CENSORING SECULARISM:

THE EXISTENCE OF RELIGION, THE COURTS AND THE CONSTITUTION[1]

INTRODUCTION

India has always been the home to diversity, be in relation to language, religion or culture. However, in recent times there has also been a rise in the demand of acknowledgement of these multi-faceted identities. While states like Andhra Pradesh have managed to push for a different state carved within it on the basis of language and culture (Telangana), there are others, such as Maharashtra and Gujarat which are still demanding a bifurcation of their territories. Such demands evolve either into violent protests, as was the case in Andhra, where public property was vandalised or through other means including fasts unto death. The protests and debates surrounding these demands have a two-fold effect on the public. Besides acting as a means to express one's opinion, they also help in the development and realisation of identities for individuals in the public who are unaware. The recent surge in such public demands could be partly attributed to the growing knowledge and awareness of one's distinct identity.

Yet another way to observe the rise in realisation of these multiculturalist identities is by looking at the judiciary, the issues that are debated upon in the court of law and the solutions offered by it. Scholars have regularly pointed out that in secular states the involvement of courts in religious matters is commonplace[2]. This is because religion is, in part, constituted by means of law, but simultaneously as something that is constituted to stand at arm's length from the law.[3] The entanglement of law and society thus, is commonly understood as secularism. Hence, the problems the society, or an individual from a society faces in relation to the religious norms reflect on how the religion has evolved to be encompassed by the individual's or community's identity. Similarly when a certain judicial decision awards damages to a person who would otherwise be termed to be bound by social norms, there is an acceptance to the identity that is

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[2] Gilles Tarabout, "Ruling on Rituals: Courts of Law and Religious Practices in Contemporary Hinduism." 17 SAMAJ [Online], 23 (2018). 10.4000/samaj.4451

[3] Lambek, Michael "Interminable Disputes in Northwest Madagascar.", in F. von Benda-Beckmann, K. von Benda-Beckmann, M. Ramstedt, and B. Turner, Religion in Disputes: Pervasiveness of Religious Normativity in Disputing Processes, edited by. New York: Palgrave MacMillan (2013).

fostered. The rise in judicial expansion can also be traced to be proportional to the realisation of such identities.

Multiculturalist identities may refer to the identity borne due to common ethnicity, class, religion and so on. For the purpose of this study the focus shall be centred on religious identities.

Secularism in India has continuously suffered backlash from various religious communities for either being too weak, non-existent or 'pseudo'. However, the problem that arises with each of these allegations is that they are based on varying definitions and implications of 'secularism'. Secularism as seen through each of these views has faced an internal threat since it is believed that the conceptual and normative structure of secularism is itself terribly flawed. This research paper will be focusing on certain events that embody the rise in both, religious identities and the expansion of the judicial system and using them to test whether both (or either) are leading to a decline in the secular nature of the Indian state.
The judgements that will be used here to substantiate the rise in judicial expansion affecting the religious identities may include certain other religious denominations such as Christianity but will primarily centre on Hinduism and Islam.

RELIGION IN RELATION TO SECULARISM

Courts and identity

The fathers of the constitution sought to place the individual at the centre of the constitution and this individual free to create his identity. The courts also try to uphold this understanding of identity by acknowledging religious identity. In fact, in 1995, the Supreme Court of India even mentioned the Halsbury's *Laws of England* (1st ed. 1907) according to which "A church is formed by the voluntary association of individuals" and extended this conception to all religious bodies.[4]

Hence by this understanding of identity and religion, the two appear to be dependent on the other, but religion as one manner of identity. In order to actually understand what the constitution understands from its definition of a 'religious denomination' and religious practice as defined in Article 25 (1) it might be useful to look at the Madras v. Shri Lakshmindar Tirtha

[4] Most. Rev. P.m.a. Metropolitan. v. Moran Mar Marthoma, 1995 AIR 2001.

