

SECULAR AND PLURAL: BASIC STRUCTURE AND THE CONSTITUTIONAL MANDATE

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Abstract

Ever since the Supreme Court enunciated the 'basic structure' doctrine with secularism as a core and inviolable principle, the latter has been a constant point of reference for judgments relating to religion and religious freedom. Yet, as we read these decisions we are confronted with a range of diverse interpretations of what secularism entails; in particular, what is meant by 'no discrimination on religious grounds' and 'religious neutrality'. These divergent meanings surface because another critical principle that shaped the discussions on Fundamental Rights, and the political imagination of the Constituent Assembly, namely, pluralism, is left out of the equation.

Pluralism, and a pro-diversity perspective, which the Constitution embraced, needs also to be seen as a part of the basic structure and placed alongside secularism as a distinct principle especially when we are dealing with matters of religion - be it, religious freedom, non-discrimination on religious grounds, religious neutrality or religious practices. Without bringing the principle of pluralism, secularism may lead us down different lanes, confused and rudderless, meandering too far from the constitutional mandate.

Keywords: secularism, pluralism, religious neutrality, essential practices, non-discrimination

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Introduction

A remarkable feature of the Supreme Court judgment in the Kesavananda Bharati case¹ was that it identified secularism as a part of the ‘basic structure’ of the Indian Constitution long before the term secular was formally inserted in the Preamble. Although India was frequently identified as a secular state in the political and public discourses of the time, the Supreme Court judgment bestowed a formal recognition and legitimacy to this representation of the Indian polity. Since then, in innumerable cases (running into thousands), the Courts have invoked ‘secularism’ while adjudicating a wide range of issues dealing with religion, social identities and related constitutional issues.

In these recurring references, secularism is identified variously as religious neutrality (the state will not have any religion of its own and will not be aligned with any religion), freedom of conscience, *dharmanirpekshata*, *panthnirpekshata*, *sarva dharma sambhava*, indifference to religion and caste identity, uniform and equal/identical treatment, no-discrimination on grounds of religion, tolerance, and at times even, humanism. In addition to it, Indian secularism is differentiated from its western counterpart, and occasionally a distinction is made between secularism and secularization. The latter is identified with a steady decline of religion in social and individual life, while secularism in India

¹ Kesavananda Bharati Sripadagalvaru v State of Kerala, 1973 (4) SCC 225

is presented as not being anti-religion. Instead, it is observed that India is both a religious society and a secular state, and these elements go together in this democracy.

These conceptions of secularism, or more precisely, Indian secularism, are frequently drawn from the texts of well-known political analysts (D. E. Smith, Granville Austin are a familiar point of reference) and leaders, such as, Gandhi, Ambedkar, Radhakrishnan. Several judgments acknowledge this and quote from these writings to make their point. The difficulty, however, is that the meaning of secularism that is culled from these sources points us in different directions. That is, there is a dissonance among them and along with it, ambiguities and silences that often go unattended. If secularism is a core principle of the Constitution that cannot be amended or altered, then we must have some clarity and agreement about what would constitute the destruction or the erosion of this principle, so that appropriate action can be taken to check it.

Discussions about the meaning of secularism also need to take on board another principle that was central to the political imagination that shaped our Constitution, namely, pluralism. Without bringing in the principle of pluralism, and placing it alongside secularism, we cannot expect to understand the constitutional mandate or affirm its intent. Indeed, without acknowledging the centrality of pluralism as a value, we cannot hope to minimize the contrary pulls that currently mark the legal and judicial readings of secularism.

Court judgments do, at times, point to the cultural and religious diversity that has existed in India. However, acknowledging this fact is not enough, for pluralism is not simply a descriptive category; it does not merely point to the presence of many different languages, traditions, and cultures. As a political ideal, pluralism values diversity and asks us to supplement our idea of equality or *same treatment* for all persons by *treating people belonging to different communities as equal*. These two different framings of equal treatment take us down different paths, and this is what has happened even in legal pronouncements.

