

THE IDEA OF SECULARISM AND THE SUPREME COURT OF INDIA

*Justice Aftab Alam, Supreme Court of India
The Gandhi Foundation 2009 Annual Lecture
at The Honourable Society of The Inner Temple, Temple Church, London
14 October 2009*

The Right Honourable Lord Justice Laws, distinguished guests,
It is for me a privilege to be asked to attend the presentation of the Gandhi Foundation Peace award to the Children's Legal Centre. I warmly congratulate The Children's Legal Centre for their very good work for the refugee children and I am sure that the award and the recognition will inspire them to carry on their noble work with even greater zeal.

I am grateful to the Gandhi Foundation for inviting me to give the 2009 Annual Lecture. I feel especially fortunate since this year's lecture is held in association with the Honourable Society of The Inner Temple and the venue of the lecture is the Temple Church.

India's judicial system owes a great deal to the English. It was set up in the later part of the nineteenth century to put into reality the ideas and theories of the English Utilitarian philosopher Jeremy Bentham, James Mill, his son John Stuart Mill and Lord Macaulay and their associates. The initial graft must have been quite traumatic for the Indian people at that time but over a period of a century and a half the system has taken deep roots in the Indian soil. In recent times there have of course been a number of changes in the super-structure but basically the system remains very much the same. The historical connection and the on-off and on relationship between this great institution and a certain Indian make this visit a very special occasion for me. I thank you all once again.

I propose to speak to you about secularism and the Supreme Court of India. I will try to cover, very broadly three areas; one concerning community based rights or minority rights and how in recent years the Court has tended to give priority to individual rights and freedoms over community based rights; two how the Court has perceived secularism and how in some of its later decisions it has tended to take a mono-culturist rather than a pluralist view of secularism and third, how the Court has tried to regulate the State's intervention in religious affairs and in the process has itself assumed a highly interventionist role.

But before going to the main subject it will be useful to have a brief introduction to India's great pluralism.

India is home to eight major religions of the world. The Constitution of India recognizes twenty two languages as Indian/national languages. Indians speaking the same language may belong to different religions. Conversely, Indians belonging to the same religious group may come from different ethnic stocks, may speak different languages, dress differently, eat different kinds of food in entirely different manners and may have completely different social and economic concerns. In India, religion, the welfare State and secularism overlap and combine to make a highly interesting and unique kind of society.

So let me elaborate with some specific examples:

There are six different ways, sanctioned by law, in which an Indian, depending on his or her religion, can get married. The one mode of solemnization of marriage that applies to all Indians irrespective of religion

finds favour with very few, mostly in cases where the spouses come from different religious groups.

The vast body of law dealing with property rights treats two Indians differently, again depending upon their religion.

On my death the devolution of my estate upon my heirs will take place in a way completely different than in case of my Hindu friends.

Among Hindus there is the concept of joint family. It is quite inseparable from the Hindu way of life. The institution of Hindu undivided family or joint family is woven into a number of laws with the result that those laws affect different people quite differently.

In 1964 Pope Paul VI came to India when the 38th Eucharistic Congress was held in Bombay at the Oval Maidan opposite the Bombay High Court. The Pope refused to go to Delhi but the President and the Prime Minister of the republic came to Bombay to greet him. The State of Maharashtra provided all the facilities for holding the Congress¹.

For every Muslim going for Haj, the Government of India spends, from the tax-payers money, a substantial amount as air fare subsidy. In the Government of India budget for the year 2009-10 a sum of rupees 632 crores (approx 77.53 million pounds) is allocated as Haj Subsidy².

¹ Reporting about the Congress, The Time, London of December 4, 1964 wrote:

Portuguese anger is mild compared to that of some right-wing Hindu groups, which look upon the congress as a colonialist plot to destroy the culture of India. There are blunt posters on the street of Bombay warning that "Christianity is a danger to Hinduism." Indian officials minimized the threat to the Pope, but put a number of Hindu fanatics in protective custody and strengthened the 16,000-man Bombay police force with 3,000 troops from the Maharashtra State police.

² Some Muslim groups though argue that the huge subsidy is in reality to the national carrier because the pilgrims are not allowed to take any airline other than Air India.

Kumbh Mela or the fair of the nectar pot takes place four times every twelve years when millions of Hindu pilgrims congregate to take the holy dip in the river on a single day. The next fair is to take place in 2010 in Haridwar where the Ganges comes down into the plane. The State of Uttarakhand would spend the estimated amount of Rs.500 crore (approx. 62.53 million pounds) for organising the Mela. Besides the Kumbh there would be at least a dozen purely religious festivals where direct government spending would run into thousands of crores of rupees

Amidst all this a majority of Indians honestly believe that they live in a secular country. And they feel quite comfortable in the thought.

From the random illustrations presented before you it is not very difficult to see the position of religion and the nature of secularism under the constitutional scheme in India. As regards religion, the Constitution of India provided for a model that was already lived by, almost to perfection, by one of the greatest Indians of all times. For, who could be more deeply religious and at the same time more secular than Mohandas Gandhi? The Indian Constitution, unlike the First Amendment of the United States Constitution does not have any provision proscribing the making of any law respecting an establishment of religion. It recognizes religion as a source of law. With a view to protect minority rights, it confers affirmative social and cultural rights on religious groups. It guarantees the freedom of religion but enables the State to regulate religious practices on certain limited grounds. Thus under the Indian Constitution secularism involves a plural establishment of religion with the State maintaining a *principled distance* or, as some call it, *equidistance* from all religions. The Court is called upon, in a variety of ways, to oversee and regulate the *principled distance* that the State ought to

keep from religious establishments and the nature of State intervention permissible in religious affairs.

