrative of the transformation of judicial policy, and instead offer a conglomeration of reasons for this change. There have been some scholars, like Robert Baird,

who seem to believe that the main (if not the sole) reason for the court to adopt this methodology was to widen the reforming power of the state (Baird, 2005). Others, like Marc Galanter and, more recently, Pratap Bhanu Mehta, seem to believe that the reason was to prevent a larger conflict between the ideologies of the state and religion, or the ends of public interest and religious interest (see Galanter, 1997: 252; Mehta, 2008b: 311–38). I suggest that, along with these reasons, another plausible reason could be Gajendragadkar J's personal beliefs. This is corroborated by his consistent approach right from the *Narasu Appa case*. But the reason for this approach being adopted without any significant challenge was that this methodology of reading the text made the state's interventions for 'social reform' and the court's attempt to legitimise them extremely easy. The court merely needed to label the practice in question as 'not religion', and thus legitimise the actions of the state without undue controversy. Thus, the most significant reason to continue with this approach was the constitutionality of reform legislation.

And thus we come to the definitive decisions with regard to 'state-religion' relations for the Supreme Court. I refer to them as Gajendragadkar J's triad of cases: *Durgah Committee, Ajmer v Syed Hussain Ali* MANU/SC/0063/1961 (*Durgah Committee*); *Tilkayat Shri Govindlalji Maharaj v State of Rajasthan* MANU/SC/0028/1963 (*Govindlalji*); and *Yagnapurushadji (Sastri Yagnapurushadji v Muldas Bhudardas Vaishya* MANU/SC/0040/1966). We are already aware of the approach of this judge and in these three cases he articulates his approach fully, leading it to determine the course of future jurisprudence.

This triad of cases involved challenges to enactments that provided for taking over the administration of certain religious denominations.¹⁷ The transformation in the protection is self-evident in *Durgah Committee*. While dealing with the ambit of protection under arts 25 and 26, Gajendragadkar J struck 'a note of caution' and held that:

In order that the practices in question should be treated as a part of religion they must be regarded by the said religion as its essential and integral part; otherwise even purely secular practices which are not an essential or an integral part of religion are apt to be clothed with a religious form and may make a claim for being treated as religious practices within the meaning of Article 26. 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. [emphasis added]

At once, the Justice introduces a 'rationality' test, and this test is not to determine the scope of the exception under art 25(2)(b), but in fact for the determination of a particular practice as religious or not.¹⁸ And how does the court determine the 'secular-ness' of the alleged practice? In all the three cases, the Justice refers to the history of secular practice of intervention in such religious institutions. And through this secular practice, the Justice determines that the alleged practices are not really religious, but, in fact, secular.¹⁹ The most remarkable feature of the judgments is the continuation of Gajendragadkar J's reading of religion and its nature, exemplifying his 'reformist' approach and belief in 'social engineering'.²⁰ As in his separate opinion in *Narasu Appa*, the Justice propounds the real intent of religion, casts away superstitions inculcated in it and purifies its original nature by pointing out the secular aspects that in his view cannot even be called 'religion'.²¹ Contrast this with the methodology of the court in *Devaru*. As in the later case, Gajendragadkar J could have left the meaning of religion wide, and by reading Arts 25 and 26 harmoniously, restricted the autonomy of religious institutions in secular matters as specifically provided in art 25(2)(b). But the judge instead reads down 'religion', and holds that there is, in fact, no relevance of the fundamental rights in such cases.²²

This fine-tuning of religious belief was accompanied by a basic change in the test of 'essentiality' itself, something that is not often noticed. As noted above, the test had been propounded in the context of distinguishing 'essentially religious' practices from 'secular' practices (Sathe, 2003: 169), so as to impose the restriction under art 25(2)(b). In *Mohd Hanif Quareshi v State of Bihar* MANU/SC/0027/1958 (*Cow Slaughter* case), for example, the court dealt with a challenge to an enactment prohibiting the slaughter of cows on the basis, among others, of the right of Muslims to sacrifice these animals on the occasion of Eid-ul-Azha.²³ Das CJ denied the very relevance of a fundamental right as, according to it, Muslims have an option of sacrificing other animals and it 'does not appear to be obligatory that a person must sacrifice a cow'.

The very fact of an option seems to run counter to the notion of an obligatory duty. It is, however, pointed out that a person with six other members of his family may afford to sacrifice a cow but may not be able to afford to sacrifice seven goats. So there may be an economic compulsion although there is no religious compulsion. (*Cow Slaughter* case at 20)²⁴

The test of 'essentiality' transformed into the test of 'obligation', and was generalised from differentiating secular from religious practices, to determining the protection of freedom of religion itself.²⁵ This reasoning reached its nadir of absurdity when, in *Dr M Ismail Frauqui v Union of India* MANU/SC/0860/1994 (*Ram-Janmbhoomi* case), Verma J held that

the building and preservation of mosques would not be protected by freedom of religion under Islam, since a 'mosque is not an essential part of the practice of the religion of Islam' as 'Namaz (prayer) by Muslims can be offered anywhere, even in the open' (at 86).²⁶

The Wall

Is there a 'wall of separation' between 'religion' and 'state' in India? The normative framework of secularism through which Donald E Smith (1963) first criticised the state's involvement in religious activities seems to have been shattered, rejected by the impulse of defining secularism anew,²⁷ suited for the 'novel' conditions in the Indian situation (Tripathi, 1966b: 193; Misra, 1992; Bhargawa, 2009). The Supreme Court itself in the seminal case of *SR Bommai v Union of India* MANU/SC/0444/1994 (*Bommai*) rejected, in no unclear terms:

The wall of separation between law and the religion with a wider camouflage to impress control of what may be described as exploitative parading under grab of religion. (*Bommai* case at 259 per Ramaswamy J)²⁸

But Smith's analysis did argue for a strong secular state, something which the courts have been too eager to accept, through couched in their own definition of 'secular'. Thus Smith is partially correct when he says that:

The indifference to religion which characterises the contemporary western outlook has already made a powerful impact on certain sections of Indian society, and the process is a continuing one. *Whether good or bad in terms of the individual this process tends to strengthen the secular state ...* [emphasis added]

After *Bommai*, the Supreme Court itself has preferred to define secularism in more religious terms, by placing reliance on the Indian religious traditions, as if religion and tradition itself lends legitimacy to the concept (see *Ram-Janmbhoomi* at 31; *AS Narayana Deekshitulu v State of Andhra Pradesh* (1996) 9 SCC 548). Thus, the court has understood religious values to create a space for secularism in the Indian polity. Another facet of the court's reading of secularism allows the state to give political significance to religious and caste identities for the purposes of affirmative action.²⁹ Clearly, the court has decided not to read constitutional secularism as a process of secularisation.³⁰

This absence of a wall between religion and state is evinced by the constitutional text³¹ and its hermeneutics, and is supported by the dominant 'Constitutionalisms' in India.³² I propose a different metaphor, however: Indian secularism constructed by the judiciary is a *permeable membrane*, but one permeable only by the 'secular'/'state', and not by

'religion'. Thus when in *Bommai*, the Supreme Court declared secularism a part of the basic structure,³³ it was, according to SP Sathe:

giving a warning to the Hindu right and organisations that entertaining the idea of a majoritarian Hindu state that any move in that direction towards constitutional amendment would be considered a violation of the basic structure of the Constitution.³⁴

In other words, religion was not welcome in the domain of law and politics. Law, especially in its constitutive element, was impregnable.³⁵

The nature of the permeability of 'religion' by the state is more complex. One facet is, of course, that the Constitution envisages social welfare and reform (Constitution of India, 1950, arts 25 and 26). Thus, the state is empowered to intervene in cases of such considerations.³⁶ The belief, and the construction, of the Constitution as a 'social document' (Austin, 1966), 'furthering the goals of the socio-economic revolution', gives legitimacy to this intervention.³⁷ But this does not make India non-secular,³⁸ although it does give the secular Indian state a unique 'overall arbitral role' (Blackshield, 1966: 9).³⁹

Jacobsohn characterises this feature of Indian secularism as 'ameliorative secularism',⁴⁰ but this phrase does not do justice to the specific nature of state intervention or, in other words, the specific nature of the permeability of the membrane between 'state' and 'religion'. Galanter does far better.⁴¹ First, he characterises a secular state not as a bystander, but as providing, explicitly or implicitly, a normative vision of religion in society. Second, in the context of India, he identifies two modes of law's 'regulative oversight'. One, its 'mode of limitation', that is, 'the shaping of religion by promulgating public standards ... [and] overruling conflicting assertions of religious authority'; and two, its 'mode of intervention', that is, 'an attempt to grasp the levers of religious authority and to reformulate the religious tradition from within' (Galanter, 1997: 250-1).

I suggest that the nature of the permeation is not to define the limits of 'religion', but rather to define 'religion' itself. The praxis of secularism engulfs the practice of religion and the belief system of the religious. Secularism not only displaces religion to enter its erstwhile occupied space, but, in fact, enters religion.⁴² The most remarkable feature about the approach of the courts is that they have construed secularism to allow them to become an equal partner in deciding what constitutes 'religion', not as an outsider, but as an insider. This transformation of the constitutional policy, which has allowed courts to decide the content of religion, has made the state an internal critic of society. In other words, the state could criticise religious practice from within the domain of religion itself and did not need to resort to criticism from outside of

religion. This transformation of the state from being an external to an internal critic remains the hallmark of Indian secularism.⁴³ And this transformation has given the judiciary a political role in 'secularism-adjudication'⁴⁴ – not only does it legitimise state intervention, it carries out the internal critique itself.

There have been some misplaced attempts at portraying this internal critique arising from the approach adopted by Gajendragadkar J as Gandhian in nature (Galanter, 1997: 249). The nature of the Constitution was neither based on popular sovereignty, nor was it entirely post-colonial (Baxi, 1991; Kannabiran, 2004: 18; Dhavan, 2008). The Constitution itself rejected Gandhi, his tradition and his critique of modernity (Austin, 1966: 39; Baxi, 2005: 31). An internal critique adopted by Gandhi, which involved creative reconstruction of traditions and religious texts, was a mode of cultural dissent, a means of deliberation and cultural-critique of regressive traditions.⁴⁵ Once the court indulges in the textual recreation, that Gandhi often resorted to,⁴⁶ it is backed by state power, and thus no need for deliberation and persuasion arises. The court, using state power, can never become a legitimate insider of a Gandhian nature, it will remain an imposter.⁴⁷

Of course, not all cases of secularism-adjudication lead the courts to become an insider. An example of how the courts identify themselves on both the sides of the internal/external critique dichotomy is the interplay between *Mohd Ahmed Khan v Shah Bano Begum* (1985) 2 SCC 556 (*Shah Bano*; as an internal critique) and *Sarla Mudgal v Union of India* AIR 1995 SC 1531 (*Sarla Mudgal*; as external critique). The former ends with a plea for the Uniform Civil Code,⁴⁸ and the later begins with it.