To underscore this point, the paper begins by drawing attention to the multiple, and often contrary, readings of secularism that we find in the pronouncements of the Courts, including the Supreme Court of India. What follows is not an exhaustive account of the judicial discourse on secularism, but it is indicative of the issues that need to be addressed in relation to the principle of secularism. Reflecting on the divergent conclusions reached by the Courts, and at times, by the same Court, it makes a plea for considering pluralism as a distinct principle that must be placed alongside secularism and not simply subsumed under it. Secularism has been acknowledged as a basic constitutional principle, but as the verdicts of the Courts reveal it is not a sufficient guarantor of the plural and diverse fabric of India. Treating people belonging to different communities *as equal* and protecting their freedoms requires that pluralism must also be seen as a part of the basic structure of the Constitution and the two principles – secularism and pluralism – be read together to affirm the constitutional mandate and intent.

The Idea of Non-Discrimination: Secular and Pluralist Trajectories

When the Courts invoke the principle of secularism they speak of non- discrimination², no-distinction/discrimination on grounds of religion³, same treatment for all, religious neutrality and impartiality⁴. Although these terms appear similar and even interchangeable, they are imbued with different meanings. Non-discrimination on grounds of religion is often read as treating all persons alike, in a uniform and identical manner, by setting aside considerations of religion and caste⁵. The religious identity of a person is said to be “immaterial”⁶ – something that must not be factored into the decision. This idea of being impartial and neutral is at times extended further to argue that the secular (and neutral) state must have “no religion” of its own⁷ and religion should not be intertwined with activities of the state⁸. More

² The Bihar Staff Selection Commission vs Shashi Bhushan Yadav on 7 November, 2022, available at <https://indiankanoon.org/doc/126405400/>

³ Sanjay Kumar Singh vs State Of Rajasthan And Ors on 24 July, 2012, available at <https://indiankanoon.org/doc/88468711/>; B. Archana Reddy And Ors. vs State Of A.P., Rep. By Its Secretary, Law ... on 7 November, 2005, available at <https://indiankanoon.org/doc/1848048/>; The Trustee vs State Of Kerala on 24 January, 2020, available at <https://indiankanoon.org/docfragment/82069459/>

⁴ Ziyauddin Burhanuddin Bukhari v. Brijmohan Ram Das Mehra, 1976 2 SCC 17

⁵ Often the judges speak of creating a “unified and cohesive” or a casteless society, (Indira Sawhney Etc. v. Union of India and Ors., AIR 1993 SC 477) and “eradication of all attitudes and practices derived from or connected with religion which impede our development and retard our growth into an integrated nation” (Dr M. Ismail Frauqui And Ors. vs Union Of India (Uoi) And Ors AIR 1995 SC 605).

⁶ S.R. Bommai vs Union Of India, AIR 1994 SC 1918

⁷ Ashwini Kumar Upadhyay vs Union Of India, 2023 SCR (3) 184; M.K. Sanoo vs State Of Kerala on 10 August, 2001, available at <https://indiankanoon.org/doc/1598546/>

⁸ State of Karnataka vs. Dr. Praveen Bhai Thogadia, 2004 (4) SCC 684; Dr. Surbahmaniam

recently, the Supreme Court read non-discrimination and neutrality to imply that the same principle be applied to all (that is, to people from different communities)⁹. This was another way of treating everyone alike, except that the principle was not spelt out in advance; it merely maintained that the same measure be applied to all groups in the same context. If, for instance, religious symbols are not permitted for one community, then the same should be held for others. If one educational institution is free to frame its curriculum, then similar freedom should be given to others.

There are a few instances where secularism and non-discrimination are associated with extending “equal respect” to all religions, being tolerant¹⁰ and treating all religions with equality. Often a distinction is made between secularism and secularization; the latter indicating an anti-religious attitude, which is then differentiated from Indian secularism, which accepts the value of religion and the presence of God.

A striking example of these varied readings of secularism is the recent decision of the two-member bench of the Supreme Court on the issue

Swamy vs State Of Kerala on 27 January, 2011, available at <https://indiankanoon.org/docfragment/1816970/>; available at <https://indiankanoon.org/docfragment/631213/>

⁹ Supreme Court of India, Special Leave Petition (Civil) Diary No(s). 34086/2024.