Now, let me begin by telling you about a recent proceeding before the Supreme Court. A Muslim boy was expelled from a school run by Christian missionaries for keeping a beard in contravention of the rules framed by the school authorities. For keeping the beard the boy invoked Article 25³ of the Constitution that gives to every person the freedom of conscience and free profession and practice of religion. The School defended its rules on the basis of Article 30⁴ of the Constitution that gives to all minorities the right to

³ Article 25 of the Constitution:

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.

⁴ Article 30 of the Constitution:

Right of minorities to establish and administer educational institutions.-

All minorities, whether based on religion or language, shall have the right to establish and administer educational institutions of their choice.

[(1A) In making any law providing for the compulsory acquisition of any property of any institutional institution established by and administered by a minority, referred to in clause (1), the State shall ensure that the amount fixed by or determined under such law for the acquisition of such property is such as would not restrict or abrogate the right guaranteed under that clause]....(

establish and administer educational institutions. The expulsion was challenged unsuccessfully before the High Court and the matter finally came to the Supreme Court. On 30 March 2009 the petition was dismissed *in limine* but in course of the brief hearing one of the judges made certain observations that were widely reported in the media. The judge said:

“We don't want to have Talibans in the country. Tomorrow a girl student may come and say that she wants to wear a burqa, can we allow it?”⁵

The remark created an uproar. The outrage was not against the dismissal of the case but against the remarks calling the beard and the burqa as the mark of the Taliban. Then, something very unusual happened. On 6 July 2009, on a review petition, the Bench recalled its order dismissing the petition and requested the Chief Justice to have the case placed before some other Bench. On 11 September 2009 the case came up before another Bench. And this time the response of the Court was completely different. The Court not only issued notice to the school authorities but give an ex-parte interim direction to the school to take back the expelled student and to allow him to pursue his studies there. The Court also made some observations in course of the hearing that were reported in the media. The Court said:

“How on earth could a school disentitle a student from pursuing studies just because he has kept a beard? Then there will be no end to such prima facie ridiculous rules.”⁶

inserted by the Constitution (Forty-fourth Amendment) Act, 1978, with effect from June 20, 1979)

(2) The State shall not, in granting aid to educational institutions, discriminate against any educational institution on the ground that it is under the management of a minority, whether based on religion or language.

⁵ *No Talibanization of India says SC, Court rejects student's plea to keep beard*- Times of India , 31 March 2009 (P. 13)

“So if you are a Sikh, you will not be able to sport a beard. Tomorrow they will say you are not fair complexioned (and will remove you)”¹

“Nowadays, it has become a fashion for some people to pierce their ears. So such persons will not be allowed to study?”²

This single case seems to exemplify the difficulties faced by the Court in dealing with two competing constitutional rights. Leaving aside the unfortunate remark, the first Bench obviously gave precedence to the group right guaranteed by the Constitution to a religious minority, in this case the Christian management of the school. The second Bench, on the other hand, deemed fit, in the context of the case, to uphold the right of the individual, the Muslim boy. This deep dilemma seems to run through the decisions of the Supreme Court on the issue of cultural and educational rights guaranteed by the constitution to religious minorities.

In 1957, barely ten years after independence, the first elected Communist government of the State of Kerala, took steps to enact a law bringing the school education in the state under its extensive control. A number of Christian organizations running a vast network of schools in the State for a very long time and some Muslim groups went up in arms and their agitation threatened to create a political crisis. In that situation the President of India to whom the Bill had come for his assent made a reference to the Supreme Court seeking its advice on the constitutional validity of a number of provisions in the Bill. The reference was heard by a constitution bench of seven Judges, headed by Chief Justice S. R. Das.

⁶ Ridiculous to expel student with beard: SC- Times of India (p.9) on 12 September 2009

In dealing with the Presidential Reference the Supreme Court gave a very expansive interpretation of the right under Article 30. It held that the right under Article 30 was not restricted only to institutions set up for conservation and promotion of **culture, language or religion**. A religious minority could establish and administer an educational institution of any kind depending upon its “**choice**”. In exercise of the right guaranteed under Article 30 a minority community was free to set up a primary school as well as an institution of higher education teaching Arts, Social Sciences, Natural Sciences or even professional courses.

[The Court held that Article 30 was a stand-alone Article and the right guaranteed to the minorities under it was not controlled either by Article 29 or any other Article in the chapter of Fundamental rights or even Article 45 in the chapter of Directive Principles relating to education to children below the age of six years.]

Speaking for the Court Chief Justice S. R. Das said:

“So long as the Constitution stands as it is and is not altered, it is, we conceive, the duty of this Court to uphold the fundamental rights and thereby honour our sacred obligation to the minority communities who are of our own.”

The decision in the case of *Re. Kerala Education Bill*, however, was not unanimous. There was at least one dissenting voice (of T. L. Venkatarama Aiyar, J.). He took the view that Article 30 was primarily intended to protect educational institutions established for the conservation and promotion of the **culture, language or religion** of a minority group. Aiyar J. held that Article 30 created a purely negative obligation on the State and prevented it from

interfering with minorities living their own cultural life as regards religion or language.

Aiyer J. observed:

“Now, to compel the State to recognise those institutions would conflict with the fundamental concept on which the Constitution is framed *that the State should be secular in character.*”

The two views directly opposing each other and both relying upon the principles of secularism that were manifested in *Re. Kerala Education Bill* appear to run through the decisions of the Supreme Court on all aspects of secularism.

