Secularism and the Indian Constitution: Some Jurisprudential Aspects

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Secularism and its meaning are intensely discussed in contemporary polity in India. In recent times, secularism has come to be juxtaposed with and against the dominant Hindutva ideology. In the Indian context, the meaning of secularism can be unravelled either through a politico-legal analysis of Constituent Assembly debates or through judicial interpretation of the same in the post-independence era. This article adopts the latter approach and critiques some jurisprudential aspects of the debate on what is secularism in the Indian context, and what are its ramifications on the role of the state in upholding citizenship rights.

Introduction

While the Constituent Assembly did not include the word ‘secular’ into the Constitution, the same was introduced into the Preamble of the Indian Constitution through the 42nd amendment in 1976. However, this amendment too gave no indication of what the meaning of the term was. Indeed, the Supreme Court has opined that the constitution does not define the word ‘secular’ as it is a very elastic term and not capable of any precise definition.’[1] The Indian judiciary, as the final interpreter of Constitutional provisions, has pronounced various judgments on the meaning, import and implications of the term ‘secularism’.

Separation of State and Religion

One of the earliest judgments on the issue was delivered in 1955 – *Narayanan Namboodripad vs. State of Madras* – where the Madras High Court examined the western notion of ‘wall of separation’ between religion and State, and concluded that provisions exist in the Indian Constitution which are ‘inconsistent with the theory that there should be a wall of separation between Church and State’.[2]

In 1973, *Kesavanada Bharati vs. State of Kerala*, the Supreme Court, speaking through the erstwhile Chief Justice Sikri, observed that the Parliament could not use its amending powers under Article 368 to ‘damage’, ’emasculate’, ‘destroy’, ‘abrogate’, ‘change’ or ‘alter’ the ‘basic structure’ or framework of the Constitution.[3] He included the secular character of the Indian Constitution as one of the basic features of the Indian Constitution. However, neither he nor his brother judges elaborated on the notion of secularism.
Tolerance of All Religions

If one thought that the judiciary would interpret ‘secularism’ to mean the western notion of separation between the state and religion, in 1974, in Ahmedabad St. Xaviers College Society v. State of Gujarat, the Supreme Court rejected this notion in the Indian context. Speaking through Justices Matthew and Chandrachud, the apex court observed as follows:

“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 characterize 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.”

The attitude of ‘live and let live’ referred to in the above-mentioned judgment was perhaps expressed differently as ‘tolerance of all religions’ in latter judgments.

In 1975, in Indira Gandhi vs. Rajnarain, the Supreme Court had an opportunity to revisit the issue of secularism as a basic feature of the Indian Constitution. The Supreme Court observed as follows:

“secularism means that the State shall not discriminate against any citizen on the ground of religion only and that the State shall have no religion of its own and all persons shall be equally entitled to the freedom of conscience and the right freely to profess, practise and propagate religion.”

In this judgment, the Supreme highlighted two distinct aspects of secularism – the western notion of state having no religion of its own, which is, in other words, a separation of State and religion; and equal entitlement to freedom of religion to all persons – which is a distinct Indian notion.

Additionally, the judgment also elaborated on the concept of secularism in conformity with the ‘live and let live’ notion referred to in an earlier judgment, by stating as follows:

“secularism is neither anti-God nor pro-God, it treats alike the devout, the agnostic and the atheist. It eliminates God from the matters of the state and ensures that no one shall be discriminated against on the grounds of religion”. That, every person is free to mould or regulate his relations with his God in any manner. He is free to go to God or to heaven in his own ways. And, that worshipping God is left to be dictated by his own conscience.”

This strand of Indian secularism has also been referred to as ‘soft’ secularism, as it does not entail the State to aggressively work to prevent discrimination against religious minorities or protect them from disabilities that may be imposed on grounds of religion, but merely respect and ‘tolerate’ religious differences.
‘Active’ Secularism and the Role of the State

In 1976, the Supreme Court went one step further to determine what the role of the Indian State should be in conformity with its secular character. In Ziyauddin Burhanuddin Bukhari v. Brijmohan Ram Das Mehr[6], the Supreme Court said that the role of the State is to be neutral or impartial in extending its benefit to citizens of all castes and creeds; it further highlighted the Constitutional mandate on the State to ensure, through its laws, that disabilities are not imposed based on persons practising or professing any particular religion. Here one can observe two aspects of secularism being highlighted – the ‘passive’ secularism which is also ‘negative’ in nature – to refrain from wrongful action of discrimination on religious grounds, juxtaposed with ‘active’ secularism where the State plays a ‘positive’ role in ensuring that no disabilities are imposed on persons on the ground of religion. The former envisages a neutral role of the State while the latter envisages a pro-active role of the State. This dual role of the secular state continues to be seen in present day.

Elimination of Caste-Based Discrimination

In the journey of the Indian judiciary in interpreting the notion of secularism, one question then came to be asked – is Indian secularism confined only to religion, and non-discrimination on grounds of religion? Or does it also include eliminating discrimination on the grounds of caste? In 1992, the Supreme Court, in Indra Sawhney v. Union of India, the Supreme Court adopted the latter interpretation.[7] It said: “secularism envisages a cohesive unified and casteless society... caste poses a serious threat to secularism and a consequence to the integrity of the country”.

The judgment in S.R. Bommai v. Union of India, delivered in 1994, further elucidated the notion of secularism in the eyes of the Indian judiciary.[8] In this judgment, the Supreme Court affirmed that secularism is part of the basic structure of the Indian Constitution, and that the concept of “secularism” was very much embedded in the Indian Constitutional philosophy from its inception. It observed that what was implicit earlier had been made explicit by the Constitution (42nd amendment) in 1976, when the word ‘secular’ was added to the Preamble to the Indian Constitution. The nine judge Bench of the apex court further reiterated the broader definition of secularism as including anti-casteism, as adopted in Indira Sawhney (discussed above).