In *Shah Bano*, Chandrachud J, speaking for the Supreme Court, was dealing with the right of a Muslim woman to claim maintenance under s 125 of the Code of Criminal Procedure, 1973. The Code, unlike Muslim personal law (based on traditional sources and their interpretation primarily through translations and commentaries (Fayzee, 1964; Hidayatullah, 2001)), applies to everyone irrespective of their religion. At the time, the protection of maintenance to women under the Code was wider than that under the Muslim personal law. Thus, the argument of the wife was that s 125 of the Code would apply even in cases where maintenance was paid under the Muslim personal law. Chandrachud J first, dealt with the question whether the provision would apply to Muslims, despite their personal laws. The Justice, in clear terms held that '[t]he statutory right [s 125] available to her [the Muslim wife] under that Section is unaffected by the provisions of the personal law applicable to her' (*Shah bano* at 9). This would have been enough to provide the remedy to the petitioner, but the court went on to find whether there was, in

actuality, any conflict between the statutory right and the right of the woman under Muslim law. Thus the Justice went ahead and interpreted the contentious Qur'anic verses and propounded Islamic law to hold that even Islam did not provide for anything to the contrary (at 15–22).

Ten years later, in *Sarla Mudgal*, the Supreme Court dealt with another complicated matter. The court was faced with the question whether a Hindu man, married under the Hindu law, can covert to Islam and solemnise a second marriage? Bigamy was prohibited only for Hindus, and Muslims continue to be governed by their personal law, which allows for polygamy. Thus the question was whether s 494 of the Indian Penal Code, 1860, which prohibits bigamy, applied to Muslims. Kuldeep Singh J held that, even though s 494 would not apply to Muslims, its ambit would be wider. A marriage which is solemnised under Hindu law can only be dissolved under Hindu law and, in that context, s 494 would continue to apply. Contracting any other marriage, while the previous (Hindu) marriage subsists, would amount to bigamy, and thus fall foul of the Penal Code. This was decided according to the rights created under the statute,⁴⁹ namely 'justice, equity and good conscience' (*Sarla Mudgal* at 23) and natural justice (at 24).

In both these cases, the Court referred to the Uniform Civil Code, but in a different way in each case. The Uniform Civil Code, with its contentious existence within the Directive Principles of State Policy, the unenforceable 'principles of governance' under Part IV of the Constitution, aims to provide for a common civil statute covering family laws of all Indians. Even though no attempt has been made to create such a code till now, it has had a strong presence in political discourses, while being resisted by religious minorities like Muslims. While in *Sarla Mudgal*, Kuldeep Singh J dealt with the case from outside the pale of religious doctrine (even employing, what he called, 'justice, equity and good conscience' in *Shah Bano*, Chandrachud CJ constructed the Islamic texts to find 'proper' (Islamic) law. Thus for *Sarla Mudgal*, UCC discourse became an external critique of religion, thus calling for a removal of religion from the public sphere to be replaced by a secular code, while in *Shah Bano*, UCC was merely an appendage to a larger methodology of constructing the true faith.⁵⁰

Subversion of Rights

The legitimacy of the court's attempts at an *internal critique* of religion has been questioned with vigour, from the court's lack of fidelity to the text of the Constitution (Tripathi, 1966b: 193–4; Derrett and Duncan, 1999: 447; Ghose, 1973: 133–8), to its incompetence to construe religious texts (Galanter, 1997: 253–5). Such involvement of the court carries with it normative values of the elite who have come to occupy the judge's seat.

And in the process of expression of these normative values, the judges often generalise the brahminical traditions, trying to create a uniform belief system in the heterogeneity of Hindu traditions, while overlooking customs and beliefs of the people.⁵¹

There is no doubt that the role of the court in secularism and adjudication of constitutional rights is a complex one, and one which involves balancing religious rights against the power of the state to regulate and control,⁵² and the religious rights of one group against the others.⁵³ But the methodology of the court has left the individual's religious rights weak and emaciated. All the definitive cases dealing with freedom of religion were in the context of denominational rights. The courts, in this specific context, defined the limits to religious freedom to provide maximum scope to state control. Thus, 'defining religion' was appropriated from the community to the courts. For example, in *SP Mittal v Union of India* (1983) 1 SCC 51, the majority, despite the firm belief of the followers of Sri Aurobindo that his teachings formed a separate religious denomination, held that his teachings could only be characterised as a philosophy and not a religion (at 103–6).⁵⁴ Subsequently, these tests came to be applied in cases involving individual liberty as well. This movement of the court from leaving the determination of religion to the community,⁵⁵ to the appropriation of the power to define religion, and that too in rationalistic, nationalistic and scientific terms, limited the conscience and religion of an individual as well. It became impossible for an individual to justify and preserve his conduct through the means of freedom of religion.

This complete control over an individual's religion and conscience is made acute by the complete judicial discretion as to the determination of what constitutes the essential/obligatory/integral parts of religion,⁵⁶ turning it into a judicial fiat.

The definition of 'religion' itself has been a matter of controversy in other constitutional jurisdictions. For example in America, even though the nature of disputes in the establishment clause and free exercise clause, in a way, requires some kind of determination as to the definition of religion, the courts have stayed away from this exercise, perhaps because of the impossibility of the enterprise (for example, see Freeman, 1983: 1548). No doubt, indulging in defining religion may itself be establishment of religion but in some cases the American courts have defined religion nonetheless. For example, in the conscientious objector cases, the courts have broadened 'religion' to include any belief.⁵⁷ The crucial inquiry 'in determining whether the registrant's belief are religious [was] whether these beliefs play the role of a religion and function as a religion in the registrants' life'.⁵⁸ This methodology in itself provides a

very wide protection to religious freedom, especially individual freedom. Thus, the courts have held that it is the sincerity of religious belief, and not the truth which is the determining factor,⁵⁹ and it is not necessary that the belief is either shared by everyone in the community⁶⁰ or provided in the religious scriptures⁶¹ for it to be protected.