For about the next thirty five years, however, with the sole exception in the case of *Aligarh Muslim University*⁷, the majority decision in *Re. Kerala Education Bill* was by far the dominant view on the issue of the rights of the religious minority. The Court went on expanding the scope of the right under Article 30 and five years later in *Rev. Sidhrajibhai vs. State of Gujarat*⁸ a six judges Bench went on to hold:

“The right under Article 30(1) is a fundamental right declared in terms absolute. Unlike the fundamental freedoms guaranteed by Article 19 **it is not subject to reasonable restrictions.**”

⁷ In *Azeez Basha vs. Union of India*; AIR 1968 SC 662 the Supreme Court held, contrary to the common belief that AMU was not a minority institution because it could not be said to have been established by the Muslim Community (the University was set up by the Aligarh Muslim University Act, 1920, passed by the Governor-General's Legislative Council). The judgment has been criticized by constitutional experts and is described as clearly wrong. See Seervai's *Constitutional Law of India*, fourth edition, Vol. II, pages 1319-1324.

⁸ AIR 1963 SC 540

In the following years the Court mostly dealt with cases⁹ in which specific regulations sought to be enforced by the State came under challenge and examined how far those regulations could be said to ensure academic excellence and how far those tended to interfere with the right guaranteed under Article 30.

In 1974 came the case of *St. Xavier College, Ahmedabad*¹⁰. The decision in *St. Xavier College* made a resounding reiteration of the Court's position on the question of minority rights. It reaffirmed the decisions in *Re. Kerala Education Bill* and other earlier cases and in some respects expanded the scope of Article 30 even further.

Five years later in *Lilly Kurian vs. Sr. Lewina*¹¹, A. P. Sen J. observed:

“Protection of the minorities is an Article of faith in the Constitution of India”.

The first sign of the turn around came about thirty five years after the decision in *Re. Kerala Education Bill* in 1992 in the case *St. Stephen's*

⁹ *Rev. Father W. Proost and others vs. The State of Bihar and others*, AIR 1969 SC 465: Date of judgment, 13 September, 1968 (Five Judges' bench)

Rt. Rev. Bishop S. K. Patro vs. State of Bihar and others, (1969) 1 SCC 863: Date of judgment, 2 April, 1969 (Five Judges' bench)

State of Kerala, etc. vs. Very Rev. Mother Provincial etc., (1970) 2 SCC 417: Date of judgment, 10 August, 1970 (Six Judges' bench)

D. A. V. College, Bhatinda, Etc. vs. The State Of Punjab And Others, (1971) 2 SCC 261: Date Of Judgment, 5 May, 1971 (Five Judges' Bench)

The Governing Body, G. C. College, Silchar, Assam and another vs. The Gauhati University And Others, (1973) 1 SCC 192: Date of judgment, 26, October, 1972

¹⁰ (1974) 1 SCC 717

¹¹ (1979) 2 SCC 124

*College*¹². But before going to *St. Stephen's College* I may just mention some developments that firmly established secularism in the Indian jurisprudence, albeit in a general, undefined way.

In *Kesavananda Bharati*¹³ (1973) the Supreme Court said that the Constitution has certain 'fundamental features' constituting 'its basic structure', the core that was beyond the amending powers of the Parliament. Secularism was cited as one such basic feature. Two years later (1975) in the election case of *Indira Nehru Gandhi*¹⁴ the Court said that secularism was inalienable from the Constitution and the polity established under it. In those two cases the Court did not elaborate on the nature of secularism as there was no occasion for it. But from the one or two sentences in the two judgments (Shelat and Grover JJ. in *Kesavananda Bharati* and Chandrachud

¹² *St. Stephen's College vs. University of Delhi*, (1992) 1 SCC 558

¹³ *Kesavananda Bharati vs. State of Kerala*, AIR 1973 SC 1461

The theory of the Basic Structure of the Constitution was supported by seven judges of the thirteen-judge Bench that heard the case. Of those seven, four judges cited secularism as part of the basic structure of the Constitution:

Sikri C.J.: "Secular and federal character of the constitution"

Shelat and Grover JJ: "Secular character of the State"

Reddy J.: "Liberty of thought, expression, belief, faith and worship"

¹⁴ *Smt. Indira Nehru Gandhi vs. Raj Narain*, 1975 (Supp.) SCC 1

Chandrachud J. observed:

"I consider it beyond the pale of reasonable controversy that if there be any unamendable features of the Constitution on the score that they form a part of the basic structure of the Constitution, they are that : (i) India is a Sovereign Democratic Republic; (ii) Equality of status and opportunity shall be secured to all its citizens; (iii) *The State shall have no religion of its own and all persons shall be equally entitled to freedom of conscience and the right freely to profess, practice and propagate religion and that* (iv) the Nation shall be governed by a Government of laws, not of men. These, in my opinion, are the pillars of our constitutional philosophy, the pillars, therefore, of the basic structure of the Constitution."

J. in *Indira Nehru Gandhi*) it appears that the Court was referring, in the abstract, to the first principles of western secularism that prohibit the State to have any religion of its own and gives the individual the freedom of conscience and the right freely to profess, practice and propagate religion.

After *Kesavananda Bharati* and *Indira Nehru Gandhi* the Supreme Court reiterated in a number of decisions that secularism is a basic feature and a part of the basic structure of the Indian Constitution and it could not be in any way undermined either by any legislative enactment or by any executive action. The observations concerning secularism are made in vastly different contexts and sometimes seem to convey different meanings of secularism. Here I do not propose to refer to each such decision. Suffice to note here that this line of decisions reached its high point in *Bommai*'s¹⁵ case.

In *Bommai* the Court was called upon to consider the constitutional validity of the presidential proclamations [issued under Article 356 of the Constitution] dismissing the governments of several States. Among the States hit by the presidential proclamation were Rajasthan, Madhya Pradesh and Himachal Pradesh. The reports of the Governors of the three States, that formed the constitutional basis for the Presidential Proclamation, *inter alia* stated that the governments of those States had extended active overt and covert support to communal organizations and individuals, greatly aiding them in the demolition of the Babri Masjid, the medieval mosque. After the demolition, the three State Governments made no secret of their abetment in the act but on the contrary took pride in the fact in their public utterances. According to the Governors' reports, the constitutional machinery in those States had failed. But the undeniable fact was that the each of the three

¹⁵ *S. R. Bommai vs. Union of India*, (1994) 3 SCC 1

dismissed governments enjoyed clear majority in their respective Assemblies. The presidential proclamation was, therefore, assailed as an attack on democracy.

