THE CHITTAGONG UNIVERSITY JOURNAL OF LAW

Volume XXIV, 2019
(Published in June 2023)

চট্টগ্রাম বিশ্ববিদ্যালয় জার্নাল অফ ল

THE CHITTAGONG UNIVERSITY JOURNAL OF LAW

আইন অনুষদ

Faculty of Law
University of Chittagong

খণ্ড চব্বিশ, ২০১৯
Vol. XXIV, 2019

Published in June, 2023

ISSN No- 073-5448

Published by
Registrar
University of Chittagong, Chattogram–4331, Bangladesh

Printed by
MAA Art Printers

Cover and Journal Formatted by
Mourshadul Alam, Senior Instructor (Deputy Registrar)

Price
Taka 200.00
US $ 10.00

ISSN NO- 073-5448

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The Chittagong University Journal of Law
ISSN 073-5448
VOL.XXIV, 2019 (pp. 41-60)

Religious Equality in South Asia: Does "Constitutionalized Secularism" Matter?

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Md Jahedul Islam ©

Abstract

Constitutional principle of secularism has been famously interpreted as creating a "wall of separation" between the state and the church (religion). Most states in the South Asian region are, however, fraught with histories of the political bias to dominant religions and the societal intolerance to religious plurality. Yet, these countries have endorsed a varying degrees of commitment to secularism and religious freedom in their constitutions. India and Nepal are constitutionally secular countries without any state religion. Higher judiciaries of both countries, however, have effectively established Hinduism as the most favoured religion. Bangladesh and Sri Lanka, on the other hand, are constitutionally secular states but have constitutional bias towards a most favoured religion. Facing the dilemma, Bangladesh Supreme Court has declared secularism as a basic structure of the constitution but paradoxically refused to adjudicate the constitutionality of its state religion amendment. The Sri Lankan Supreme Court calls the state a secular one but interpret the constitutionally guaranteed "foremost place of Buddhism" at the expense of religious freedom of minorities. This paper argues that in the process of constitutional adjudication, the higher judiciaries of South Asia's secular and hybrid-secular countries have come to one common ground - the establishment of the dominant religion at the cost of equality and freedom for religious minorities. From a theoretical point of view, if secularism is minimally understood as religious neutrality, if not a "wall of separation", these South Asian countries are failing even this minimal understanding of secularism and their courts are trying to give their constitutions "a secular or neutral outlook, when [those, in fact, are] neither secular nor truly neutral". Therefore, this paper argues that constitutional secularism in the region is a dead idea – at least in its "wall of separation" and state neutrality sense.

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1. Introduction

The South Asian region has a long history of religious strife, communal riot, and minority repression. By the end of the British Empire in the mid-1940s, the region got divided into religious lines. The bloody separation of India and Pakistan on a divisive rhetoric of the so-called "Two-Nation Theory"[1] has left a permanent strain of Hindu-Muslim rivalry in the region. Buddhist nationalism also surfaced as radical rhetoric in other parts of the region. As it stands now, the politico-religious fault line in South Asia is drawn among three dominant religions – Hinduism (India and Nepal), Islam (Afghanistan, Bangladesh, Maldives, and Pakistan) and Buddhism (Bhutan, Myanmar, and Sri Lanka). Countries have shown different levels of constitutional commitment to secularism and religious tolerance. Some designate themselves as religiously neutral secular states (India and Nepal), some have endorsed a hybrid version of secularism that accommodates a favoured or state religion (Bangladesh, Bhutan, Myanmar, and Sri Lanka), some others are purely theocratic states (Afghanistan, Pakistan, and the Maldives).

Like the rest of the world, secularism has been a contested concept in the region. This study of the highest court jurisprudence from the region shows that the South Asian courts have interpreted secularism and religious freedom consistently to the advantage of dominant religious groups. This paradoxical trend has brought the secular (India, Nepal) and hybrid secular (Bangladesh, Sri Lanka) states of the region[2] to one meeting point – the establishment of the dominant religion at the cost of religious equality and freedom for the minorities.

