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Comparison of Indian Jurisprudence on state-religion separationvis-a-vis Foreign Apex Courts

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1. Establishment Clause in the United Stated of America

The constitution of the United States of America has what is popularly called the 'establishment' clause. The first amendment states that '*Congress shall make no law respecting an establishment of religion*'[1]. Such relationship was described by Thomas Jefferson as the 'wall of separation'. The US Supreme Court explains it by stating that there will be no established church in the United States and the Government too cannot pass any law which favors one or more religion over other or others. It stated that, '*Neither can force nor influence a person to go to or to remain away from church against his will or force him to profess a belief or disbelief in any religion. No person can be punished for entertaining or professing religious beliefs or disbeliefs, for church attendance or non-attendance. No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion. Neither a State nor the Federal Government can, openly or secretly, participate in the affairs of any religious organizations or groups and vice versa.*'[2]

USA has a strict policy of not mixing religion and state policies. But this policy also has some contradictions. The Supreme Court has held the practice of granting tax exemptions to church to be Constitutional[3]. Almost all the US Presidents have been from Christianity and some sects have had disproportionate shares of them.[4]The issue of teaching 'Creation Science' remains a

[1] Constitution of the United States of America
[2] Everson v. Board of Education, 330 U.S. 1 (1947)
[3]Walz v Tax Commission, 397 U.S. 664 (1970)
[4] https://www.pewresearch.org/fact-tank/2017/01/20/almost-all-presidents-have-been-christians/ (visited on March 15, 2020), https://www.potus.com/presidential-facts/religious-affiliation/ (visited on March 15, 2020)

hugely contested issue in USA. Creationism is a religious concept that it was God that created everything including the humans. This is against the theory of evolution which says that humans were not 'created' but evolved from other primitive species. Large sections of US society belief in creationism and want it to be taught to their children in schools. The legislatures of various states wanted to oblige to the demands of not teaching evolution in public schools. In 1925 the state of Tennessee passed the Anti-Evolution Act. The Act was upheld by the Tennessee Supreme Court.[5] So in those times it was accepted by the courts of such a practice. The position came for decision before the United Court Supreme Court in *Epperson v. Arkansas*[6] in 1968 and the Act to prohibit the teaching of evolution was struck down. In *McLean v Arkansas Board of Education*[7], the Arakansas Court struck down a law which required the public schools to stick a balance between the teaching of evolution science and creation science. This was later supported by the Supreme Court in *Edwards v. Aguillard*[8] The court refused to believe that creation science is a science and its inclusion in the syllabi is secular. Due to the Supreme Court's various similar pronouncements, the proponents of creation science created the concept of 'Intelligent design'. This new concept was similar to the older on e albeit in garb of non-religious intellectual argument. This was done so that the judgments of the courts could be prevented from ruling that the introduction of teaching of Intelligent Design in public schools are in violation of the Establishment clause. However the courts saw through this attempt of hoodwinking the judiciary and disallowed it to be taught in public schools. Creation science can still be taught in private schools in US. The fact that this issue has been this much contested and remains contested even now is the evidence of dilemma that modern societies with a strong sense of secularism still have difficulty in having unanimity of opinion regarding relationship between state and religion.

2. European Courts and European Convention on Human Rights (ECHR)

In *P.M. Bhargava &Ors v. University Grants Commission &Anr*[9], the matter before the Indian Supreme Court was that whether the University Grants Commission being 'state' can start and

[5] Scopes v State, 154 Tenn. 105, 289 S.W. 363 (1927)
[6] 393 U.S. 97 (1968)
[7] 529 F. Supp. 1255 (1982)
[8] 482 U.S. 578 (1987)
[9] AIR 2004 SC 3478

fund courses on JyotirVigyan (science of astrology). UGC was accused of Hinduising the education sytem and burdening it with pseudo-science. The court held that, '*since Astrology is partly based upon study of movement of sun, earth, planets and other celestial bodies, it is a study of science at least to some extent*.' Regrading the accusation of it being pseudo-science, the court was of the opinion that, '*as to whether JyotirVigyan should be included as a course of study having been considered and examined by an Expert Body of UGC and they having recommended for including the said course for study and award of degree in universities, it will not be proper for this Court to interfere with the aforesaid decision specially when no violation of any statutory provisions is demonstrated*' and that *' teaching of 'JyotirVigyan' can under no circumstances be equated with teaching of any particular religion'.*

The opinion of the Indian courts in this case is similar to that of the ECHR as mentioned below.