But the Court was firm and unyielding in the defence of secularism. Seven out of the nine Judges¹⁶ constituting the Bench resolutely reiterated the view that secularism was the basic feature of the Constitution and in case a State Government acted contrary to the constitutional mandate of secularism or, worse still, directly or indirectly, subverted the secular principles, that would tantamount to failure of the constitutional machinery and the State Government would make itself liable to dismissal under Article 356. [Reddy J. (writing for himself and Agrawal J. and with whom Pandian J. concurred) appears absolutely non-comprising on the issue of secularism¹⁷.]

¹⁶ J.S.Verma and Yogeshwar Dayal JJ. Differed with the majority opinion on the question of justiciability of the Presidential Proclamation and accordingly felt it unnecessary to express any opinion on the remaining matters.

¹⁷ Reddy J. observed:

Secularism is one of the basic features of the Constitution. While freedom of religion is guaranteed to all persons in India, from the point of view of the State, the religion, faith or belief of a person is immaterial. To the State, all are equal and are entitled to be treated equally. In matters of State, religion has no place. No political party can simultaneously be a religious party. Politics and religion cannot be mixed. Any State Government which pursues unsecular policies or unsecular course of action acts contrary to the Constitutional mandate and renders itself amendable to action under Article 356.

This (secularism) may be a concept evolved by western liberal thought or it may be, as some say, an abiding faith with the Indian people at all points of time. That is not material. What is material is that it is a constitutional goal and a basic feature of the Constitution. Any step inconsistent with this constitutional policy is, in plain words, unconstitutional.

He went farther and observed that not only the state but even a political party could not pursue a non secular agenda. He said:

If any party or organization seeks to fight the elections on the basis of a plank which has the proximate effect of eroding the secular philosophy of the Constitution (it) would certainly be guilty of following an unconstitutional course of action. Political parties are formed and exist to capture or share State power.... If the Constitution requires the State to be secular in thought and action, the same requirement attaches to political parties as well. The Constitution does not

Around the same time as the Court was engaged in salvaging secularism from the debris of the demolished medieval masque, it also started to see the interplay between the community based rights and individual rights in a new light. *St. Stephen's College, Delhi*, a Christian minority institution, is one of the finest colleges in the country. Its great reputation and academic excellence makes it one of the most sought after colleges in the north India. Every seat in the various under graduate courses counts for admission. In the case of *St. Stephen's College* the Court, for the first time deviating from the decision in *Re. Kerala Education Bill*, held that it was not open to a government aided minority institution to deny admission to students of other communities or to devise a selection process so as to exclude students from other communities. Such a course would violate Article 29(2) of the Constitution that mandates that no citizen shall be denied admission into any educational institution maintained by the State or receiving aid out of State funds on ground only of religion, race, caste, language or any of them. The Court felt the need to strike a balance between an individual's right based on merits and the right of minorities to set-up and administer educational institutions of their choice and directed that *St. Stephen's College* could have no more than fifty percent seats reserved for Christian students. Thus, the right under Article 30 was for the first time subject to Article 29.¹⁸

recognize, it does not permit, mixing religion and State power. Both must be kept apart. That is the constitutional injunction. None can say otherwise so long as this Constitution governs this country. Introducing religion into politics is to introduce an impermissible element into body politics and an imbalance in our constitutional system.... The fact that a party may be entitled to go to people seeking mandate for a drastic amendment of the Constitution or its replacement by another Constitution is wholly irrelevant in the context. Constitution cannot be amended so as to remove secularism from the basic structure of the Constitution. Nor the present Constitution can be replaced by another; it is enough to say that the Constitution does not provide for such a course – that it does not provide for its own demise.

¹⁸ Article 29 of the Constitution

Twelve years later through a trilogy of decisions¹⁹ (i. 2002: *TMA Pai vs. State of Karnataka*, eleven-Judges Bench, ii. 2003: *Islamic Academy of Education vs. State of Karnataka*, five-Judge Bench and iii. 2005: *PA Inamdar vs. State of Maharashtra*) the Court practically rewrote the law relating to the right of religious minorities to establish and administer educational institutions.

The position that emerges from the three decisions may be summarized thus:

Finally a trilogy of decisions rendered between 2003 and 2005 brought about a complete change in the way the Supreme Court looked at the right of the religious minority to establish an educational institution guaranteed under Article 30 of the Constitution.

In 2003 the socio-economic and political conditions in India were not the same as in 1958 when the Court had given its opinion on the Kerala Education Bill. In a recent interview Professor Amartya Sen²⁰ stated that in 1991-92 the Indian State was over-extended in certain areas and under-extended in some areas like education and healthcare. The vacant space in the two areas was filled up by private investors. A large number of private

29. Protection of interests of minorities.-

(1) Any section of the citizens residing in the territory of India or any part thereof having a distinct language, script or culture of its own shall have the right to conserve the same.

(2) No citizen shall be denied admission into any educational institution maintained by the State or receiving aid out of State funds on grounds only of religion, race, caste, language or any of them.