¹⁰ To give a few examples: Justice Ahmadi in *S.R. Bommai vs Union Of India*, AIR 1994 SC 1918; Justice Dhulia in *Aishat Shifa v. The State Of Karnataka & Ors*, [2022] 5 SCR 426; also, see, *Mohan C.Lazarus vs State Rep.By* on 5 February, 2021, available at <https://indiankanoon.org/doc/123318844/>. There are a number of other cases that speak of *sarva dharma sambhava* and tolerance to speak of the co-existence of religions peacefully in India and the ancient Indian philosophies. See, *Dr. M. Ismail Faruqui Etc, Mohd. Aslam, ... vs Union Of India And Others*, AIR 1995 SC 605A

of hijab ban by the state of Karnataka (*Aishat Shifa vs The State of Karnataka*, 13 October 2022). Justice Gupta saw uniformity to be the definitive element of secularism: it involved *no discrimination between citizens on religious grounds* and, “...rising above all differences of religion”, “securing the good of all citizens irrespective of their religious beliefs and practices...” (Justice Hemant Gupta, emphasis added)¹¹. From this conception of non-discrimination and religious neutrality, he concluded that “...secularism is applicable to all citizens, therefore, permitting one religious community to wear their religious symbols would be antithesis to secularism”¹². From the many judgments that Justice Gupta quoted as precedents, he was not alone in associating secularism with setting aside considerations of religion and freeing the individual from the shackles of religion and other identities so that s/he emerges as a citizen rather than a member of a community. The task of a secular state is to “bridge the gap between different sections of the society and to harmonize the relationship between the citizens”¹³ and this requires eschewing all considerations of faith and belief.

Justice Sudhanshu Dhulia, on the other hand, foregrounded tolerance as the key element of what it means to be secular. Religious neutrality, to him, meant being tolerant of plural and diverse practices; letting people live by their individual beliefs. “[S]ecularism ... is susceptible

¹¹ *Aishat Shifa v. The State Of Karnataka & Ors*, [2022] 5 SCR 426, p. 506

¹² *Ibid.* p. 541

¹³ *Ibid.* p. 507

to a positive meaning that is developing and understanding and respect towards different religions”¹⁴. Respecting other religious beliefs, or not judging them or their validity, was, in this perspective, key to being neutral.

In a reasonably similar case, involving a ban on hijab, cap, badges, by a private college in Mumbai, a division bench of the Supreme Court saw religious neutrality as implying being neutral between religions: that is, either banning all religious symbols, such as, tilak, bindi, etc. or none at all¹⁵. Singling out just a few ostentatious and visible symbols, which overwhelmingly affected members of one community more than others, constituted a form of discrimination - something that violates the principle of secularism, and religious neutrality.

These are just a few relatively recent examples where neutrality and no discrimination on grounds of religion (ideas most associated with secularism) were read differently, and this yielded different conclusions and verdicts.

The Supreme Court has a special place in the institutional fabric of a democracy not merely for its role in the system of checks and balances. Rather, its significance lies in bringing in a different rationality. While it is the will of the majority (as represented in the party/parties which form the government) that shapes legislative and executive action, the Courts are expected to invoke reason. The will of the majority can take

¹⁴ Ibid. p. 574

¹⁵ Zainab Abdul Qayyum Choudhary vs Chembur Trombay Edu. Society's, N G ... on 26 June, 2024, available at <https://indiankanoon.org/doc/131938484/>

many different forms: it can be made and remade in pursuit of certain political ends, while reason is expected to rise above those contextual constructions. It is questionable whether an abstract and universal reason is available to anyone, even honourable judges, however, the aspiration of the Courts is to be universal, and to offer reasons that stand the test of time: reasons that can act as guiding principles in a given situation, as well as those that may come before it at a later date. In the absence of an abstract universal reason, they draw upon the rationality embedded in the Constitution to reach the right decision.