In many countries of Europe, secularism is a feature in the Constitution but still that secularism is not as strict as that of France or USA. They provide full religious freedoms to all its citizens but have maintained that they have a peculiar cultural context in Christianity. Their parties are many times named after Christianity even when they have no religious goal to achieve. These practices however are not seen as contrary to secularism but as expression of the unique cultural ethos of those societies. The non-Christian citizens are seen as equal share holders of the common coparcenary of statehood. A school in Italy put up Cross Symbols in its classrooms. The plaintiff requested to court in Italy to ask the school to remove those symbols. On refusal of the court the matter went to the European Court of Human Rights. The Grand Chamber of the ECHR held that the peculiar historical and cultural context has to be examined before deciding whether the state is curbing freedom of religion by allowing certain symbols which have religious origin. It held that[10],

'the effects of the greater visibility which the presence of the crucifix gave to Christianity in schools needed to be placed in perspective. Firstly, the presence of crucifixes was not associated with compulsory teaching about Christianity. Secondly, Italy opened up the

[10]Lautsi and Others v. Italy, GC 30814/06 (18 March 2011).

school environment to other religions in parallel. In addition, the applicants had not asserted that the presence of the crucifix in classrooms had encouraged the development of teaching practices with a proselytizing tendency; neither had they claimed that [children] had experienced a tendentious reference to that presence by a teacher in the exercise of his or her functions. Lastly, [MsLautsi] had retained in full her right as a parent to enlighten and advise her children, to exercise in their regard her natural functions as educator and to guide them on a path in line with her own philosophical convictions'.

The above judgment stems from the opinion that the majority religion or the native religion as the case may be, is the cultural background of the country. Symbolism of that 'religion' can be categorized as strictly religion and sometimes as the base culture of the country. While the former cannot be allowed in a secular county later is not avoidable in any country. In India too this interpretation seems to have gained ground.

3. Judicial pronouncements of the Indian Courts

Section 123(3) of the People's Representation Act, 1951 prohibits candidates from any appeal to his or her religion, race, caste, community or language to further his or her 'prospect for election, or for prejudicially affecting the election of any other candidate. Section *123(3A)* prohibits candidates from promoting "feelings of enmity or hatred between different classes of the citizens of India on grounds of religion, race, caste, community or language" for the purposes of gaining votes or prejudicially affecting the votes of another candidate. In *Dr. Ramesh YeshwantPrabhoo v Shri PrabhakarKashinathKunte*[11] the court held that, *'mere use of the word `Hindutva' or `Hinduism' or mention of any other religion in an election speech does not bring it within the net of sub-section (3) and/or sub-section (3A) of Section 123, unless the further elements indicated are also present in that speech'.* The court then went on to discuss and describe the meaning of these terms and in what possible context these can be used by political persons during elections and without restrictions in the following words,

[11] AIR 1996 SC 1113

'no precise meaning can be ascribed to the terms `Hindu', `Hindutva' and `Hinduism'; and no meaning in the abstract can confine it to the narrow limits of religion alone, excluding the content of Indian culture and heritage. It is also indicated that the 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 these decisions the term `Hindutva' or `Hinduism' per se, in the abstract, can be assumed to mean and be equated with narrow fundamentalist Hindu religious bigotry, or be construed to fall within the prohibition in sub-sections (3) and/or (3A) of Section 123 of the R.P. Act.

The court gave a detailed meaning to Hindutva and considered that it is possible to use this term in India in the sense that it means the Indian culture and not just Hindu culture. The appeal by Ramesh YeshwantPrabhoo was dismissed and he was held to be violative of the said provisions of the Act. The court went on to create the distinction between proper and improper use of the term hindutva by,

'considering the terms `Hinduism' or `Hindutva' per se as depicting hostility, enmity or intolerance towards other religious faiths or professing communalism, proceeds from an improper appreciation and perception of the true meaning of these expressions emerging from the detailed discussion in earlier authorities of this Court. Misuse of these expressions to promote communalism cannot alter the true meaning of these terms. the mischief resulting from the misuse of the terms by anyone in his speech has to be checked and not its permissible use'[12]

So, the appellant was held liable, not because he used the term 'hindutva' but for the reason that he used it wrongly and in narrow sense. The court held this similar position in another judgment namely *Manohar Joshi v. Nitin BhauraoPatil*[13].

In *Engel v. Vitale*[14] it was held that instituting a religious prayer in the school is unconstitutional.

[12]Dr. Ramesh Yeshwant Prabhoo v. Shri Prabhakar Kashinath Kunte, AIR 1996 SC 1113
[13] AIR 1996 SC 796

Even if the prayer in non-sectarian or non-mandatory even then it cannot be instituted in the schools[15]. But in *Zorach v. Clauson*[16] the Supreme Court had held that the schools have the power to allow some students to leave school for some part of the day to receive religious teachings, and to require other students to remain in the school. It was held on the basis that it is not against the establishment clause and was not imparting religious instruction in the school premises. The approach of the US Supreme Court thereby has been strict in enforcing the 'establishment' clause. However it has not been free from exceptions. In *Marsh v. Chambers*[17] it was held that the 'unique history' of the United States allowed the Government funding of Chaplains to be constitutional and permissible.