This should have been the case while reading the freedom of religion rights under the Indian Constitution as well, especially when the courts could have used the textual restrictions on the freedom in order to balance the rights with other considerations.⁶² But the courts have continued to interpret religion under art 25 in a denominational and dogmatic sense, and not in the sense of a religious experience of an individual.

A usual situation is presented in *Mohammed Fasi v Superintendent of Police* MANU/KE/0114/1985 (*Mohammad Fasi*). According to a departmental regulation, a Muslim police constable was not allowed to wear a beard. He pleaded that, for him, his beard was a matter of religious expression, something which was enjoined by his perception of religion, and that the Constitution allows all individuals freedom of conscience, to profess and practise religion. But the Kerala High Court held that since a beard is neither obligatory nor essential in Islam, Mohammad Fasi had no right to keep a beard as an expression of his religion (at 12). The court neither held that such practice was against public health, morality or order, or other fundamental rights, nor could it hold that it is a secular practice or that restricting it was a matter of social welfare. The court construed Mohammad Fasi's religion, and told him that he had construed it wrongly.

The question remains whether secularism allows religious expression as a means of cultural dissent. Can an individual peacefully reject the claims of the state, refuse to fall in line with the normative structures established by the dominant secularism and be allowed to do so? *Bijoe Emmanuel v State of Kerala* MANU/SC/0061/1986 (*Jehovah's Witnesses* case) presents us with the uncertainty of its prospects. Three children, faithful Jehovah's Witnesses, stood respectfully when the national anthem was sung, but never sang it. They considered it against the tenets of their faith. Such disrespect for the symbol of nationalism led to their expulsion from the school. The High Court looked closely at the national anthem and observed that it did not violate any religious sensibilities, and thus not singing it would not be justified (at 2). Chinappa Reddy J in the Supreme Court reversed the judgment, but the reasoning is confused. Even though he held that the petitioners' true and conscientious beliefs qualified for the protection of freedom of religion, he nevertheless took the step of examining the nature of the belief system of the Jehovah's Witnesses (4–8). But the judge did not sit in judgment on the essentials of their religious beliefs, nor did he rationally and scientifically scrutinise them. He

succeeded in protecting their beliefs by leaving out the whole line of precedents leading up to this case.⁶³

Would the court have succeeded in this enterprise had it maintained its approach – of restricting freedom of religion to what it construed as the ‘essential’ or ‘compulsory’ aspects of religion – to secularism? Perhaps not. This had led some to characterise ‘freedom of religion’ under the Constitution not as a freedom at all, but rather as a ‘charter for the reform of Hinduism’ (Galanter, 1997: 247). But this characterisation ignores the rights of the individual, and the role of other religions in the fabric of the Indian polity. At a deeper level, it allows the state to uproot religio-political dissent, by defining patriotism and nationalism as superior to the ‘superstitious’ religion. Can a citizen refuse to fight for the state by claiming that killing his fellow human beings violates his conscience and religion, or would he have to satisfy the court of the centrality which non-violence holds in the doctrine of faith? Would Gandhi have been able to satisfy the court of how integral non-violence was to his creed? Dhavan has claimed that:

[A] truly secular state or society is more than one which tolerates difference. It is one in which the right to be different is recognised and even encouraged, and perforce, one whose identity is not overtly or covertly over-identified with or appropriated by the people of any one faith, persuasion or community to the exclusion of others. (Dhavan, 2001: 301)

The question remains – is a secular state really possible in this construct of constitutional secularism?

Notes

- * BA, LLB (Hons) NALSAR University of Law, Hyderabad, India. Currently serving as a Judicial Clerk at the Supreme Court of India. The author is grateful to Professor Amita Dhanda for her guidance. Special thanks to Ruchira Goel and the editors of the *Australian Journal of Asian Law* for improving this article.
- 1 It seems that all mainstream political parties in India claim to espouse the ‘real’ secularism. While Bhartiya Janata Party (Indian People’s Party, BJP), which is the main right-wing political party in India, claims to represent what it calls ‘positive secularism’ (see Bhartiya Janata Party, 2008), the Congress Party uses secularism against BJP. Secularism, thus, has become a multi-definitional concept in the Indian polity. See Nandy, 2007; Mehta, 2008a.
- 2 See *SR Bommai v Union of India* MANU/SC/0444/1994, 86: ‘[T]he 42nd Amendment merely made explicit what was implicit in it’: at 86. ‘The significance of the 42nd (Amendment) Act lies in the fact that it formalised the pre-existing situation. It put the matter beyond any doubt, leaving no room for any controversy’: per Jeevan Reddy J at 91. ‘Though the concept of the ‘secularism’ was not expressly engrafted while making the constitution, its sweep, operation and visibility are apparent from fundamental rights and directive principles and their related provisions. It was made explicit by amending the preamble of the Constitution 42nd Amendment Act’: per Ramaswamy J at 257. ‘By this amendment what was implicit was made explicit’: per Ahmadi J at 370. See also the *Excommunication case* AIR 1962 SC 853 at 871.