Use of Religion for Political Purposes

Despite this broad consensus arrived at among the nine judges in the Bench, they seemed to express different notions of secularism and role of a secular state. For example, Justice Ahmadi, in elaborating the notion, stated that secularism is based on the “principles of accommodation and tolerance”, which was a reiteration of ‘soft’ or ‘passive’ secularism. However, Justice Sawant and Justice B.P. Jeevan Reddy observed that ‘the concept of secularism is not merely a passive attitude of religious tolerance; it is also a positive concept of equal treatment of all religions. They explained that Constitutional provisions prohibit the establishment of a theocratic State and prevent the State from identifying itself with or otherwise favouring any particular religion. In the view of Justice Ramaswamy, secularism is not ‘anti-god.’ He emphasized that in
the Indian context, secularism has a positive content, and rejected the Western notion of secularism – the concept of erecting “a wall of separation between religion and State”. Justice Ramaswamy also opined that the concept of positive secularism separates spiritualism with individual faith.

The judgment further stated that neutrality of the state would be violated if religion is used for political purposes and advocated by political parties for their political ends. In other words, it opined that an appeal to the electorate on grounds of religion offends secular democracy. In this sense, the court seemed to have revived the western notion of separation of religion and the State, and religion and politics, despite Justice Ramaswamy’s explicit rejection of this notion of secularism. Justice Ramaswamy, in his separate opinion, observed that the State has the duty to ensure secularism by law or an executive order. He explained that programs or principles evolved by political parties based on religion amount to recognising religion as a part of political governance which the Constitution expressly prohibited. In his considered opinion, it is the duty of the court to bring every errant political party in line if it goes against secular ideals like casteism and religious antagonisms. Even if a political party indirectly espouses a religious cause, it was acting in an unconstitutional manner, he observed.

Re-Emergence of Tolerance of All Religions – ‘Sarwa Dharma Sambhava’

However, the Supreme Court soon began diluting the active and positive concept of secularism it had laid down in the judgment in Bommai (discussed above), in Ismael Faruqui v. Union of India, also known as Ram Janmabhoomi case.[9] In this judgment, Justice Verma, speaking for himself, Justice Venkatachaliah and Justice Ray, justified the concept of secularism by quoting extensively from Hindu scriptures. He quoted from the Yajur Veda, Atharva Veda and Rig Veda to justify the concept of secularism as ‘Sarwa Dharma Sambhava’, that is, tolerance of all religions. The Supreme Court, through this judgment, rejected the western notion of secularism (separation between the State and religion) as had been done in S.R. Bommai’s case. However, it is ironic that a self-proclaimed secular court would resort to drawing upon Hindu religious scriptures to substantiate its notion of secularism. It is also significant that this judgment emphasizes on the ‘soft’ and ‘passive’ aspect of secularism, which had been advanced by Justice Ahmadi in S.R.Bommai’s case, and ignores the more active role envisaged for a secular State, discussed explicitly in many of the judgments discussed above. In a dissenting opinion, Justice Bharucha supported the concept of positive and active secularism. However, he too concedes to the fact that ‘tolerance’ of Hindus, who form the majority religious community in India, was pivotal to the existence of secularism.

In Ramesh Yashwant Prabhoo (Dr.) v. Prabhakar K. Kuntel, the Supreme Court diluted the ‘constitutional duty’ of the Court to get political parties in line with secularism, by advising leaders to be only “more circumspect and careful in the kind of language they use.”[10] In Manohar Joshi v. Nitin Bhau Rao Patil, a further dilution can be seen, where the Supreme Court observes that the statement that “(T)he first Hindu State will be established in Maharashtra” is by itself not an appeal for votes based on religious grounds, “(b)ut the expression, at best, of such hope....”[11]
In *Valsamma Paul (Mrs) v. Cochin University* the Supreme Court reiterated the elimination of caste-based discrimination for establishment of a secular and egalitarian social order under the Constitution of India.[12] Interestingly, Justice Ramaswamy, in this judgment, seems to have returned to the soft and passive approach on secularism by equating it with tolerance of all religions, while emphasizing the need for an ‘integrated Bharat’. The court observed that secularism was a bridge between religions in a multi-religious society to cross over the barriers of their diversity.

**Conclusion**

A cumulative analysis of these and other significant judgments on the notion of secularism indicate that in the post-independence era, judicial interpretation of the concept of secularism in India has been chequered, and not a unilinear one. This is contrary to what the concept of ‘stare decisis’, coupled with a unitary judiciary headed by the Supreme Court of India, is expected to achieve – a certain level of consistency in the judgments pronounced.

The courts have predominantly rejected the western notion of secularism as the separation of religion and the State, and have emphasized on an Indian / indigenous notion. However, the judgments have dilly-dallied between a ‘soft’ and ‘passive’ approach to secularism as a tolerance of all religions, and a more active and aggressive approach to secularism as broad-based and encompassing equal treatment of all religions, prevention of disability on religious grounds, protection of rights of religious minorities and promotion of an egalitarian society through an elimination of caste-based discrimination.

Such a lack of consistency and clarity in judicial interpretations does not bode well in a context of erosion of secular values and strengthening of divisive politics, which portend the subversion of rule of law and citizenship rights.

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[9] (1994) 6 SCC 360
[10] (1996) 1 SCC 130
[12] (1996) 3 SCC 545