The next part (Part 2) of the paper will explain the three models of secularism - the "hard or thick", "soft or thin" and "established religion model" of secularism. However, it is important to mention that the authors do not attempt any normative judgment on the suitability or unsuitability of any of the three secularism models discussed here. The aim of the next parts of the paper is to analyze how the three different models are interpreted by the highest courts of the South Asian region in

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[1] Two-Nation theory is a political doctrine which rationalized the division of undivided India into two independent states *i.e.,* India and Pakistan based on Hindu and Muslim majorities in the respective territories. The theory assumed that the Hindus and Muslims of the subcontinent were separate nations and hence needed separate states. For a general understanding of the doctrine see: Mehreen Hassan, 'The Two Nation Theory and the Creation of Pakistan' (2020) 7(2) *Asian Journal of Social Sciences and Management Studies* 80.

[2] While a thorough study of each of the nine South Asian countries would have made this study exhaustively comparative, the unavailability of enough case laws from Bhutan and Myanmar has forced us to study India and Nepal from the secular states (with no state religion) and Bangladesh and Sri Lanka from the hybrid states (with secularism plus state or favoured religion). We have left out Pakistan, Maldives and Afghanistan from the discussion since these countries are constitutionally identified as theocratic states and do not include Secularism as a constitutional principle.

different constitutional cases. In this sense, this paper is a comparative study of judicial approaches to secularism rather than a theoretical analysis of different models of secularism. Therefore, the Part 3 will bring the higher court jurisprudence of India, Nepal, Bangladesh, and Sri Lanka as comparative study of empirical reality in the region. Discussion in this part will explain how these courts struggled with secularism at different stages of their constitutional evolution and how ultimately, all of the courts ended up prioritizing the religion of the majority and relegating the religion of the minority to a subordinate position. Part 4 concludes the paper by arguing that the distinction between having and not having a constitutional guarantee of secularism is shrinking in the region.

2. Three Models of Secularism

Secularism is popularly understood as the separation of religion from politics. Though secularism's idealized definitions usually call for a complete separation of religion from the state, its practical variants fetch different social, political, and constitutional understandings.[3] The sociological view of secularism advocates a general decline of religious belief and practice among the citizens. Political secularism calls for the privatization of religion and its exclusion from the political domain.[4] The constitutional principle of secularism, on the other hand, requires the separation of the state from religious rules and institutions. This scheme of "principled distance between the state and religion" ideally consists of three components. First, the states' legal and judicial processes are not controlled by religion.[5] Secondly, the state lacks official religion and do not sponsor religious institutions, processes, or education.[6] Thirdly, the states do not interfere with individuals' religious freedom or discriminate between religious groups. However, it is debatable whether complete seclusion of religion from politics in all three constitutional senses is practical. Political developments and judicial precedents in Anglo-European jurisdictions suggest that the strict separation of religion from politics has remained largely utopian.[7] Even the states without

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[3] Jose Casanova, 'Rethinking Secularisation: A Global Comparative Perspective', (2006) 8(1) *The Hedgehog Review* 7, 9.

[4] Richard Moon, *Freedom of Conscience and Religion* (Irwin Law 2014) 20.

[5] A. T. Kuru, 'Changing perspectives on Islamism and secularism in Turkey: The Gulen movement and the AK party' in: Dr Ihsan Yilmaz et al (eds), *Muslim World in transition: Contributions of the Gulen movement*, (Leeds Metropolitan University Press 2007) 141; Philip Hamburger, *Separation of Church and State* (Harvard University Press 2004) 79-88.

[6] Stephen L. Carter, 'The Byron Mccormick Lecture Reflections on The Separation of Church and State', (2002) 44 (2) *Arizona Law Review* 293.

[7] Brett G. Scharffs, 'The (not so) Exceptional Establishment Clause of the United States Constitution', (2018) 33(3) *Journal of Law and Religion* 137; Daan Brayeman, 'The Establishment Clause and the Course of Religious Neutrality' (1986) 45(2) *Maryland Law Review* 352.

official or favoured religion directly or indirectly patronize the dominant religion.[8] On the other hand, strict secular states like France and Belgium suppress the religious practices of unfavoured minorities.[9]

There are two dominant models of secularism.[10] The Anglo-American model of soft or thin secularism, characterized by the famous Jeffersonian "wall of separation",[11] underscores privatization of religion, non-intercourse among state and religion, the maximum allowance of religious freedom and non-discrimination among religious groups. Still, many of the Anglo-American countries have dominant religions that influence their laws and state policies. Traditions and institutions of the dominant religion continue to receive state patronization there.[12] The second model – 'thick or hard secularism' - draws inspiration from the French Revolution and the European renaissance. Hard secularism goes beyond the separation of the Church from the state. A hard secularist state would rather try to regulate religion as part of its national unification agenda. The approach, however, is criticized for being excessively suppressive to the unfavoured religious groups of a given time.[13]