In the cases mentioned above the judges offered detailed reasoning to support their judgment, and yet, they reached very different conclusions. It would be a mistake to say that some among them understood religious non-discrimination correctly while others did not. The issue is not of correctness or what is the right meaning of secularism. As was noted earlier, Justice Gupta (in the 2022 Aishat Shifa case) and the Division bench (in the 2024 Zainab Abdul case) read religious neutrality the same way. Both associated it with no discrimination on grounds of religion. In asking the question –“Will you say that somebody wearing ‘tilak’ or ‘bindi’ will not be allowed”¹⁶ - the presiding judges were invoking the idea of no discrimination on grounds of religion, albeit for them, religious neutrality meant applying the same principle to all religious groups. The response from the State could easily have been in the affirmative (a response that often comes

¹⁶ Tribune News Service, ‘Will you ban girls wearing tilak or bindi: Supreme Court partly stays Bombay High Court verdict upholding ban on hijab/burqa/niqab on college campus’, *The Tribune*, August 9, 2024

from the French state when it invokes the principle of *Laïcité*), and it would have satisfied the neutrality (read, no distinction) test. This altered response from the state may well have yielded a conclusion similar to the one arrived at by Justice Gupta.

The point is, non-discrimination and neutrality are open to multiple and different interpretations, and we cannot escape these tensions and contrary meanings without bringing in an additional principle - namely, pluralism/ diversity. When secularism is taken as a standalone principle, religious non-discrimination (no discrimination on religious grounds) frequently pushes towards uniformity, no distinction and no reference to identities. When we supplement it with the principle of pluralism, we move easily from identical treatment (treating everyone equally) to treating people belonging to diverse communities *as equal*¹⁷. Adding pluralism to the equation also expands the idea of *equal treatment* to include *equal respect and equal consideration* for all. It compels us to ask if members of different communities are equally placed (and some are not facing greater hurdles) when it comes to accessing the same opportunities and resources.

Let me put this another way. The Constitution, particularly Chapter Three that deals with Fundamental Rights, embodied, along with liberty, equality, and justice, secularism and pluralism as basic values. Secularism expressed a commitment to uphold the basic rights of all

¹⁷ The distinction between treating everyone equally (identically) and treating them as equal draws upon the work of Ronald Dworkin. See. R. Dworkin, *Taking Rights Seriously*, Cambridge, Massachusetts: Harvard University Press, 1977.

citizens and do away with social and legal barriers that prevent citizens from enjoying the rights that are granted to them. In this respect, it promised that no one will be discriminated against on the grounds of their religion or caste, or any other social identity. State religion had been, elsewhere in the world, a source of unequal treatment for those who did not endorse the official religion of the state, hence, secularism affirmed that the state will have no religion of its own and will also not be aligned with any religion. A commitment to pluralism, on the other hand, was a promise that no religious community will be expected to assimilate into the culture of the numerical majority; as such they will have the right and the opportunity to live in accordance with their beliefs and practices. Pluralism, or a pro-diversity framework, brought in a new dimension that went beyond identical treatment for all. Non-discrimination here promised space to live in accordance with one's way of life so that different communities and their cultures continue to flourish.

There is thus a significant difference between the principles of secularism and pluralism and the path that they unfold before us. In and by itself secularism tends to push for primacy to individual rights and treating each individual as an autonomous person, and not as a member of any specific social and cultural community. A commitment to pluralism and diversity brings in the concern for equal treatment for all groups and some degree of autonomy for them to define their way of life and live by it. Hence, it sees individuals not just as citizens but also as members of diverse communities, and compels us to ask if our actions, policies, and decisions disadvantage or place a

disproportionately higher burden on members of some communities, especially when it comes to observing one's beliefs and practices. Pluralism pushes the idea of non-discrimination and neutrality in a different direction. The Constitution placed the commitment to secularism alongside pluralism, so that equality and non-discrimination can take on a richer, more complex and layered meaning and not flattened to ensure sameness in every sphere and every respect, particularly in matters relating to religion and culture.

Balancing Secularism with Pluralism

The founding members of our Constitution were committed deeply to both the principle of secularism and the principle of pluralism. The challenging task before them was to find a way to balance these two values. If secularism privileged individual rights trumping other considerations, pluralism leaned towards the accommodation of diverse beliefs and practices. Coming with the promise of non-assimilation, pluralism pushed for some degree of autonomy for communities to continue with their ways of life. Articles 25 and 26, along with 29 and 30, were remarkable illustrations of how these two orientations can, and should be, balanced.