¹⁹ (i) *TMA Pai Foundation vs. State of Karnataka*: (2002) 8 SCC 481

(ii) *Islamic Academy of Education vs. State of Karnataka*; (2003) 6 SCC 697 and

(iii) *PA Inamdar vs. State of Maharashtra*: (2005) 6 SCC 537

²⁰ Outlook, 17 August, 2009.

colleges, teaching professional and job oriented courses came up in different parts of the country. Admission in these colleges were taken without much regard to merits and mostly on payment of large amounts as 'donation'/capitation fee. This development, on the one hand, had caused much distortion in the system of higher/professional education in the country and on the other hand there was growing pressure from the private investors in the area of education to gain legitimacy. In 1993 it was contended before the Supreme Court that imparting education or teaching was like any other occupation, trade or business and could be carried on as such under the protection of Article 19(1) (g)²¹ of the Constitution. The Court firmly rejected the argument holding that in India imparting education was a noble pursuit, a piety, a charity. It held that it was obligatory for the State to provide free and compulsory education to children of the age of six to fourteen years, for it was the child's fundamental right, being a part of right to life guaranteed by Article 21²² of the Constitution. The Court also prohibited capitation fee by any name whatsoever and devised a scheme for admission into private professional colleges in terms of which the private management could fill up only fifty percent of the seats and the remaining fifty percent would go to students recommended by the state government

²¹ Article 19(1)(g) of the Constitution:

Protection of certain rights regarding freedom of speech, etc.-

(1) All citizens shall have the right-

xxxxxxx

(g) to practice any profession, or to carry on any occupation, trade or business.

²² Article 21 of the Constitution:

21. Protection of life and personal liberty: No person shall be deprived of his life or personal liberty except according to procedure established by law.

purely on the basis of merit. A question then arose how the two quotas, one fixed in *St. Stephen's College* and the other in *Unni Krishnan*²³ would work out in the case of minority institutions. A minority organization, called Islamic Academy of Education brought the issue to the Supreme Court and its case was referred to the larger bench. Here a number of non-minority private colleges also joined the issue who were mainly interested in getting the *Unni Krishnan* scheme of admission undone. Ultimately *Islamic Academy* was relegated to the back and *Pai*, a non minority private college, came to the fore.

Pai was heard by a bench of eleven judges so that the Court may not be bound by any of its earlier judgments. In *Pai* it was for the first time the question of minority rights was not considered independently and it got mixed up with cases of non minority private colleges. The decision in *Pai* is very heavy on secular rhetoric but at the end of the judgment the minority rights appear to be considerably restricted in comparison to their earlier position. *Pai* blurred the line between a minority institution and a non minority private institution.

Within less than a year another Constitution Bench took up the case of *Islamic Academy* in order to clear the doubts and anomalies arising from the *Pai* decision and two years thereafter another seven-judge Bench of the Supreme Court assembled to hear the case of *Inamdar* to clear the confusion arising from *Pai* and *Islamic Academy*. At the end of the exercise Article 30 all but lost its independent identity. The position that emerges from the three decisions may be summarized thus:

²³ (1993) 1 SCC 645

- The right to set up educational institutions and impart any kind of education at any level is available to every Indian citizen under Article 19 (1) (g) of the Constitution as the right “to carry on any occupation, trade or business” (*Unni Krishnan* overruled!)
- Article 30 does not give to the religious minorities any additional or separate right. The religious minority has no special right that the majority does not have under the Constitution.
- Articles 29 and 30 do not confer any rights but afford certain protections to the minorities. The two Articles can be better understood as a protection and/or a privilege of the minority rather than an abstract right. (View of Venkatarama J. in minority of 1:6 in *Re. Kerala Education Bill* resurrected!)
- The right under Article 30 is not absolute. It is subject to Article 29(2) and other laws. It can be restricted in public interest and national interest. (*Sidhraj Bhai* expressly overruled!).
- The decision in *Inamdar* also laid down guidelines relating to the manner of admission and composition of students that render the minority status of an institution quite precarious.
- It also needs to be pointed out that the three decisions indeed brought about a basic shift in the Court’s position in regard to the right of the religious minority to establish educational institutions but the greater and equally significant shift was towards privatisation of education.

To sum up, for about forty or forty five years the Supreme Court held that though the Constitution did not permit community specific political rights, it

recognised community specific social rights. But in the last fifteen years the court seems to have come to the view that under the Constitution there can not be any community specific rights either political or social

Coming now to the second part of our discussion about the Court's perception of secularism, its decisions in the last fifteen years show the tendency to see Indian secularism more from a mono-culturist rather than a pluralist point of view. In 1994, in *Bommai*, Reddy J. speaking for himself and two other judges of the Court said, "if the Constitution requires the State to be secular in thought and action, the same requirement attaches to political parties as well" because, "political parties are formed and exist to capture or share State power." Barely two years later the Court had before it four appeals²⁴ in which the Bombay High Court had voided the elections of the winning candidates for indulging in "corrupt practice" by making appeals for votes in the name of religion. The Supreme Court dismissed one of the appeals (on behalf of Dr. Ramesh Yeshwant Prabhoo) but allowed the other three appeals restoring the elections of the three appellants. The four decisions, commonly referred to collectively as the 'Hindutva Decisions' are highly significant and among them the most important one is in the case of *Manohar Joshi*.

In his election speeches Manohar Joshi, the winning candidate had said that "[T]he first Hindu State will be established in Maharashtra", one of the States of India. The court, studiously avoiding any reference to the seven-

²⁴ *Dr. Ramesh Yeshwant Prabhoo vs. Prabhakar Kashinath Kunte & Ors.* 1996 (1) SCC 130

Manohar Joshi vs. Nitin Bhaurao Patil & Anr. 1996 (1) SCC 169

Moreswar Save vs. Dwarkadas Yashwantrao Pathirkar 1996 (1) SCC 394

Ramakant Mayekar vs. Celine D'Silva (Smt.) 1996 (1) SCC 399

judge bench decision in *Bommai*, set-aside the decision of the High Court and restored the appellant's election observing that "a mere statement that the first Hindu State will be established in Maharashtra is by itself not an appeal for votes on the ground of his religion but the expression, at best, of such a hope."