A third - "Established Religion"- model adopted by some states with a history of religious tension tends to distinguish the concept of separation from neutrality.[14] argues that mere endorsement of a particular religion does not amount to discrimination towards non-dominant groups. Likewise, the mere inclusion of secularism in a constitution does not guarantee state neutrality towards all religions.[15] If neutrality is a matter of substantive policy, a religious state could respect the non-dominant religions,[16] despite its lack of institutional separation from the dominant religion.[17] While some Anglo-European states do not officially

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[8] Mathew John, 'Decoding Secularism: Comparative Study of Legal Decisions in India and U.S,' (2005) 40(18) *Economic and Political Weekly* 1901, 1903.

[9] *S.A.S. v. France,* 2014-III Eur. Ct. H.R. 341; *Dakir v. Belgium,* App. No. 4619/12, Eur. Ct. H.R.

[10] William M. McClay, 'Two Concepts of Secularism', (2001) 13(1) *Journal of Policy History* 47

[11] James Hutson, 'A Wall of Separation FBI Helps Restore Jefferson's Obliterated Draft, 1998' <https://www.loc.gov/loc/lcib/9806/danbury.html> accessed 07 February 2021

[12] Aernout J Nieuwenhuis, 'State and religion, a multidimensional relationship: Some comparative law remarks', (2012) 10(1) *International Journal of Constitutional Law* 153, 155.

[13] Olivier Roy, *Secularism Confronts Islam* (Columbia University Press 2007).

[14] Javier M. Torron, 'Institutional Religious Symbols, State Neutrality and Protection of Minorities in Europe', (2014) 171 *Law & Justice*: *The Christian Law Review 21, 25.*

[15] Dwight Bashir, Elizabeth K Cassidy and Isaac Six, *Annual Report of The U.S. Commission on International Religious Freedom* (U.S. Commission on International Religious Freedom 2018) 37.

[16] Robert Audi, 'The Separation of Church and State and the Obligations of Citizenship', 1989 18(3) *Philosophy & Public Affairs* 259.

[17] Kristin Henrard, 'Duties of Reasonable Accommodation in Relation to Religion and the European Court of Human Rights: A Closer Look at the Prohibition of Discrimination, the Freedom of Religion and Related Duties of State Neutrality', (2012) 5(1) *Erasmus Law Review* 59, 75.

endorse any religion, they still visibly associate with dominant Churches. Many others officially endorse a dominant religion but maintain a very good record of religious freedom and tolerance.[18] The gist of the "Established Religion" model is that secularism need not essentially be seen as a concept of separation of religion from the state. The focus should rather be on protecting religious diversity and minimum assurance of the minorities' religious freedom while the state continues to endorse, nurture and patronise the dominant religion's traditions and institutions.

Recently, the Established Religion Model has drawn support from some liberal thinkers. Charles Taylor, for example, argues that the thick and thin classification of secularism is not viable in modern-day political realities. Taylor argues that the "strict separation of state and church" should not be considered as an end in itself. It should rather be seen as a means[19] of attaining diversity, liberty, the rule of law and democratic equality.[20] Secularists, therefore, do not essentially need to pursue a water-tight separation of the state and the Church. Nor do they need to eliminate religions.[21] They should rather look for the coexistence of opposing moral world views and an "overlapping consensus" on some political ethics like the rule of law, equality, non-discrimination, and pluralism.[22] In this sense, secularism may be attained even when states visibly associate themselves with a particular religion. However, Taylor's view is criticized for its total disregard of the wall of separation between state and religion and its failure to acknowledge that a minimum level of separation is necessary for an "overlapping consensus on core political ethics" to emerge.[23] As the discussion of South Asian jurisprudence in the next part will show, absent this minimum level of separation, even constitutionally secular states could paradoxically establish the dominant religion.

3. South Asia's Blurring Idea of Constitutional Secularism

In the South Asian region, India and Nepal are constitutionally secular states that do not have any state religion. Sri Lankan and Bangladesh constitutions, on the other hand, are of hybrid nature. Sri Lankan constitution has expressly mentioned Buddhism as the most favoured religion. The Sri Lanka Supreme Court, however,

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[18] Jeroen Temperman, *State-Religion Relationships and Human Rights Law: Towards a Right to Religiously Neutral Governance* (Martinus Nijhoff Publishers 2010) 30-33.