- 3 The Forty Second Constitutional Amendment inserted the word 'secular' in the Preamble to the Constitution. This 'transformation' is inspired from the hypothesis of Rajeev Dhavan, when he makes a distinction between 'political constitutionalism' and 'juridical constitutionalism'. See Dhavan, 1992: 373–461.
- 4 This Baxi distinguishes from governance-oriented secularism, such as matters regarding election law. Baxi, 1991, seems to continue with the right-governance dichotomy from his earlier works making a distinction between 'justice' and 'governance' texts in the Constitution.
- 5 Article 25 of the Constitution of India reads:

Freedom of conscience and free profession, practice and propagation of religion:

 - (1) Subject to public order, morality and health and to the other provisions of this Part, all persons are equally entitled to freedom of conscience and the right freely to profess, practise and propagate religion.
 - (2) Nothing in this article shall affect the operation of any existing law or prevent the State from making any law:
 - (a) Regulating or restricting any economic, financial, political or other secular activity which may be associated with religious practice;
 - (b) Providing for social welfare and reform or the throwing open of Hindu religious institutions of a public character to all classes and sections of Hindus.

Explanation I: The wearing and carrying of kirpans shall be deemed to be included in the profession of the Sikh religion.

Explanation II: In sub-clause (b) of clause (2), the reference to Hindus shall be construed as including a reference to persons professing the Sikh, Jaina or Buddhist religion, and the reference to Hindu religious institutions shall be construed accordingly.
- 6 Article 26 of the Constitution of India reads:

Freedom to manage religious affairs:

Subject to public order, morality and health, every religious denomination or any section thereof shall have the right:

 - (a) To establish and maintain institutions for religious and charitable purposes;
 - (b) To manage its own affairs in matters of religion;
 - (c) To own and acquire movable and immovable property; and
 - (d) To administer such property in accordance with law.
- 7 Most commentators feel that this approach of the court was justified, even understandable: See Suramanian, 1961; Groves, 1962; Sathe, 1968; Aiyar, 1970, especially Chapter 5 *Fundamental Rights: The Seven Freedoms of Religion and Religious Establishment*; Rai, 1975; Bachal, 1975; Baird, 1992; Derrett and Duncan, 1999, especially Chapter 13 *Religion in Modern Indian Law*; Jacobsohn, 2003: 95–103; Mahmood, 2006.
- 8 An exception is Professor PK Tripathi's critique of the early line of cases as early as 1966, although it is not clear whether he sees in this process the court's attempt at realigning secularism. See Tripathi, 1966b.
- 9 Note the similarity in Chagla CJ's approach and the approach of American decisions. The belief/practice dichotomy was propounded in the American jurisprudence in *Reynolds v United States* 98 US 145 at 164 (1878) and *Braunfeld v Brown* 366 US 599 at 603 (1961). This seems to be the permanent position in America. See *Cantwell v Connecticut* 310 US 296 (1940); *United States v Lee* 455 US 252 (1982).
- 10 The petitioners based their claim of violation of religious freedom on the basis of Hindu scriptures and the religious significance of a son for salvation.
- 11 His approach was further elaborated in the 'triad' of cases which will be dealt with in detail below.
- 12 Gary Jacobsohn also identifies this distinction when he writes that '[t]hese two jurisprudential tracks-determining the social welfare content of state action, and distinguishing essential from non-essential religious activity-enable the judiciary to encroach deeply into the domain of religious freedom': Jacobsohn, 2003: 97.

- 13 The consequence of this on the individual's right to freedom of religion is dealt with in detail below.
- 14 In *Ratilal*, the Mukerjea J speaking for the bench explicitly followed the precedent which he had laid down himself in *Shirur Mutt*. See *Ratilal* at 9.
- 15 This methodology is contrasted, below, with the second model of Gajendragadkar J.
- 16 There have been arguments that this 'autogenesis of denominational authority' resulted in a serious compromise of the individual's right to freedom of religion. One of the arguments raised in support of the legislation in the *Excommunication* case was that the civil rights of individuals would be affected. See for example Tripathi, 1966b: 183. In fact, the minority judgment of Sinha CJ was based on this proposition. But I do not support the thesis that it was the compromise of individual's rights which led to the subsequent development in the freedom of religion jurisprudence. This is more so since the subsequent jurisprudence also compromised individual's rights at another level, as will be elaborated later. For me, this rise of jurisprudence was the result primarily of the increased autonomy given to religious denominations, which jeopardised reform legislations.
- 17 In *Durgah Committee*, the challenge was against the Durgah Khwaja Saheb Act, 1955. It was alleged that the State-appointed officials had disregarded the autonomy of the shrine of Nazrat Khwaja Moin-ud-din Chishti. In *Govindlalji* and *Yagnapurushadji*, the challenge was against the Nathdwara Temple Act, 1959 and Bombay Hindu Places of Worship (Entry Authorisation) Act, 1956 respectively, on similar grounds.
- 18 For a criticism of this position, see Dhavan, 1987: 223–4; Seervai, 1993: 1268.
- 19 See *Durgah Committee* at 16–20; *Govindlalji* at 26–32. For a critique of this methodology of using pre-constitutional practice to determine the scope of constitutional rights, see Tripathi, 1966b: 190–3.
- 20 For the 'reformist' approach of Gajendragadkar J, see Tripathi, 1966a: 488; Baird, 2005. See also Gajendragadkar, 1966: 6: 'Law is an instrument of socio-economic change, and in the classical words of Roscoe Pound, it is a branch of social engineering'.
- 21 This reading and construction of religious scriptures has been a hallmark of this approach. For example, the court has read Jain scriptures in *State of Rajasthan v Sajjanlal* AIR 1975 SC 706. Another example of reading of Hindu religious scriptures (not necessarily from a reformist intention) is *ERJ Swami v State of Tamil Nadu* AIR 1972 SC 1586.
- 22 It is noteworthy that the judge seems to take a different line in his juristic writings. He writes, while giving an example of untouchability, that 'some conservative and traditional members of the Hindu community' may rely on 'obscure Hindu texts' to prove that this practice in part of Hindu religion. Even though he states that this 'assumption' on part of these members would not be 'well-founded', he explicitly leaves out what he calls 'a pedantic discussion as to whether the relevant Hindu texts, considered as a whole, justify the view that untouchability is a part of Hindu religion'. In fact, he categorically states that because of the existence of art 17 prohibiting untouchability, this issue will become a 'social problem and cannot be allowed to be considered in the light of any religious texts. In the words of art 25, even if it is assumed that some ancient obscure Hindu religious texts countenanced or supported the idea of untouchability, they have to yield to the fundamental right'. See Gajendragadkar, 1971: 81–2.