Swamiyar of Shri Shirur Mutt in the Supreme Court.[5] It was held that 'A religion may not only lay down a code of ethical rules for its followers to accept, it might prescribe rituals and observances, ceremonies and modes of worship which are regarded as integral parts of religion, and these forms and observances might extend even to matters of food and dress'.[6]

It is in the midst of this identity creation, that the constitution defines India as a secular nation. The earliest western notion of secularism appears to be clear—separation of the church from the state. Following the idea of secularism made popular through the American and French governments that equated the separation of religion from the state to be ideal lead is to a dead end. When the state apparatus that is charged with keeping a check on the implementation of the laws itself is creating laws that infringe and even curtail religion, this separation disappears. The constitution, even at its inception had placed certain rules that limited the power of this judiciary such that the judiciary could not legally interfere in the religious practices of a sect or culture. This was done in the spirit of protection of the identity of an individual and to uphold the idea of secularism. Religious identities that many individuals hold close to their meaning of the self are a result of such culture or religion that the state claims to be blind to.

In India this secularism is protected by the courts and the disentanglement of 'the religious' and 'the secular' which is undertaken makes use of a very powerful legal tool present in the Common Law systems, that of 'essential practices.' Ideally, a cursory glance at various articles enshrined in the constitution such as Article 15 (discrimination on basis of religion) and 25 to 28 (right to practice religion) makes one believe in the non-interference of courts in matters to do with religion. However, Indian courts use this idea of essential practices to be able to adjudicate on cases to do with social and religious norms by claiming that they fall outside the protection awarded to religion by virtue of being an 'non-essential practice'. Even in the *Shirur-Mutt* case, the interference in a non-essential practice was termed secular in nature. It was held that '[religion] should be taken in its strict etymological sense as distinguished from any kind of secular activity which may be connected in some way with religion on but does not form an essential part of it'[7]

[5] The Commissioner, Hindu Religious Endowments, Madras v..Sri Lakshmindra Thirtha Swamiar of Sri Shirur Mutt., 1954 AIR 282
[6] Ibid
[7] The Commissioner, Hindu Religious Endowments, Madras v.Sri Lakshmindra Thirtha Swamiar of Sri Shirur Mutt, 1954 AIR 282

The judiciary is free to decide which cases can be classified as essential practices and those which cannot. This awards large power in the judiciary's hand. A judgement in 1961 by Justice Gajendragadkar had tried to limit this power by defining what religious essential practices may entail. The judgement in the Durgah Committee, Ajmer and Anr v. Syed Hussain Ali even claimed that '[…] the protection must be confined to such religious practices as are an essential and an *integral* part of it and no other.'.[8] Religion can be understood in various ways but the two broad views that can be used are, those who see religion to be a result of its goals and hence primarily dependent on the scriptures, and those who see the ceremonies done to please the God as important to the religion. Most upper courts tend to take an idealistic stand and classify everything from animal sacrifice to more as non-essential practice. Courts may use sanskritised texts as evidence to opine on what religious tenets may say about a certain act or ceremony. The Constitution also imposes the duty of "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" on the State which links the religious freedom of an individual to the state.[9]

Justice Bhagwati also talked about why religious freedom cannot be absolute and needs to be delimited so the secular State could perform the historic function of confining religion to its essential sphere. Not doing so would create chaos and is necessary to bring about social reforms with a view to lifting India out of medievalism, obscurantism, blind superstition and anti-social practices.[10] The secular nature of the state as understood by the judiciary can thus be understood to interpret the religious and not to control or put a stop to it.

SECULARISM RE-DEFINED

The major question that the debates on religion give rise to is whether secularism can be said to be under threat. In order to answer this question one needs to understand the term secularism. One answer which will be re-visited in the latter half of the paper is given by Rajeev Bhargava by his understanding that there are different connotations of secularism in India and the rest of the western world. This enables us to view secularism as a response to two forms of

[8] The Durgah Committee, Ajmer and Anr vs Syed Hussain Ali And Ors, 1961 AIR 1402.
[9] Constitution of India, Article 25 (2)(b).
[10] Bhagwati, P.N. "Religion and Secularism under the Indian Constitution", (Pp. 35–49) in by R.D. Baird Religion and Law in Independent India, New Delhi: Manohar (2nd enlarged edition-2005).

institutionalised religious domination, inter and intra-religious. This way of conceiving secularism defeats the charge that secularism is intrinsically anti-religious.[11]

Unfortunately, the preliminary definition of secularism that is applied to India is based on the two commonly accepted ideal models of secularism, namely the French model and the American model.