[19] Charles Taylor, 'Why We Need a Radical Redefinition of Secularism?', in Eduardo Mendieta and Jonathan VanAntwerpen (eds), *The Power of Religion in the Public Sphere* (Columbia University Press 2011) 34–59, 41; Jocelyn Maclure and Charles Taylor, *Secularism and Freedom of Conscience* (Harvard University Press 2011) 29.

[20] Taylor (n 19) 37.

[21] ibid 48.

[22] ibid 36

[23] Sebastián Rudas, 'The Paradox of Political Secularism', in Jonathan Seglow and Andrew Shorten (eds), *Religion and Political Theory: Secularism, Accommodation and The New Challenges of Religious Diversity* (ECPR Press 2019) 39-56.

designates the state as a secular one. Bangladesh started as a purely secular state. Military rulers of the 1970s and 80s, however, established Islam as the state religion. This part of the discussion will consider how the higher judiciaries of India, Nepal, Bangladesh and Sri Lanka struggled to settle on a stable understanding of secularism and/or religious freedom in their respective constitutions. It appears that their positions travelled from a principled distance of the state from religion, through the so-called mutual tolerance model of secularism, then through a concept of dominant and favoured religion model and, finally, to a *de facto* establishment of the dominant religion.

3.1. India's Journey from Secularism to Constitutionalized Hindutva

The Indian Constitution of 1950 touted a "common Indian nationhood" and avoided the officialisation of religion. It was overwhelmingly secular and guaranteed religious freedom, non-discrimination and enhanced minority protection.[24] However, secularism was included in the text through the Forty-second Amendment of 1976.[25] The exact meaning of secularism, however, remained contested.[26] While progressives perceived it as "principled neutrality" towards all religions,[27] political governments rarely adopted the "principled neutrality" and "wall of separation" understanding. The early day secularist rhetoric hardly meant anything more than non-communal, non-sectarian state policies and "non-preference" of a particular religion.[28] Later developments in Indian politics, however, threatened even this minimalist understanding of religious non-preference. By now, India being under the right-wing Bharatiya Janata Party (B.J.P.) rule for a considerable time, *Hindutva*[29] ideals have effectively sidelined much of the original understandings of secularism. Given the reality, some find it futile to have secularism as a constitutional principle anymore. They argue for dropping it from the constitution and replacing it with principles like religious equality and freedom.[30] The Indian Supreme Court appears to have taken clues from the trend.

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[24] Ramesh Thakur, 'Ayodhya and the Politics of India's Secularism' (1993) 33(7) *Asian Survey* 645.

[25] The 42nd amendment to the Indian Constitution brought changes in the Preamble and declared India as "Sovereign Socialist Secular Democratic Republic".

[26] Bhavya Gupta and Arush Agarwal, 'Secularism as an Ideology: A Global and Indian Perspective' (2019) <http://dx.doi.org/10.2139/ssrn.3334461> accessed 12 January 2021.

[27] Sanghamitra Padhy, 'Secularism and Justice: A Review of Indian Supreme Court Judgments', (2004) 5027 *Economic and Political Weekly* 39, 46-47.

[28] Donald Eugene Smith, *India as a Secular State* (Princeton University Press 1963) 381.

[29] Birtannica, *Hindutva Indian Ideology* <https://www.britannica.com/topic/Hindutva> accessed 02 February 2021.

[30] Veit Bader, 'Constitutionalising Secularism, Alternative Secularisms or Liberal-Democratic Constitutionalism - A Critical Reading of Some Turkish, ECTHR and Indian Supreme Court Cases on Secularism', (2010) 6(3) *Utrecht Law Review* 8.