Freedom of conscience and practice (Article 25) and freedom to manage religious affairs (Article 26) gave communities and groups the space to govern themselves. In a way it placed religion – religious beliefs, practices, and affairs - in a separate category where individuals enjoyed a high degree of freedom to manage and regulate their own affairs and live in accordance with their self-defined way of life. To

ensure that a given or chosen way of life did not negate the basic freedom of others (including others within the community), the state could intervene and legislate to protect the vulnerable. This was a way of balancing secularism (the concern for basic individual rights) with protection for diverse ways of life.

The commitment to protect cultural diversity was expressed even more stridently in Articles 29 and 30. The former gave groups the right to conserve and protect their language and culture, the latter gave minorities the right to establish educational institutions to impart education of their choice. Protection of the rights of individuals as citizens (not merely as members of communities) came in through the sub-clauses: for instance, no one could be denied admission to institutions that were partially or wholly funded by the state merely on grounds of their religion, caste, or language.

The twin principles of pluralism and secularism were thus placed side-by-side in the Constitution. If pluralism demanded that the fundamental right to equality be extended to see if individuals as members of different communities were being treated as equals, the freedom given to pursue distinct religious and cultural ways of life was also subject to secular scrutiny to ensure that pluralism does not completely override the right to be treated equally. This effort to recognize and bring together two different principles – pluralism and secularism – without privileging any in absolute terms is the defining feature of the Indian Constitution.

There has been considerable debate on the concept of secularism and the specific nature of Indian secularism. These discussions have drawn our attention to the difference between Indian and Western secularism, particularly to the fact that India did not create a firm wall separating religion from state¹⁸, nor did it restrict religion to the private domain. Religion had a public presence here, and the state could intervene in religious affairs to pursue certain values, like equality. However, what rarely finds a mention is that this idea of secularism was supplemented by a pro-diversity commitment. It recognized that the expectation in a nation-state is that different communities will assimilate, hence it gave groups the right to promote and preserve their language and culture. It also supplemented the freedom of conscience and freedom of worship with freedom of practice. This was the uniqueness of the Indian framework. It worked with the understanding that pluralism as a value brings in an additional dimension to our conception of equality. At the same time, the members of the Constituent Assembly were acutely aware that existing ways of life, observed social and cultural practices, may be exclusionary, and they may not treat all members equally. Thus, even as the community (and its way of life) was protected from external pressures, individuals were protected from internal pressures that may be placed upon them by the community

¹⁸ Although it is customary to associate the idea of separation with western notion of secularism, it is necessary to recognize that state-religion relationships take many different forms even in the west, and in many European democracies religion, in the form of the official state church, has a strong public presence and is often actively involved in shaping policies. See, Modood, Tariq and Thomas Sealy, (ed.). 2024. *Governing Religious Diversity in Global Comparative Perspective*. Oxford & New York: Routledge.

and its practices. The latter was as important as the commitment to non-assimilation and diversity.

Pluralism and the Secular Gaze

In the Constituent Assembly, the debate on Fundamental Rights was shaped by the desire to balance, on the one hand, the commitment to secularism with pluralism, and, on the other, pluralism with secularism. To take just one example of the latter: the right to profess and practice one's religion bestowed recognition to community personal laws. However, while plurality of codes, and their continuation was accepted, personal laws were not granted the status of a fundamental right, even though a proposal for this was placed before the House¹⁹. In response to that amendment, Ananthasayanam Ayyangar clarified that making some space for state intervention was only an “*enabling provision*”²⁰

“There is absolutely no provision in the Fundamental Rights that you ought to ride rough-shod over their personal law. The law of the land as it exists today gives sufficient guarantee so far as that is concerned.... My submission is that it is impracticable, for, in an advanced society, even the members

¹⁹ To use Ananthasayanam Ayyangar's words, the “double guarantee” (recognizing plural personal laws and making them a fundamental right), which would have privileged pluralism unequivocally, was not accepted (A. Ayyangar, CAD, Vol. 7, 2 December 1948, emphasis added). Ambedkar went on to argue that in a society “full of inequities, so full of inequalities, discriminations and other things ... it is ... quite impossible for anybody to conceive that the personal law shall be excluded from the jurisdiction of the State” (Ambedkar, CAD, Vol. 7, 2 December 1948)