The French model broadly holds that the state must be kept separate from religion but still retain power to interfere in it if need be. However religion can never interfere in secularism. Use of religious symbols is excluded from the public discourse. French public institution nor religion are to interfere in the domain of the other. Political discourse or ideology has no prayer or reference to god[12]. Naturally this kind of secular model leaves no room for the growth of the individual identity publically and simply seeks to draw a line between the private and the public. The citizens are expected to live their life differently in the public than the private and there are limitations to their religious discourse in the larger crowd. This kind of model when applied in the Indian context, would not just undermine the diverse nature of India but also go against the creation of the identity of the individual which is a crucial aspect of the constitution.

The idealised American model of secularism places religion and the state at par and advocates the idea of mutual exclusion. Neither the state nor any religion is allowed to interfere with each other. This model is said to be crucial to help in the equal treatment of all religions and so people are free to set up and run their own religious associations. In this model there is no means for the state to be able to propagate and ensure the existence of certain tenets when they are broken within a religion. For example, taking the example of the recent case of Triple Talaq, if this model were to be applied in India, it would make the state unable to protect the equality of women and give them no recourse.

In fact, it appears that both America and France's models of secularism evolved to tackle only one religion, namely Christianity and not to the deep diversity in religion. In such models there is a historical bias for single religion and no place for the existence of multi-religious identities.

[11] Bhargava, Rajeev "Reimagining Secularism: Respect, Domination and Principled Distance.", 48 EPW pp. 79–92. *JSTOR*, www.jstor.org/stable/24479049.
[12] Gilles Tarabout, "Ruling on Rituals: Courts of Law and Religious Practices in Contemporary Hinduism." 17 SAMAJ [Online], 23 (2018). 10.4000/samaj.4451

Hence it is necessary to look at secularism in a different way, i.e re-define it in India to understand the relationship between religion and secularism.

Secularism in India cannot be understood as it was in the west since religious diversity existed in India long before the framework of the constitution was put in place. Hence, there was no way India's democracy could ever be called a secular if it relied on a single religious denomination model. Even the framers of the constitution never intended secularism to mean the same as it did in the west since they provided articles for the protection of and individual's rights of professing and propagating religion. Indian secularism rests on the concept of moderation, where the state allows its citizens to freely practice their religion but also involves itself if it goes beyond a certain tenets described in the constitution. Individuals can also profess and propagate their religion with pride and be a part of the larger public discourse. An important element of this version of secularism is the manner in which there is no rigid boundary between the private and the public and citizens do not have to hide certain aspects of their identity. This model further allows different communities to intermix and create their own harmony. Religions can evolve, be birthed and even be broken in further sections and each of these sections are free to exist within or separated from the religion.

It is this context that has given the birth of judicial activism and expansion. Since we have now established that secularism and religion are not exclusive but dependent in the Indian context, it might be useful to understand how the legal processes such as judicial expansion plays into it.

ENTANGLEMENT OF LAW AND RELIGION: A SERIES OF JUDGEMENTS

Judicial Expansion

Before entering the realm of judicial expansion and its relation to secularism it is important to understand what these terms are actually perceived to be. Judicial activism or expansion is said to be an important asset used to protect the larger interests of the society. It has been portrayed as a positive phenomenon by the media in many cases, since they claim it is the first step towards making the judiciary and subsequently, the government for the people. While it may be easy to focus on the rosy picture of the Indian government that is being portrayed world

over, it is vital that one also looks at the other side of the debate to understand how judicial activism may not be the best step forward for democracy.

The Judicial activism and expansion debate is based on the primary section of the Indian constitution which provides for the separation of the organs of the state; namely, the legislature, executive and the judiciary. In order to examine the meaning of judicial activism, it is necessary to refer to certain provisions of the Indian Constitution relating to Amendment, Judicial Review, Fundamental Rights, Directive Principles of State Policy and the significance of Social Action Litigation (SAL) affecting the different spheres and polity. Each of these organs have proscribed functions and the system so created ensures neither is influenced by the other. The rise in judicial activism has been undermining this very structure. As per the constitution, the legislature is tasked with the framing of the laws, while article 73 outlines the extent of the executive and also gives it power to make laws. The judiciary, on the other hand, has not been given this power. It is a matter of concern that over the years this original, beneficial and unexceptionable character of the Court's activism in PIL has been largely converted into a general supervisory jurisdiction to correct actions and policies of government, public bodies and authorities.[13] Judicial activism is nothing but an expanded role of the judiciary as it encompasses an area of the legislative inactivity. It is an effort to revitalize the system through the provision of simplest, fastest and inexpensive access to individual, however it can categorically be understood as the expansion of the judiciary in its jurisdiction and *locus standi*.[14]