During the heydays of centre-left secularist political parties, the Indian Supreme Court embraced secularism as the "very basic of Indian Constitution"[31] and declared it as one of the unamendable basic structures of the constitution.[32] The Court, however, could not settle whether secularism meant a strict "wall of separation between the Church and the state" or a mere principle of religious tolerance.[33] In one case - *Ziyauddin Burhanuddin Bukhari* v. *Brijmohan Ram Das Mehra* - regarding a Muslim electoral candidate accused of using religious propaganda against his opponent - the Supreme Court defined secularism as a guarantee of equality among citizens.[34] This logic was later followed in the *Indra Sawhney case,* where secularism was described as guaranteeing a cohesive, unified, and casteless society.[35]

Then came *S.R. Bommai v. Union of India,*[36] where the dissolution of four B.J.P. led state governments was upheld. In this case, the Indian Supreme Court held that the constitutional principle of secularism would require the suppression of communal and religious politics.[37] This time, the Court canvassed secularism as a wall of separation between state and religion. Since the encroachment of the wall was "strictly prohibited",[38] the state was duty-bound to bring the deviant political parties like B.J.P. back from their antagonistic religious politics.[39] As will be seen later, this idea of suppressing religion-based parties as part of a secularist agenda was endorsed by Bangladesh's original constitution of 1972. Both of the countries, however, would backtrack from the position at later stages of their development.

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[31] *Sardar Taheruddin Syedna Saheb v. State of Bombay* AIR 1962 SC 853, 871.

[32] *Kesavananda Bharati v. State of Kerala* (1973) 4 SCC 225.

[33] In a case concerning the minority communities' right to establish and administer the educational institution of their choice (*Ahmedabad St. Xaviers College Society v. State of Gujarat* (1974) 1 SCC 717), Justice Matthew and Justice Chandrachud argued, "The Constitution has not erected a rigid wall of separation between the Church and the State. .... There are provisions in the Constitution which make one hesitate to characterise 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", (para. 139).

[34] *Ziyauddin Burhanuddin Bukhari v. Brijmohan Ram Das Mehra* (1975) SCR 453.

[35] *Indra Sawhney v. Union of India* (1992) Supp. (3) SCC 217 (para 569).

[36] *S R Bommai v. Union of India* AIR 1994 SC 232. This was a challenge to the dismissal of four BJP led state government in the wake of Babri Mosque riot in early 1990s on the charge of BJP being instigating religious hatred.

[37] Antony Copley, 'Indian Secularism Reconsidered: From Gandhi to Ayodhya', (1993) 2(1) *Contemporary South Asia* 47.

[38] *S R Bommai* (n 36), para 29 (Ahmad J); para 146 (Sawant and Kuldip Singh JJ.), para 178 (Ramaswamy J.), para 304 (Jeevan Reddy and Agrawal JJ).

[39] ibid, para 148, para 252 (Ramaswamy J).

Bommai's "wall of separation" idea started to fade away very soon. In *Dr Ismael Faruqui v. Union of India,*[40] the government's acquisition of *Babri Masjid* and adjacent lands was upheld. The Court held that such control or taking of religious places was not against secularism, particularly when "[a] mosque is not an essential part of the practice of the religion of Islam. *Namaz* (prayer) by Muslims can be offered anywhere, even in the open."[41] Understandably, the government of that time had legitimate law and order justification behind the acquisition. However, the problematic part of *Ismail Faruqui* judgement was in its sliding away from the *Bommai* understanding of secularism. The judges quoted extensively from ancient Hindu religious scripture *Veda* to present a modified definition of Indian secularism. This time, secularism was defined as a message of tolerance among religions – "*Sarwa Dharma Sambhava*"[42]. Modifying the definition and justification of such definition by reference to a dominant religious scripture is deeply problematic. It places the dominant religion as the interpretative touchstone of judging what secularism would mean in a given case. Also, the doctrine of essential religious practice – originally established in the *Shirur Mutt case* of 1954[43] - would later be used to suppress the minorities.

The next paradigm-shifting judgments were about *Hindutva*. *Hindutva* ideology advocates the construction of an imaginary Hindu Nation in India.[44] Principal drafter of the Indian Constitution Dr. B.R. Ambedkar famously compared it with "fascism and glorification of war".[45] However, the Indian Supreme Court would soon recognise the *Hindutva* as a constitutional philosophy. The seven *Hindutva* cases[46] of 1996 were more or less similar to the facts of *Ziyauddin Burhanuddin* v. *Brijmohan Ram Das* case mentioned earlier. In *Ziyauddin*, a Muslim candidate was accused of using Islam as an electoral propaganda tool. In *Hindutva* cases, the B.J.P. candidates were accused of using *Hindutva* as electoral propaganda. While Mr *Ziyauddin*'s election was nullified for violation of electoral laws and secularism, the *Hindutva* judgments glorified the *Hindutva* as a nationalist and secular ideal. The Court held:

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[40] *Dr Ismael Faruqui v. Union of India* (1994) 6 SCC 360.