²⁰ A. Ayyangar, CAD, Vol. 7, 2 December 1948

who belong to a particular community may desire their personal law to be changed”²¹

Hence, there must be some room for effecting change. Ambedkar, even with his concern about all-encompassing nature of religion in India, endorsed this view. He assured the members saying -

“...no one need be apprehensive of the fact that if the State has the power, the State will immediately proceed to execute or enforce that power in a manner that may be found to be objectionable by the Muslims or by the Christians or by any other community in India”²².

Secular scrutiny was considered necessary by many members. Besides Ambedkar, several women members - Rajkumari Amrit Kaur, Hansa Mehta, to mentions few - were apprehensive that protection given to religious practices might well be applied to defend such customs as, Sati, child marriage, etc. In these kinds of situations, the state could not abandon its obligation to protect the vulnerable and ensure equality for them. It is these concerns that brought in oversight, as well as intervention, by the state. Thus, secular concerns came in, but they were not intended to weaken the commitment to pluralism – something that had formed the bedrock of the entire process of constitution making.

²¹ A. Ayyangar, CAD, Vol. 7, 2 December 1948

²² Ambedkar, CAD, Vol. 7, 2 December 1948

Very early in the deliberations, the Constituent Assembly formed an Advisory Committee to discuss the Fundamental Rights of Citizens, Minorities, Tribals, Excluded and Partially Excluded Areas. A separate subcommittee was formed to discuss and address the concerns of various kinds of minorities. The commitment to pluralism was thus written into the entire process.

In recent times, separate representation is often seen as a necessary condition, or sign, of affirming the presence of diverse communities and giving voice to them. The Indian Constitution did not take that route. After much discussion, the proposal for separate representation was withdrawn by the subcommittee on minorities. Would separate representation have been a stronger guarantor of the principle of pluralism? Or would it have released the majority and their representatives from the responsibility of affirming the constitutional mandate and accommodating pluralism in the public arena? These questions are a subject of continuing debate in India and elsewhere in the democratic world, and it is not possible to do justice to them in this paper. Nevertheless, what must be stressed is that the Constitution made several provisions for recognizing diversity and ensuring that different communities can profess and practice their cultural and religious way of life. This commitment was buttressed by successive governments giving voice and representation to different communities, albeit through informal means, such as, appointments in cabinet, public institutions and other enterprises.

Religion, Pluralism and the Courts

In the post-independence period, the task of striking a balance between secular concerns and commitment to pluralism has fallen disproportionately upon the judiciary. This is not surprising as the secular gaze came in the form of policies and laws of the state, and the Courts had to determine if these actions unduly and unjustifiably infringed the space granted to the communities to live in accordance with their way of life. Whether the Courts have privileged plurality and given it sufficient weight; whether they have successfully balanced autonomy given to communities in religious and cultural matters with state regulation, are both debatable. However, there is no denying that the constitutional framework created room for adjudication by the Courts.²³

Unlike some Western democracies, most notably America, where religion is more firmly separated from state, in India, the Constitution allowed external/state intervention in religious affairs. It also differentiated between 'religious' and 'secular' affairs of religious institutions, protecting autonomy in case of the former and permitting state interventions in the latter. On both counts, the Courts were expected to adjudicate; they had to assess the justification of state action and protect the rights given to communities and groups. Hence, the Courts could not have stayed away from questions relating to

²³ A comparison is often drawn with America to argue that in a democracy the Courts should not be engaged in interpreting religion. A distance should be maintained between the two. See, Pratap B. Mehta, 'Passion and Constraint: Courts and the Regulation of Religious Meaning', in R. Bhargava (ed.), *Politics and Ethics of the Indian Constitution*, OUP, Delhi 2008.

religion and observed practices. One can, indeed, one must, ask if the Courts have given due attention to pluralism while being mindful of the concerns of secularism and equal citizenship.