The Court went much further and using the words "Hindu", "Hinduism" and "Hindutva" interchangeably observed that those terms were not amenable to any precise definition and no meaning in the abstract would confine the term "Hindutva" to the narrow limits of religion alone. The Court further observed, "[T]he term 'Hindutva' is related more to the way of life of the people in the sub-continent. It is difficult to appreciate how in the face of [prior rulings] the term 'Hindutva' or 'Hinduism' *per se*, in the abstract can be assumed to mean and be equated with narrow fundamentalist Hindu religious bigotry...."

It may be recalled here that Dr. Radhakrishnan in his famous (1926) Upton lectures²⁵ had characterized Hinduism as a "way of life" rather than a religion based on dogma. This description of Hinduism was extensively used by the Court earlier in the temple entry case²⁶ in which the Court had intervened firmly in support of the Dalits' entry into Hindu temples. The Court had tried to reconcile the Hindu 'way of life' with the democratic way of life envisaged under the Constitution with social justice as one of its cornerstones. The Hindutva decisions appropriated the approach and the reasoning of the temple entry decision but for an object entirely different from the earlier case.

²⁵ *Upton Lectures* delivered at Manchester College, Oxford, 1926

²⁶ *Sastri Yagnapurushdasji vs. Muldas*, AIR 1966 SC 1119

The Hindutva decisions came under severe criticism for conflating “Hindutva” with Hinduism and thus trying to purge it of all elements antithetical to secularism. But at the same time those decisions were greatly applauded by the supporters of free speech and democratic liberalism.

The Hindutva decisions seem to have inspired the Court to take the monoculturist view of secularism in a series of later decisions some of which are presented here.

In 2002 a PIL²⁷ (Public Interest Litigation) was filed questioning the Curriculum for School Education framed by the National Council for Educational Research and Training on the ground that it was heavily loaded with religion and the contents of the Vedas. It was contended that the inclusion of religion, Sanskrit, Vedic Mathematics, Vedic Astrology etc. in the courses of study for the schools was contrary to secular principles. The curriculum prepared by the NCERT, was, therefore, bad as it offended one of the fundamental features of the Constitution. Dharmadhikari J. one of the members of the three-judge Bench wrote a separate, though concurring judgment in which he discussed in some detail about the true nature of secularism. He observed that the doctrine of the State’s neutrality towards all religion was a narrow concept of secularism. He further observed that, the policy of complete neutrality towards religion and apathy for all kinds of religious teachings in institutions of the State had not done any good to the country. The real meaning of secularism in the language of Gandhi is “sarva dharma samabhav” meaning equal treatment and respect for all religions, but we misunderstood the meaning of secularism as negation of all religions”. In the *Aruna Roy* case the Court upheld the constitutional validity of the

²⁷ *Aruna Roy & Others vs. Union of India & Others*, (2002) 7 SCC 368

national curriculum overlooking that what was included in the curriculum was not religious teachings of all kinds but only of one particular kind. It also unfolded, on the authority of Gandhi, a view of secularism²⁸ that one would find very difficult to reconcile with Gandhi's idea on religion and State. After the independence of India, Gandhi wrote:

“The State should undoubtedly be secular. It could never promote denominational education out of public funds. Every one living in it should be free to profess his religion without let or hindrance. (The Good Boatman by Rajmohan Gandhi P.402)”

[In *Aruna Roy* the Court held that though the curriculum mentioned the subject as ‘Vedic Astrology’ its contents were actually in the nature of ‘Vedic Astronomy’ and hence, its inclusion in the school course was not

²⁸ Dharmadhikari J. observed:

“The word “secularism” used in the preamble of the Constitution is reflected in the provisions contained in Articles 25 to 30 and Part IV-A added to the Constitution containing Article 51-A prescribing fundamental duties of the citizens. It has to be understood on the basis of more than 50 years’ experience of the working of the Constitution. The complete neutrality towards religion and apathy for all kinds of religious teachings in institutions of the State have not helped in removing mutual misunderstanding and intolerance inter se between sections of the people of different religions, faiths and beliefs. “Secularism”, therefore, is susceptible to a positive meaning that is developing understanding and respect towards different religions. The essence of secularism is non-discrimination of people by the State on the basis of religious differences. “Secularism” can be practiced by approach by making one section of religious people to understand and respect the religion and faith of another section of people. Based on such mutual understanding and respect for each other’s religious faith, mutual distrust and intolerance can gradually be eliminated.

Study of religions, therefore, in school education cannot be held to be an attempt against the secular philosophy of the Constitution.

The real meaning of secularism in the language of Gandhi is sarva dharma samabhav meaning equal treatment and respect for all religions, but we have misunderstood the meaning of secularism as sarva dharma samabhav (sic) meaning negation of all religions. The result of this has been that we do not allow our students even a touch of our religious books.....”

unjustified. Two years later it upheld the teaching of Vedic Astrology (Jyotir Vigyan) too as graduate and post-graduate (B.Sc. and M. Sc.) courses in different universities²⁹. The Court did not accept the submission that the prescription of Jyotir Vigyan as a course of study had the effect of “saffronising” education or that it in any manner militated against the concept of secularism which is part of the basic structure of the Constitution and is essential for the governance of the country.]

In 2005 an organisation representing a section of the Jain community came to the Court seeking a direction to the Central Government to notify “Jains” as a minority community. The Court not only firmly rejected the prayer but also expressed its strong disapproval of the very concept of ‘minority’³⁰. Calling it a baggage from India’s history, the Court noted, “Muslims constituted the largest religious minority because the Mughal period of rule was the longest followed by the British Rule during which many Indians had adopted Muslim and Christian religions...” It further observed that the concept of “minorities” was the result of the British policy of divide and rule that first led to the formation of separate electorates and reservations of seats on the basis of population of Hindus and Muslims and finally led to the partition of the India and formation of a separate Muslim State of Pakistan. The Court pointed out that India was a democratic republic which had adopted the right to equality as its fundamental creed and hence, the Constitutional ideal should be the elimination of “minority” and “majority” and the so called forward and backward classes.