[41] ibid, para 85 (Verma J).

[42] ibid, para 31.

[43] *The Commissioner, Hindu Religious Endowments, Madras v. Sri Lakshmindra Thirtha Swamiar of Sri Shirur Mutt*AIR 1954 SC 282, (1954) SCR 1005.

[44] Murzban Jal, 'Rethinking Secularism in India in the Age of Triumphant Fascism', (2015) 43(3-4) *Journal of Socialist Theory* 521.

[45] B.R. Ambedkar, 'Krishna and His Gita', in Valerian Rodrigues (ed.), *The Essential Writings of B.R. Ambedkar* (Oxford University Press 2008) 193.

[46] *Ramesh Yashwant Prabhoo (Dr.) v. Prabhakar K. Kuntel* (1996) 1 SCC 130; *Manohar Joshi v. Nitin Bhau Rao Patil* (1996) 1 SCC 169; *Ramchandra K. Kapse v. Haribansh R. Singh* (1996) 1 SCC 206; For further details see: Barbara Cossman and Ratna Kapur, *Secularism's Last Sigh? Hindutva and the (Mis) Rule of Law* (Oxford University Press 1999).

> "The words 'Hinduism' or 'Hindutva' are not necessarily to be understood and construed narrowly, confined only to the strict Hindu religious practices, unrelated to the culture and ethos of the people of India, depicting the way of life of the Indian people."[47]

By using *Hindutva* as an alternative coinage of Indian nationhood, the Indian Supreme has nullified the *Bommai* understanding of secularism[48] and started its journey with the Dominant Relgision Model of secularism.[49] It was argued as back as in 1996 that legitimation of *Hindutva* as a force of cultural unification would risk India's cultural and religious diversity.[50] If the *Hindutva* judgments could be labelled as the transformation of India's soft secularism into an established religion model, there is another judicial development that continues to undermine the religious freedom of the minorities.

In forceful pursuance of *Hindutva* as a mantra of national unification, the Indian Supreme Court has created a "dangerous"[51] bulk of "essential religious practice" jurisprudence. In applying the "essential religious practice" test, the Indian Supreme court has taken the role of a jaundiced cleric who would "inconsistently determine the essentiality" of others' religious practices, "repeatedly change the method of determining [such] essentiality", and "seriously undermine the religious liberty".[52] It has been used to satisfy the dominant religious groups and the disadvantage of unpopular minorities.[53] The danger of a secular court playing the role of a religious interpreter is that if the religious non-experts, like the judges, discard whatever religious practice not proved to their satisfaction to be essential, the affected religious groups would have no other constitutional protections.[54] As Rajeev Dhavan and Fali Nariman put it, "Few religious pontiffs possess this kind of power and authority."[55]

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[47] *Ramesh Yashwant Prabhoo (Dr.) v. Prabhakar K. Kuntel* (1996) 1 SCC 130, (paras 39, 42).

[48] Patnaik, Arun Km and Prithvi Ram Mudiam, 'Indian Secularism, Dialogue and the Ayodhya Dispute', (2014) 42(4) *Journal of Religion, State and Society* 374.

[49] Ronojoy Sen, 'Defining Religion: The Indian Supreme Court and Hinduism', (2006) *Heidelberg Papers of South Asian and Comparative Politics* 24.

[50] T B. Hansen, 'Globalisation and Nationalist Imaginations: Hindutva's Promise of Equality through Difference' (1996) 3(10) *Economic and Political Weekly* 603, 608.

[51] Smith (n 28) 497; See also: Ronojoy Sen, *Articles of Faith: Religion, Secularism, and the Indian Supreme Court* (Oxford University Press 2012).

[52] Faizan Mustafa and Jagteshwar Singh Sohi, 'Freedom of Religion in India: Current Issues and Supreme Court Acting as Clergy', (2017) 4(9) *BYU Law Review* 915.

[53] In *State of West Bengal v. Ashutosh Lahiri* AIR 1995 SC and *M H Querseshi v. State of Bihar* AIR 1958 SC, the Court declared the slaughtering of cows during Eid ul Adha illegal.