A perfect example of this methodology is the *Tandav Dance* case, *Acharya Jagdishwaranand Avadhuta v Commissioner of Police, Calcutta* AIR 1984 SC 51, where the court was faced with the constitutionality of the restriction of a particular dance of the Anadmarginis, which was performed naked, and with the display of skulls. The court, instead of holding the practice restricted due to public morality, holds the practice not 'essential' to the religion, and thus not protected by freedom of religion. Interestingly, the same court in *Commissioner of Police v Acharya Jagadishwananda* AIR 2004 SC 2984, went ahead and ruled the opposite and that too without much substantiation as to the change which had occurred in the 'essential aspects' of the religion. Also see *State of Bombay v NB Mali* AIR 1952 Bom 84; *HB Singh v TNH Ongbi* AIR 1959 Man 20.

- 23 The constitutionality of the Bihar Preservation and Improvement of Animals Act, 1955 and Uttar Pradesh Prevention of Cow Slaughter Act, 1955 was challenged as it prohibited such practices. It was argued that the sacrifice of cows was a religious practice among Muslims and is a religious tradition under Islam.
- 24 This transformation of the test is not often noted. The basis, and at one level, the justification, for this test has been a statement on Dr Ambedkar during the Constituent Assembly Debates: 'There is nothing extraordinary in saying that we ought to strive hereafter to limit the definition of religion in such a manner that we shall not extend it beyond beliefs and such rituals as may be connected with ceremonies which are *essentially religious* ... I do not see why religion should be given this vast, expansive jurisdiction as to cover the whole of life and to prevent the legislature from encroaching upon that field. After all what are we having this liberty for? We are having this liberty to reform our social system, which is so full of inequalities, discrimination and other things which conflict with our fundamental rights' (added emphasis): See the Constituent Assembly Debates, 1989: 507–8. *Shirur Mutt-Ratilal-Devaru* did use the test to determine whether the practices were 'essentially' religious. But in cases like the *Cow Slaughter* case, this has been changed to 'essential to the practice of religion' and thus obligatory, although this significant difference has not been observed: Jacobsohn, 2003: 98–9.
- 25 For similar methodology of the court, see *Ram Prasad Seth v State of UP* MANU/UP/0133/1957, where the court upheld a statute prohibiting polygamy. It was argued that, under the Hindu religion, a son is necessary for salvation. The court held that polygamy was not obligatory, as adoption in such cases is an available option; see para 7. Note that the court could have adopted Chagla CJ's approach by identifying the enactment under 'social welfare and reform'. For other *Cow Slaughter* cases, see *State of West Bengal v Ashutosh Lahiri* AIR 1995 SC 464; *State of Gujarat v Mirzapur Moti Kureshi Kassab Jamat* AIR 2006 SC 212. Also see *Jagdishwara v Police Commissioner, Calcutta* (1983) 4 SCC 522.
- 26 As on other occasions noted above, Verma J bases his opinion on pre-constitutional practice. Importantly, the Justice does not fail to add that '[p]laces of worship of any religion having particular significance for that religion, to make it an essential or integral part of the religion, stand on a different footing and have to be treated differently and more reverentially': at 82. Would that mean the Hindus have a fundamental right to the building and preservation of the Ayodhya temple, as it is allegedly the birthplace of Lord Rama, but Muslims cannot assert that right as it is not as significant to them as to the Hindus? For a general look at the specific controversies in this case, see Parikh, 2005. For a discussion of what controversies are presented by the rise of the Hindu Right in India, see Crossman, Brenda and Kapur, 1997.
- 27 This seems to be the case from the start of the constitutional polity itself. See Galanter's scathing critique of Smith's book immediately after its release (1965). Also see Flint, 1965, and a reply to this criticism in Smith, 1968: 200. Nevertheless, there seems to be constant effort to fit the peculiar and unique character of the relationship between temporal and religious authorities in traditional societies into the mould of either 'religious' or 'secular': Whitecross, 2007. For another outdated attempt at 'reintroducing' secularism in India, see Yildirim, 2004.
- 28 Also see *Ahmedabad St Xaviers College Society v State of Gujarat* (1974) 1 SCC 717 at para 139: 'The Constitution has not erected a rigid wall of separation between the Church and the State. It is only in a qualified sense that India can be said to be a secular state. There are provisions in the Constitution which make one hesitate to characterise our state as secular. Secularism in the context of our Constitution means only an attitude of live and let live developing into the attitude of live and help live' (per Matthew and Chandrachud JJ). See also Galanter, 1997: 167.
- 29 Constitution of India, 1950, arts 15 and 16. See *Indra Sawhney v Union of India* (1992) Supp (3) SCC 217. In this context, for the complexities offered by Indian secularism, see Baxi, 1999b: 212–13.
- 30 Secularisation has been defined by Bryan Wilson, as 'the process whereby religious thinking, practice and institutions lose social significance': Wilson, 1966; Wilson, 1985.