²⁹ *P.M.Bhargava & Ors. vs. University* AIR 2004 SC 3478

³⁰ *Bal Patil and another vs. Union of India and others*, 2005 (6) SCC 690

Coming now to the third and the last part of the talk we will see how the Court has tried to regulate the efforts of the State to control religious affairs in the context of Article 26³¹ of the Constitution. Article 26 gives to every religious denomination or any section thereof the freedom to manage its religious affairs, subject, however to considerations of public order, morality and health. In order to determine the extent of the right the Supreme Court in its earliest days evolved the *essential practices test*³² according to which immunity from State intervention was available to only such practices that were integral to the faith and not to other practices pertaining to economic and commercial matters though associated with religion. The interesting point to note is that the court preferred to lay down the essential practices test, rather than simply subjecting the law to the test of public order, morality and health (to which Articles 25 and 26 rights are subject). So, instead of denying constitutional protection on the ground that a certain practice violated public order, morality or health, all secular standards, the court preferred to hold that that certain practice was not an essential part of the particular religion. The Court also arrogated to itself the right to decide whether or not a certain practice was essential to a religion, of course with

³¹ Article 26 of the Constitution:

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.

³² *Commissioner HRE, Madras vs. Sri Lakshmindra Thirtha Swamiar of Sri Shirur Mutt*, 1954 (1) SCR 1005

reference to authoritative sources and texts relating to that religion. Later on, in the *Durgah Committee*³³ case the Court held that Articles 25 and 26 were intended to protect existing rights and they did not confer any new rights. In the *Durgah Committee* case the Court went a step further and held that religious practices might have sprung from superstitious beliefs that are “extraneous and unessential assertions” to the religion. Such practices would naturally have no immunity against State intervention.

The essential practices test, in application, led to both socially negative and positive results. In *Saifuddin Saheb*³⁴ the Court upheld the authority of the Dai-ul-Mutlaq, the spiritual and temporal head of the Dawoodi Bohra community, to excommunicate on the ground that the power to excommunicate was an essential religious practice. In the case of *Harry Stainislaus*³⁵ the Court held that the right to propagate one’s religion, protected by the constitution did not include the right to convert others to one’s own religion.

On the positive side there is the very notable case³⁶ concerning the entry of Harijans into Hindu temples. Some people of the Swaminarayana sect took the plea that they did not belong to the Hindu religion and hence their temples were not covered by the Act prohibiting Hindu temples from refusing entry to Harijans. The Court referred to several texts on Hinduism and Indology and concluded that the Swaminarayan Sect was part of the

³³ *The Durgah Committee Ajmer and Anr. vs. Syed Hussain Ali and Ors.* AIR 1961 SC 1402

³⁴ *Saifuddin Saheb Sardar Syedna Taher vs. State of Bombay* AIR 1962 SC 853

³⁵ *Rev. Stainislaus vs. State of M.P.* (1977) 1 SCC 677

³⁶ *Sastri Yagnapurushdasji vs. Muldas*, AIR 1966 SC 1119

Hindu religion, and their temples were fully covered by the provisions of the Act.

As can be seen, the Court's approach, at least in its early days, was shaped by the desire to reform and reshape certain religious practices. It, therefore, consciously gave itself the power to judge what was an essential practice of a religion - those that were not essential practices could not avail of the protection of Article 25. This led the Court to adopt an extremely interventionist approach – often even resorting to scriptural interpretation.

Apart from the reformist explanation, one may also attribute the interventionist position of Courts to the fact that in a country like India, it is easier to say something is not essentially religious than to say that religion is against public order. This may be another reason why Courts have generally preferred the essential practices test as compared to subjecting religious freedoms to secular public order restrictions.

The inherent limitation and danger in this approach to the construction and interpretation of constitutional rights was exposed in the *Anand Margis*³⁷ case and more severely in the case of *Shah Bano*³⁸, one of the most controversial decisions by the Court involving religion. In *Shah Bano* the question before the Court was whether the statutory provisions of maintenance of divorced wives were applicable to Muslims, in view of the Muslim Personal Law (*Shariat*) Application Act, 1937. The Court held that there was nothing in Muslim personal law that conflicted with the statutory provisions for maintenance. But the Court arrived at its conclusion by

³⁷ *Acharya Jagdishwaranand Avadhuta vs. Commissioner of Police, Calcutta* (1983) 4 SCC 522

³⁸ *Mohd. Ahmed Khan vs. Shah Bano Begum* (1985) 2 SCC 556

beginning the judgment with a Hadith of doubtful veracity and proceeding with the observation “there can be no greater authority on this question than the holy Quran”.

The decision came under a lot of criticism and there was great resentment against the Court arrogating to itself the right and the authority to interpret the Quran, forgetting that the Court had consistently resorted to scriptural interpretation while applying the essential practices test to the Hindu Religion.

For political considerations the Central Government codified the law on Muslim wives’ right to maintenance and had parliament pass the legislation. The new Act was challenged in *Danial Latifi*³⁹ case as violative of the constitutional right of the Muslim woman to obtain statutory maintenance beyond the *iddat* period, which had been upheld in *Shah Bano*. The Court, while upholding the constitutional validity of the Act was also able to preserve all the rights given to a Muslim divorcee woman in the *Shah Bano* case, triumphantly observing that “it may look ironical that the enactment intended to reverse the decision in *Shah Bano’s* case, actually codifies the very rationale contained therein”.