[54] Duncan M Derrett, 'Religion, Law, and the State in India' (Favor and Favor 1968) 447.

[55] Rajeev Dhavan and Fali S. Nariman, 'The Supreme Court and Group Life: Religious Freedom, Minority Groups, and Disadvantaged Communities' in Kirpal, B. N., Ashok Desai, Gopal Subramaniam, Raju Ramachandran, and Rajeev Dhavan (eds), *Supreme But Not Infallible: Essays in Honour of the Supreme Court of India* (Oxford University Press 2000) 159-192.

The essential religious practice test has affected the Muslim minorities so disproportionately as to make it comparable to the French model of hard secularism, where religious practices of unpopular minorities are suppressed for the sake of some so-called secular ideals.[56] For example, India's uniform family law controversy shows that the Court has been more than willing to use secularism as a justification for subverting religious plurality. In *Sarla Mudgal and others v. Union of India,* the court emphasised that a uniform civil code was required for national integration.[57] While the Supreme Court's aggressive push for a uniform civil law for all religious communities is hailed by the far-right groups, it has remained a major source of frustration for the minority communities.[58]

The Indian Supreme Court's journey from constitutional secularism to constitutionalised *Hindutva* now risks aggressive pursuance of Hindu nationalism's oneness at the cost of India's religious and cultural diversity and pluralism.[59] Some recent judgements of the Court reveal the disturbing trend. For example, article 30 of the Indian Constitution provides a right for minorities to establish and manage their educational institutions. A division bench of the Supreme Court recently denied the *madaras* of West Bengal a right to appoint their teachers,[60] while a different bench of the same court allowed the Sikh educational institutions of West Bengal the same right to appoint teachers only four months earlier.[61] This was done in defiance of a long chain of judicial precedents[62] that upheld the minorities' freedom of "choice" on what they teach and how they administer their institutions.[63] Also, the very recent *Babri Mosque Judgement* controversially evicted the minority Muslims from their century-old place of worship, allegedly to appease the religious majority.[64]

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[56] Ashis Nandy, 'The politics of secularism and the recovery of religious tolerance', in Rajeev Bhargava (ed), *Secularism and its Critics* (Oxford University Press 1998) 321-344.

[57] *Sarla Mudgal and Others v. Union of India* AIR 1995 SC 1531.

[58] Ronojoy Sen, 'The Indian Supreme Court and the quest for a 'rational' Hinduism, South Asian History and Culture' (2009) 1(1) *South Asian History and Culture* 86.

[59] Padhy (n 27).

[60] *Civil Appeal No. 5808 of 2017* (unreported judgment).

[61] *Civil Appeal No. 2858 of 2007 with Civil Appeal No. 2859 of 2007* (unreported judgement) <https://indiankanoon.org/doc/174986626/>accessed 07 February 2021.

[62] *Ahmedabad St. Xaviers College* v State of Gujarat *1974* AIR 1389, *Rev. Sidharjbhai v. State of Bombay* 1963 AIR 540; *T.M.A. Pai Foundation v. State of Karnataka* 2003 AIR 355, *Re Kerala Education Bill 1957* [1958] INSC 20; *Rev. Father W. Proost v. State of Bihar1969* AIR 465; *Very Rev. Mother Provincial v. State of Kerala*1970 AIR 259; *Bihar State Madrasa Education Board v. Managing Committee of Madrasa*1990 AIR 695.

[63] Faizan Mustafa, 'An SC verdict violative of minority rights', *The Hindu* (New Dlehi: 19 March 2020).

[64] *Pranav Dhavan and Parth Maniktala,* 'Ayodhya Verdict: Secularism, Rule of Law and Faith of Minorities' *Bar & Bench*, (New Delhi: 17 November 2019); Kapil Komireddi, 'A blow against India's secularism' *The Guardian* (London: 03 October 2010).

3.2. India as the "Proper Model" of Nepali Secularism

Until recently, Nepal was the only Hindu state in the world constitutionally. After a mass upsurge against the King, Nepal turned into a constitutional monarchy. Later, a second movement led to the abolition of the monarchy and the adoption of an interim constitution that declared Nepal as a secular state.[65] The meaning of secularism was not clarified very well. Though a commitment to religious pluralism and equality was included in the Peace Agreement between the government and the Communist Party (Maoist),[66] its relevance for constitutional secularism remains unclear. Political actors also showed "fluidity"[67] in this regard. Apart from denouncing unpopular King Gyanendra, it was rarely preached as a principle of state neutrality and separation of religion from the state.[68] Nepali judicial precedents also do not indicate any sign of a complete non-establishment of the dominant religion.[69] The government continues to engage in religious affairs and sponsor the dominant religious festivities and institutions.[70] *Kumari* and *Pashupathinath* cases are indicative of the trend.