As has been described earlier, the judiciary uses certain specific cases to justify and thereby expand its powers. This can be seen by taking the example of the Visakha guidelines. The Vishakha guidelines laid down by the court in Vishakha v. State of Rajasthan in 1997 for the protection of women from workplace harassment were created in contravention to the primarily accepted powers of the judiciary and falls under the ambit of expansion of jurisdiction of the same. At the time the judge was said to have selected a bold course of action which would benefit the society in the longer run. The problem that this brilliant judgement poses is that it has precedential value. The Indian legal system primarily relies on precedents for its stability and the creation of laws by the judiciary was considered a viable option after this judgement.

[13] Andhyarujina, T R, "Disturbing Trends in Judicial Activism." The Hindu, 30 Sept. 2016, https://www.thehindu.com/opinion/lead/Disturbing-trends-in-judicial-activism/article12680891.ece

[14] Semwal, M. M., and Sunil Khosla. "JUDICIAL ACTIVISM." 69 The Indian Journal of Political Science 113–126 (2008). *JSTOR*, www.jstor.org/stable/41856396.

This would go against the tenets of the separation of powers as prescribed by our constitution. While usually, laying down guidelines for the protection of women from harassment at workplace would be an issue the legislature must tackle, the judiciary while laying down its judgement, claimed that since the legislature hadn't been able to acknowledge and perform its functions, the judiciary would aid in doing so. Hence the guidelines for the protection of women were to be abided by despite the absence of a bill.

Similarly, before the Visakha case the question of locus standi i.e. what right you had to stand in the court demanding for justice was commonly brought up. Only the victim or in certain cases a close relative of the victim could bring the case in court. However, the inclusion of PIL's (public interest litigations) broadened the locus standi and NGO's or other such concerned parties were also allowed to move the court for the benefit of the society. Today PIL's are a common phenomenon that claim to help the disadvantaged but are often diluted to interfere with the power of the government to take decisions on a range of policy matters.[15]

Looking at judicial expansion through these lens only, it is easy to separate it from secularism and the debate surrounding it. However, the trouble arises when this expansion begins to touch upon and tamper with the existing religious and social laws. When one looks at the peculiar nature of Indian secularism and its relation with religion as a barricade which is porous, it does seem to hint at a different answer to this conundrum. The next two cases will be used to illustrate how and if secularism is hindered or in a crises due to the judicial decisions.

THE SABRIMALA JUDGEMENT: THE UPROAR

The Indian ruling for *Indian Young Lawyers Association* v. *The State Of Kerala on 28 September, 2018* came amidst violent protests demanding overturning of the judgement. The major problem that arose in the case was over the entry of female devotees between the age group of 10 to 50 years to the Lord Ayyappa Temple at Sabarimala (Kerala) which has been denied to them on the basis of certain custom and usage.

The societal and religious norms governing this custom were justified by saying that since the deity is in the form of a Naisthik Brahmachari young women should not offer worship in the

[15] Andhyarujina, T R. "Disturbing Trends in Judicial Activism." The Hindu, 30 Sept. 2016, https://www.thehindu.com/opinion/lead/Disturbing-trends-in-judicial-activism/article12680891.ece

temple so that even the slightest deviation from celibacy and austerity observed by the deity is not caused by the presence of such women[16].