What, however, is of great significance is that in *Danial Latifi*, the Court reached the same reformist conclusion as in *Shah Bano* - but through a different, and more acceptable, route. The Court subjected the Act to the test of Articles 14⁴⁰, 15⁴¹ and 21 of the Constitution, and concluded that the Act

³⁹ *Danial Latifi vs. Union of India*, (2001) 7 SCC 740

⁴⁰ Article 14 of the Constitution:

Equality before law.-

did not offend the principles contained in these Articles. It effectively held that the Act would be unconstitutional if interpreted to give Muslim women less than other women by way of maintenance.

In conclusion, I would say that on the issue of community based rights or minority rights the Court will have to find a middle ground between its two extreme positions, one where the right was held to be absolute and not subject to any reasonable restrictions even in public interest or national interest and the other where the right stands emasculated. An over-emphasis on community specific rights does not seem to do any good to anyone, not even to the minority groups. It is argued that it only serves to strengthen the walls separating the minority from the majority and acts as a barrier for the

The State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India

⁴¹ Article 15 of the Constitution:

Prohibition of discrimination on grounds of religion, race, caste, sex or place of birth:

(1) The State shall not discriminate against any citizen on grounds only of religion, race, caste, sex, place of birth or any of them.

(2) No citizen shall, on ground only of religion, race, caste, sex, place of birth or any of them, be subject to any disability, liability, restriction or condition with regard to -
(a) access to shops, public restaurants, hotels and places of public entertainment; or
(b) the use of wells, tanks, bathing ghats, roads and places of public resort maintained whole or partly out of State funds or dedicated to the use of general public.

(3) Nothing in this article shall prevent the State from making any special provision for women and children.

(4) Nothing in this article or in clause (2) or article 29 shall prevent the State from making any special provision for the advancement of any socially and educationally backward classes of citizens or for the Scheduled Castes and the Scheduled Tribes.

(5) Nothing in this article or in sub-clause (g) of clause (1) of Article 19 shall prevent the state from making any special provision, by law, for the advancement of any socially and educationally backward classes of citizens or for the Scheduled Castes or the Scheduled Tribes in so far as such special provisions relate to their admission to educational institutions including private educational institutions, whether aided or unaided by the State, other than the minority educational institutions, whether aided or unaided by the State, other than the minority educational institutions referred to in Clause (1) of Article 30.

members of the minority community to join the national main stream education and the avenues that open up from there. Far more important, it is contended that the Court in its earlier reading of the minority rights treated the minorities as monolithic blocs and thereby gave the elite within the minority groups complete control over those rights. In India minority groups are as hierarchical as the larger Indian society. It is pointed out that social surveys show that an over protection of the community specific rights was of very little, if hardly any, use to the weaker sections within the minority groups. But on the other hand a complete denial of community based rights evokes within the minority groups the fear of being subsumed by the majority and that is a source of social tension on a greater scale. Therefore, the issue of minority rights, perhaps, needs to be addressed afresh having regard to these concerns and in light of the experience of the past sixty years.

As to the nature of Indian secularism and the role of the State in matters of religion I am of the view that in India secularism can only be viewed in a broad, expansive way that has in it a place for every community and group. Indian secularism, like the civic body in India has to be inherently pluralistic and flexible. In India secularism can not be seen or used as a means for doing away with all the differences of creed and caste and region and language and for developing a more homogenised society laying undue stress on 'Indianness'. A position where the idea of secularism is applied to make all the religious and linguistic minority groups and the tribals and the Dalits within the Hindu fold to lose not only their identities but also their national aspirations would, to my mind, negate not only what the Constitution of India stands for but also what Gandhi stood for.

In October 1939, in response to the claim of a Muslim correspondent that India is not one and that Muslims were a separate nation, Gandhi had said:

“Why is India not one nation? Was it not one during, say, the Moghul period? Is India composed of two nations? If so, why only two? Are not Christians a third, Parsis a Fourth, and so on? Are the Muslims of China a nation separate from the other Chinese? Are the Muslims of England a different nation from the other English? How are the Muslims of the Punjab different from the Hindus and the Sikhs? Are they not all Punjabis, drinking the same water, breathing the same air and deriving sustenance from the same soil?.....And what is to happen to the handful of Muslims living in the numerous villages where the population is predominantly Hindu, and conversely to Hindus where, as in the frontier Provinces or Sind, they are a handful? The way suggested by the correspondent is the way of the strife. (Harijan. 28. 10. 39)”

Even after the country was partitioned Gandhi said, just two weeks before he was killed:

“Delhi has always been the capital. It is this city which was Indraprastha, which was Hastinapur. It is the heart of India. It would be the limit of foolishness to regard it as belonging only to the Hindu or the Sikh.....All Hindus, Muslims, Sikhs, Parsis, Christians and Jews who people this country from Kanyakumari to Kashmir and from Karachi to Dibrugarh in Assamhave an equal right to it.”^{42 43}

⁴² *Collected Works*, as quoted by Rajmohan Gandhi in *Revenge & Reconciliation*, P. xxviii

⁴³ In the context in which he was speaking Gandhi referred to the Hindus as a single block. But sixty years after independence the Hindus are evidently not one single block. They include within the fold the backward classes, the extremely backward classes the Dalits and the tribals etc. Vast masses of Indians oppressed by thousands of years of History are demanding a space to stand under the sun.

The simple truth stated clearly by the one who knew India and Indians better than anyone else in recent times can not be ignored by any Court or policy-maker in approaching the issues of secularism in India.

Justice Aftab Alam, Supreme Court of India

The Gandhi Foundation 2009 Annual Lecture

at The Honourable Society of The Inner Temple, Temple Church, London

14 October 2009

¹ Expelling student over beard ridiculous: SC- The Indian Express (p.2) on 12 September 2009

² Id.