Due to the absence of the 'establishment' clause in India, the approach of the state has not been secularist as in the United States. The Kothari Commission made a distinction between 'religious education' and 'education about religion', and explained the distinction as follows,

'The former is largely concerned with the teaching of the tenets and practices of a particular religion, generally in the form in which the religious group envisages them, whereas the latter is a study of religions and religious thought from a broad point of view- the eternal quest of the spirit.'[18]

In *DAV College v. State of Punjab*[19], the issue before the court was that whether the teaching of the philosophy of Guru Nanak Dev infringed Article 28. Stating that, *'to provide for academic study of life and teaching or the philosophy and culture of any great saint of India in relation to or the impact on Indian and world civilizations cannot be considered as making provision for religious instruction',* the court answered in the negative.

In 2000, the central government came up with the National Curriculum Framework for School

[14] 370 U.S. 421 (1962)
[15] Lee v Weisman, 505 U.S. 577 (1992)
[16] 343 U.S. 306 (1952)
[17] 463 U.S. 783 (1983)
[18] Education Commission, *Report on Education and National Development*, Vol. 1, 29 (National Council for Education Research and Development, 1964-66)
[19] AIR 1971 SC 1737

Education (NCFSE) which suggested 'education about religions, their basics, the values inherent therein and also a comparative study of the philosophy of all religions' in the curriculum. Its constitutionality was challenged on the ground that it violated Article 28. The court, in *Aruna Roy v. Union of India*[20], rejected the contention and upheld the validity of the proposal mainly on three grounds. Firstly, it alluded to the government committee reports which advocated[21] value based education, including the S.B. Chavan committee[22] which stated that religion is a 'most misused and misunderstood concept' and that 'the basics of all religions, the values therein, and also a comparative study of the philosophy of all religions should begin at the middle stage in schools and continue up to the university level'.[23] Secondly, it relied upon Article 51A which declares it to be a duty of every citizen to 'promote harmony and the spirit of common brotherhood amongst all the people of India transcending religious, linguistic and regional or sectional diversities'. Finally, it mentioned the difference between 'religious instruction' and 'study of religion' as accepted in the DAV College case.

The court also commented upon secularism in India. In its words, '*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-Sam-Abhav meaning negation of all religions*'. It added that '*neutrality of State towards all religions*' is a narrow understanding of secularism and positive approach towards all religions is not antithetical to secularism.

On one hand the state is actively involved into the administration of religious institutions and on the other hand the state claims to be secular. On one hand the courts lead the religion in deciding what religion is and on the other hand it remains quite behind religion when deciding upon the personal laws. The peculiar nature of secularism in India gives an impression that the state is blowing hot and cold at the same time. But when seen again the response of the state also seems

[20] (2002) 7 SCC 368

[21] Arvind Sharma, *Study of Religion in India*, Vol. 6, *ABJ pg 5* (2016)
[22] Ibid.
[23] R. Sen, *Articles of Faith: Religion, Secularism, and the Indian Supreme Court*, 90-91 (Oxford University Press, 2010)

to be appropriate atleast on the theoretical level if not practical. The Indian society is religious to the core. The state actively involves itself to maintain the stability in the society and to prevent a conflict between the religion and state, and between religions themselves. The secularism in India, evolved over a period of time, seems to be a reaction to the social conditions. The state being unable to stem religion out of civil life allowed the personal laws to stand. The religious institutions especially of the Hindus have always had a direct connection with the political powers of the day in the pre-colonial times. The state realizing the importance of maintaining these institutions well for welfare of the Hindus as well as Hinduism, took the same responsibility upon itself. But as the state started interfering in the Hindu institutions, it was natural that the Hindu institutions themselves will be interested in how they are to be administered. Quite naturally, this would have led the Hindu religious institutions to have an aspiration to have a strong voice in the political sphere since they sense a direct impact upon their administration as and when the political establishment changes.

The jurisprudence that the courts have evolved has a very interesting impact upon secularism and religious freedom. While the courts have devised the essentiality test and have delved deep into theological thickets, it has consistently kept itself away from deciding upon personal laws until the legislature codifies it. This attitude of the courts seems contradictory. Secularism as it stands today in India has been the result of the experiences that India has had in the past and it changes in the way the Indian society change. The Indian judiciary does not see secularism as neutrality in religion or separation from the state but only as fair-play between the religions.