- 31 The introduction of 'essentiality' has not stopped the court from restricting religious practices while purely relying on the textual exceptions to religious freedom, for example, of public morality, health and order, even in those cases where it could be easily established that the said practices were neither 'essential' nor 'obligatory' under the doctrine of that particular religion. See *Ramji Lal Modi v State of Uttar Pradesh* AIR 1957 SC 620; *Sant Das v Babu Ram* AIR 1969 All 436; *S Veerabhadaran Chettiar v EV Ramaswamy Naicker* AIR 1958 SC 1032; *Ghulam Abbas v State of Uttar Pradesh* (1984) 1 SCC 81; *Abdul Jalal v State of Uttar Pradesh* (1984) 2 SCC 138. For other such instances, see Mansfield, 1989: 205.
- 32 Here I use the theoretical underpinnings suggested by Upendra Baxi, when he suggests these three instances of 'State Formative Practice', engulfing the idea of the Constitution: Baxi, 1999a; Galanter, 1997: 167.
- 33 The Supreme Court in *Kesavananda Bharti v State of Kerala* (1973) 4 SCC 225, in a highly politically charged environment, had declared the Constitution to be unamendable beyond what it called the 'basic features of the Constitution': Baxi, 1985. It is noteworthy that even in *Bharti's* case, the Supreme Court declared 'secularism' to be a part of the basic structure of the Constitution. See *Kesavananda Bharti* at 292 per Sikri J, at 582 per Shelat and Grover JJ.
- 34 For Sathe, 2003: 98, the court was performing a 'political role'. The court, I suggest, performs a political role in all cases of adjudication, especially constitutional adjudication.
- 35 There are different issues which are raised in the Hindutva cases. See *Ramesh Yashwant Prabhoo (Dr) v Prabhakar K Kuntel* (1996) 1 SCC 130; *Manohar Joshi v Nitin Bhau Rao Patil* (1996) 1 SCC 169; *Ramchandra K Kapse v Haribansh R Singh* (1996) 1 SCC 206. Though these questions are outside the pale of this article, one thing that needs to be clarified is that in the Hindutva cases, the court never sanctioned the involvement of religion in politics or law per se. The impact of the judgments is more to deal with the way the court, *allegedly*, read Hindutva to be Hinduism, and thus legitimised, to a huge extent, the claims of the Hindu right in India.
- 36 In fact, the Constituent Assembly realised the need for such intervention, and also realised that the inclusion of the word, 'secular' to define the Indian Constitution may pose a threat to such interventions.
- 37 See *Minerva Mills Ltd. v Union of India* AIR 1980 SC 1789. Also see Gajendragadkar J's statement in *Yagnapurushdasji* at para 58: '[It should] always be remembered that social justice is the main foundation of the democratic way of life enshrined in the provisions of the Constitution'. Smith writes that the nature of Hindu religion, as an unorganised and decentralised creed, makes an internal movement of social reform impossible. See Smith, 1963: 126 at 231. Also see the description of this reservation in Galanter, 1997: 250. Gandhi may have proven, to a huge extent, the inaccuracy of the statement.
- 38 In the early years of the Constitution, there were opinions that saw this state intervention, including abolishment of untouchability under art 17, as not being consistent with the concept of a secular state: Luthera, 1964: 108. But this opinion has been rejected, more so by the judiciary itself by indentifying the polity as secular.
- 39 For a similar account of the nature of secularism-adjudication, see Gajendragadkar. 1966: 82: 'In substance, then, Indian *secularism seeks to harmonise* the legitimate claims of religion and the legitimate claims of the State' (added emphasis).
- 40 He says: 'I use the term *ameliorative secularism* to describe a model of the secular constitution as a conceptual projection of the multifaceted character of Indian nationhood. It is a term broad enough to encompass the layered meanings of Indian nationalism, including both its commitment to social reform and its mooring in rival and contentious religious/cultural traditions of people long burdened by the inequities of religious based hierarchies, but also embodies a vision of intergroup comity which fulfilled necessitates cautious deliberation in the pursuit of abstract justice'. See Jacobsohn, 2003: 94.
- 41 Galanter, 1997: 249–55. According to Galanter, '[a] secular State ... propounds a charter for its religions; it involves a normative view of religion. Certain aspects of what is

claimed to be religion are given recognition, support, and encouragement; others are the subject of indifference; finally, some are curtailed and proscribed. *Religion, then, is not merely a datum for constitutional law, unaffected by it and independent of it. It is, in part, a product of that law*' (added emphasis).