Pluralism has several dimensions: the one that the founding members were most concerned with is protection against the pressure to assimilate into the dominant or one homogenized national culture. They were aware that social, religious, and cultural practices varied enormously across communities and regions. In other words, diversity existed between communities and within each community. This latter was not formally or independently recognized. However, the assumption was that this plurality would be protected through the rights given under articles 25 and 29. Freedom of conscience and the right to profess and practice (article 25) was given to “every person” and article 29 referred to “any section of the citizens ...”. These phrases addressed the plurality within cultures and communities and made space for it, even protected it.

Over the past seven decades, the Courts have been swamped with cases challenging state legislations pertaining to religious institutions and charitable trusts, along with matters relating to religious practices. Drawing boundaries to separate religious and secular affairs has proved to be an onerous task. At the outset, it appeared to be a simple affair with management of finances, properties, and assets being designated as secular affairs that could be left to the state (secular external authority) while matters relating to the performance of rituals, worship, and prayers were deemed to be religious subjects, and hence, sheltered

from state interventions. The reality, however, was more complex with many grey and fuzzy areas. The Courts had to determine if the appointment of the *mahant* or the *mathadipati* is a religious or a secular matter²⁴? Whether abolition of hereditary mahants involved infringement of religious practice²⁵? There were other more hard questions, such as, can the religious authorities perform their assigned tasks well when they have no control over the finances²⁶? Whether donations given to the *mahant* should be treated as personal property, which may be used according to his discretion, or as the property of the Trust or religious institutions²⁷, and hence, subject to secular control? On these questions (particularly regarding the appointment of *mahants*), the Courts have been inclined to place their trust in the state, accepting that the formulated laws are in the general interest and undertaken with good intentions. The sphere of religion (religious matters) has, in the process, been more narrowly defined, while the space for secular authority has proportionately increased.

²⁴ Sri Sri Sri Lakshamana Yatendru & Ors vs State Of Andhra Pradesh & Anr, AIR 1996 Supreme Court 1414.

²⁵ Pannalal Bansilal Pitti & Ors. Etc vs State Of Andhra Pradesh & Anr, 1996 SCC (2) 498; H.H. Sudhundra Thirtha Swamiar v. Commissioner for Hindu Religious & Charitable Endowments, Mysore, (1963) Supp. 2 SCR 302

²⁶ Issues relating to the constitution of the managing committee, their control over funds, use of funds emerged in many cases, leading to questions of the nature and extent of control by secular and state appointed authorities. See, Tharamel Krishnan vs Guruvayoor Devaswom Managing Committee, AIR 1978 KER 68.

²⁷ The Commissioner, Hindu Religious Endowments, Madras vs Sri Lakshmindra Thirtha Swamiar Of Shrirur Math, 1954 SCR 1005; H.H. Sudhundra Thirtha Swamiar v. Commissioner for Hindu Religious & Charitable Endowments, Mysore, (1963) Supp. 2 SCR 302

On the issue of religious practices and the pluralism that they were expected to protect, again the Courts have leaned heavily in favour of secularism (understood as sameness, no-distinction, uniformity and prevailing norms) rather than pluralism and the accompanying freedom to choose a desired way of life. In case-after-case the Courts have applied the ‘essential practice’ test; instead of accepting the freedom of individuals and groups to determine the practices they adhere to, they have asked if the practice is an essential part of religion. What is essential to the practice of religion has, in turn been decided by referring to theological texts and scriptures, thereby obviating the diversity of customary practices and local traditions.

Over time plurality of practices has taken a backseat as Courts declared animal sacrifice²⁸ or worshipping a live Cobra on *Nagpanchami*²⁹ as observances that do not constitute ‘essential practices’, and hence, can be subject to state regulation. More recently, they declared wearing a hijab or supporting a beard³⁰ as non-essential practices.