The judgement however, set aside this justification and claimed that it would be interfering in the religious ideologies since the 'custom' was not an essential practice. It went on to claim that this law that was based on 'custom' was actually discriminatory to women. The judgement passed put forth that women had a right to religion and devotion and that 'such a relationship and expression of devotion cannot be circumscribed by dogmatic notions of biological or physiological factors arising out of rigid socio-cultural attitudes which do not meet the constitutionally prescribed tests'.[17] It is also interesting to note that the judgement pointed out the flaws in the custom and the reasoning behind it by saying that the mere sight of women cannot affect one's celibacy if one has taken oath of it. Secondly, the temple administration's reasoning that since women during menstrual period cannot trek very difficult mountainous terrain in the dense forest, especially for several weeks, also helped the judge hold that the entry to temple may be regulated and there cannot be any absolute prohibition or complete exclusionary rule.[18]

The judiciary thus placed religious or creation of multiculturalist identity to be of lessor importance than the protection of certain fundamental rights such as equality especially when the former appeared to have flaws or no reasoning for certain customs. Bringing in the idea of the porous barricade, it is easy to understand how this expansion of judiciary clashes with the various articles under the Indian constitution that uphold non-interference in religion. However, looking at the broadened version of Indian secularism that encompasses the religious expression within limits there is an acceptance of the same.

THE TRIPLE TALAQ JUDGEMENT: ISSUES TODAY

Similarly, the Triple Talaq judgement, or the *Shayara Bano* v. *Union of India and Ors.*[19] Judgement struck down triple talaq or Talaq-e-biddat as a means of divorce in Islam as it was held to be violative of the fundamental right to equality as awarded by the constitution of India. This judgement was also met with anger from a large population and many protests. Triple Talaq (talaq-e-biddat) as its name suggests, was a practice where three simultaneous

[16] Indian Young Lawyers Association v. The State Of Kerala, Writ Petition (Civil) No. 373 Of 2006.
[17] Ibid.
[18] Ibid.
[19] Shayara Bano v. Union of India and Ors, (2017) 9 SCC 1.

pronouncements, “talaq, talaq, talaq”, uttered at the same time, simultaneously made divorce effective forthwith. This instant talaq, unlike the other categories of ‘talaq’ was irrevocable at the very moment it was pronounced.[20] The issue here was that since marriage and divorce were sacred aspects of a religion; so much so that the Muslim marriage act passed in 1937 was also dependent on Shariyat act (personal law of the Muslim community), the court must not interfere.

The judgement of the case took this contention into account, interpreted the Quran, the law in Islamic theocratic countries such as Tunasia, Sudan, Syria and so on, in order to understand the history of existence of talaq-e-biddat. There was reliance on constitutional morality along with these religious sources for the final outcome of the judgement. The judgement also stated that many theocratic countries had done away with talaq-e-biddat and claimed that had ‘talaq-e-biddat’ been an essential part of religion, i.e., if it constituted a core belief, on which Muslim religion was founded, it could not have been interfered with, by such legislative intervention.[21]

In line with the Indian model of secularism, the judgment also brought out the similarities between the treatment met out to different religions — ‘It was commended, that the instant practice of ‘talaq-e-biddat’ should be done away with, in the same manner as the practice of ‘Sati’, ‘Devadasi’ and ‘Polygamy’, which were components of Hindu religion, and faith’.[22] The judgement is also useful in understanding the legal systems position on treatment of religious denominations. The judgement even holds that the protection of ‘personal laws’ of religious sections, is elevated to the stature of a fundamental right, in as much as Article 25 of the Constitution, which affords such protection to ‘personal law’ is a part of Part III (Fundamental Rights), of the Constitution. It is therefore apparent, that whilst the Constitution of India supports all conventions and declarations which call for gender equality, the Constitution especially preserves ‘personal law’ through which religious communities and denominations have governed themselves.

Hence the decision was taken in cognizance of the protection awarded to religious denominations and respect for the identity of the individual besides being in line with the secularism debate.

[20] Ibid.
[21] Ibid.
[22] Ibid.

CONCLUSION

The analysis and impact of Secularism in a country like India is difficult because of the various models that seem to be established earlier and the multitude of identities within it. Identity and individuality is given a central role in the constitution. This identity is explored through legal judgements that appear to be toying with religion and thus seem to be infringing on secularism. This paradox where the constitution seems to be protecting, as well as ignoring religious denominations can only be unravelled once we redefine secularism in the Indian context as a porous barricade between the state and religion.[23] The hypothesis that the rise in identities and judicial expansion is leading to a decline in the secular nature of the state is thereby proved to be false in the Indian context. Such relations between law and religion are essential to protect the religious diversity of the nation.

[23] Bhargava, Rajeev "Reimagining Secularism: Respect, Domination and Principled Distance.", 48 EPW pp. 79–92. *JSTOR*, www.jstor.org/stable/24479049.