- 42 For Galanter, 1965: 182, this process intends to strip religion of socio-legal aspects to make it a private faith and worship, of which he is an antagonist.
- 43 These attempts of the court contributed to what Luther Copeland, 1967, called 'neo-Hinduism', though he does not analyse the role of the judiciary in this development. Although Copeland did not note this, all his instances were an internal critique of Hindu religion, coming from within the society, either as the result of impressions of the West, or as an internal dialogic process started by Gandhi.
- 44 I use this phrase to describe adjudication of religion in the secular courts of law. What distinguishes adjudication on personal laws from secularism-adjudication is the predominant political and policy undertones of the later.
- 45 On the Gandhian mode of dissent, see Gandhi, 1963; Nandy, 1987; Nandy, 2000.
- 46 On the nature of deliberation and cultural-critique of Gandhi, see Parekh, 1999, especially *Chapter 7 Discourse on Untouchability* at 228.
- 47 Galanter, 1997: 253–6, himself raises doubt with respect to the legitimacy, and efficacy, of what I have called an internal critique.
- 48 See Constitution of India, 1950, art 44. This provision is in Part IV of the Constitution, which deals with Directive Principles of State Policy. These provisions, though enforceable in the courts of law, are fundamental in the running of the country, according to art 37.
- 49 *Sarla Mudgal* at 17: 'A second marriage by an apostate under the shelter of conversion to Islam would nevertheless by [sic] a marriage in violation of the provisions of the Act by which he would continue to be governed so far as his first marriage under the Act is concerned despite his conversion to Islam. The second marriage of an apostate would, therefore, be illegal marriage *qua* his wife who married under the Act and continues to be Hindu'.
- 50 Perhaps this is why *Shah Bano* managed to create much more of a furore over the court's methodology than *Sarla Mudgal*. See generally for the *Shah Bano* controversy, Engineer, 1987; Lateef, 1990; Narain, 2008: 10.
- 51 See Derrett and Duncan's (1959: 38) criticism of the court for ignoring the 'customs and beliefs of people', while relying exclusively on orthodox and literary sources.
- 52 Justice Gajendragadkar seems to interpret the jurisprudence of arts 25 and 26 in this manner. See Gajendragadkar, 1966: 82.
- 53 See *Lily Thomas v Union of India* (2000) 6 SCC 224, holding that the second marriage solemnised under Muslim law by a Hindu convert infringes the fundamental rights of the Hindu wife. See also *Rev Stainnislav v State of Madhya Pradesh* AIR 1977 SC 908, holding that there is no fundamental right to convert others to one's religion, as freedom of conscience has been given to all religious communities. This is a highly controversial case, and this position of the court has added fire to the existing controversy regarding conversions in India. For a comment on the case, see Bhartiya, 1977. Generally on the conversion controversy, see Needham and Rajan, 2007: 333–71. See also *Church of God (Full Gospel) in India v KKRMC Welfare Association* AIR 2000 SC 2773, holding that the community in question did not have a fundamental right to use loudspeakers at the time of prayers, as no religious practice can be protected that affects the rights of others. Also see *Acharya Maharaj v State of Gujarat* AIR 1974 SC 2098.
- 54 Chinappa Reddy J, for the minority, held that '[a]ny freedom or right involving the conscience must receive a wide interpretation and the expressions 'religion' and 'religious denomination' must, therefore, be interpreted in no narrow, stifling sense but in a liberal, expansive way': see at paras 5, 12, 20. Further, '[t]here is no knife-edge test or formula of a general application to determine or identify religion. Primarily, it is a question of the conscience of the community, how does the fraternity or sodality regard itself, how do the others regard the fraternity and sodality': at para 20.

- 55 For example, in the *Shirur Mutt-Ratilal-Devaru* trial, followed in *Sheshammal v State of Tamil Nadu* (1972) 2 SCC 11; *ER-J Swami v State of Tamil Nadu* AIR 1972 SC 1586 at 1593.
- 56 For the ‘randomness of the enquiry’, see Dhavan, 1987: 223. Also see Rao, 1963. As Rajeev Dhavan notes, the courts have mechanically cited *Shirur Mutt* and found their own routes of the determination of essentiality of a practice, sometimes satisfactorily, and sometimes superficially, and sometimes without any inquiry whatsoever.
- 57 See *United States v Seeger* 380 US 163 at 164–5 (1965); *Welsh v United States* 398 US 333 (1970). Even though such cases are not cases of constitutional rights adjudication, I propose that this is the approach that the Indian courts must adopt in order to secure protection for freedom of religion under the Indian Constitution.
- 58 *Welsh v United States* 398 US 333 at 339–40 (1970). Also see *Gillette v United States* 401 US 437 (1972).
- 59 See *United States v Ballard* 322 US 78 (1944). Of course this methodology does create problems of a different nature, say in the case of *United States v Kuch* 288 F Supp 429 at 445 (DDC 1968), where drug use was allowed because of religion. But these cases will be irrelevant in India, as there are explicit restrictions in art 25, and the court can restrict such activities on the basis of the textual exception of ‘public morality’ or ‘public health’.
- 60 *Sherbet v Verner* 374 US 398 (1963); *Franzee v Illinois Employment Security Department* 489 US 8229 (1989).
- 61 See *Thomas v Review Board of the Indiana Employment Security Division* 450 US 707 (1981). Here it was held that the ‘courts are not arbiters of scriptural interpretation’ and thus what constitutes religious belief is left to the believer.
- 62 There seems to be support for the position that ‘religion’ under arts 25 and 26 may be construed differently, for example, while ‘religion’ under art 25 may be construed much more broadly than ‘religion’ (in a denominational sense) under art 26. For example, MP Singh, while commenting on the *SP Mittal* case, writes that the position of Chinnappa Reddy J that ‘religion’ under art 25 should be construed widely ‘leaves the choice to the individual to decide what he considers to be the matters of ultimate concern for himself and for the society’: Singh, 2006: 208. Another leading commentary states: ‘A practice to be religious within the meaning of art 25(1) need not be adopted by all members of a religion and it cannot be denied if it is shown to be performed as an article of faith by a religious denomination. The wordings in art 25 do not refer to a religion but to religion without qualification. The absence of the word a means that reference to the Article is to the religion in general’. See YV Chandrachud et al, 2008: 3462; De, 2000: 769.
- 63 Chinappa Reddy J himself expresses his disregard for religion at a previous occasion. But this does not stop him in this case from upholding the beliefs of the petitioners. See *SP Mittal v Union of India* AIR 1983 SC 1 at 20–1. For his views on secularism and freedom of religion, see Reddy, 2008: 150–72.

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