Many scholars argue that in applying the ‘essential practice test, the Courts have given themselves more authority than even religious heads³¹. Others have asked if the Courts are the “right forum” for

²⁸ Ramesh Sharma V. State Of Himachal Pradesh & Ors., 1. CWP No. 9257 of 2011. Available at <https://hpsja.nic.in/JAcaselawAS.pdf>

²⁹ Gramsabha Of Village Battis Srirala Petitioner V. Union Of India, [Online] Available at <https://www.casemine.com/judgement/in/58117e8e2713e1794789c8a1#:~:text=It%20is%20contended%20that%20capturing,Article%2025%20and%2026%20of>

³⁰ Mohammed Zubair Corporal No.781467-G vs Union Of India & Ors, AIR 2017 SC 107

³¹ Dhavan and Nariman, ‘The Supreme Court and Group life, Religious Freedom, Minority Groups And Disadvantaged Communities, in B. N. Kirpal, H. Desai, S. Gopal et.al. (ed.), *Supreme But not Infallible: Essays in Honour of the Supreme Court of India*, OUP,

interpreting religious practices³²; whether they have the ‘competence’ to perform this task³³. On a few occasions, these doubts have also been expressed by judges themselves. In the Sabarimala case³⁴, Justice Malhotra argued that it is not for the Court to determine “the validity of religious beliefs and practices”; indeed, this should be “outside the ken of the courts”. “The issue of what constitutes an essential religious practice is for the religious community to decide”³⁵. Similarly, in *Aishat Shifa vs The State of Karnataka*, Justice Dhulia argued that “There may be diversity of views within a religion and to choose one over others, may not be correct”. The Courts should therefore “steer clear from interpreting religious scriptures”; and “it is inappropriate for this Court to enter upon an area of theology and to assume the role of an interpreter of the Hadees”³⁶. However, expressions of this kind are few and far between. The norm has been the application of the essential practice test.

The Constitution had shown another, different path for balancing pluralism with secular concerns. On the question of religious and

Delhi, 2000,

³² Galanter, Marc. “Hinduism, Secularism, and the Indian Judiciary.” *Philosophy East and West*, vol. 21, no. 4, 1971, pp. 467–87. JSTOR, <https://doi.org/10.2307/1398174>. Accessed 15 May 2025; also see, J.M. Derrett, *Religion, Law and the State in India*, Faber and Faber, London 1968; Dhavan, Rajeev. “Religious Freedom in India.” *The American Journal of Comparative Law*, vol. 35, no. 1, 1987, pp. 209–54. JSTOR, <https://doi.org/10.2307/840167>. Accessed May 19, 2025.

³³ Faizan Mustafa and Jagteshwar Singh Sohi, ‘Freedom of religion in India: Current Issues and Supreme Court Acting as Clergy’, 2017 *BYU Law Review*, 915 (2018)

³⁴ *Indian Yung Lawyers Assn. v. State Of Kerala* [2018] 9SCR 561

³⁵ *Indian Yung Lawyers Assn. v. State Of Kerala* [2018] 9SCR 561, p. 860

³⁶ *Supra* n. 11, p. 555-6

cultural diversity, pluralism was to be the norm; however, if a practice clashed with another fundamental right, such as the right to equality, then intervention and regulation were justified. To explain this further: Article 25 identified freedom of conscience and practice as a fundamental right. It is sub-clause 2 (a) and (b) of the main right that referred to state intervention, and even here, as Ambedkar explained, it was not necessary or “obligatory” on the part of the state to intervene. These sub-clauses spoke of social reform and gave the example of opening temples and public places to all, indicating that the purpose of state legislation/secular gaze was the pursuit of equality; more specifically, of minimizing exclusion.

If we look at the constitutional intent and walk down the path it laid out for us, then individuals and communities must have the right to live in accordance with their chosen religious practices, so long as these do not clash with basic rights, liberty and equality, of others or impinge upon public order. Whether a person chooses to sport a beard or feed/worship snakes on *Nagpanchmi*; whether they enter a specific place of worship or in accordance with their conviction show respect while standing outside³⁷, must be aspects of freedom of conscience, even if we find them unappealing or incomprehensible.

Courts would still need to adjudicate to see if the practice infringes basic rights of other persons or poses the threat of irrevocable harm

³⁷ Samuel Kamalesan vs Union Of India on 30 May, 2025, available at <https://indiankanoon.org/doc/119072309/>

to them. Judgment is unavoidable, and so are disagreements on these fundamental issues that call for boundary setting and balancing different, and often equally desired, values. However, one can lean on the direction that the framers of the Constitution outlined, the template they created, for balancing two deeply cherished values – secularism and pluralism.