Worshipping *Kumari* (virgin girl) is an ancient Hindu practice followed in the Kathmandu valley. The national Kumari is considered a living goddess and conducts a ritual life until she attains puberty, and a new *Kumari* takes charge. In 2005, the Kumari tradition was challenged in the court. Though the petitioner did not challenge the tradition itself, it was alleged that Kumari's exclusion from formal education, seclusion from society and other ritualistic chores were violating her rights as a child. The government's non-attention to the wellbeing of former Kumaris also was challenged. The petitioner prayed for the reformation of the practice keeping the Kumaris's best interests in mind. In its judgment, the court differentiated between the religious and cultural aspects of the tradition.[71] On the lifestyle and wellbeing of the Kumari, the court held that this was a cultural issue of the Newar community that should be reformed, and all the

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[65] The Interim Constitution of Nepal 2007, Part I, Article 4(1).

[66] The agreement as included in the Schedule 4, para 7.1.5 runs as follows: "Both sides shall, on the basis of norms and values of secularism respect social, cultural and religious sensitivity, religious sites and the religious faith of individuals."

[67] Chiara Letizia, 'National Gods at Court Secularism and the Judiciary in Nepal', in Daniela Berti, Gilles Tarabout, and Raphael Voix (eds), *Filing Religion: State, Hinduism, and Courts of Law* (Oxford University Press 2016) 38-42.

[68] Chiara Letizia, 'The Goddess Kumari at the Supreme Court, Divine kinship and secularism in Nepal', (2013) 67 *Journal of Global and Historical Anthropology* 34.

[69] Centre for Constitutional Dialogue (CCD), *State and Religion: Nepal Participatory Constitution Building Booklet Series* (Kathmandu: CCD 2009).

[70] Rajeev Bhargava, 'How has Secularism Fared in India?', in C. Jaff relot/A. Mohammad-Arif (eds), *Politique et religions en Asie du Sud: Le secularismeen tous ses etats?* (Éditions de l'École des hautes études en sciences sociales 2012) 47–67.

[71] Letizia (n 68) 39.

modern amenities of life must be made available for the Kumari. On the religious aspect of the tradition, it was held that practice was an integral and essential religious practice of the Newar community and the nation in general. Therefore, this case seems to endorse the historical practice or tradition doctrine of the U.S. Supreme Court[72] and generate an understanding that Nepali secularism does not prevent the state from sponsoring the religious institutions that might be considered part of the cultural tradition of the state.[73]

The *Pashupatinath cases*[74] were about the appointment of priests in the historic Pashupatinath Temple. The leftist government tried to break a century-long tradition that priests of this temple are always appointed from the Bhaṭṭa priests of South India. A regulation to that effect required the priests to be from Nepal instead. It was challenged in the court. The petitioners' central argument was that the government's interference in the appointment process by changing the tradition violated secularism. The case had a second issue involved. The regulation attempted to reorganise the management and development of the Temple funds and adjacent areas. On the same logic of secularism and the state's non-interference in religious affairs, the petitioners argued that the government's development trust was also unconstitutional. The court declared the changed appointment process unconstitutional and held that the Temple appointments should be handled in "accordance with the values of a secular state." On the administrative aspect of the management of the temple and its funds, however, the court recognised the role of the government. The interesting part of the observation was the court's advocacy of the Indian model as the "Proper of secularism for Nepal.[76]

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[72] *Van Orden v. Perry*, 545 U.S. 677 (2005); *Lynch v. Donnelly* 465 U.S. 668 (1984); *County of Allegheny v. ACLU*, 492 U.S. 573 (1989). Under the U.S. Supreme Court's historical practice doctrine, the state's supporting the historical religious practices of the dominant group does not amount to favouring or preferring one religion over the others in violation of the non-establishment clause of the U.S. Constitution. See: Donald L. Beschle, 'Does the Establishment Clause Matter? Non-Establishment Principle in the Unites States and Canada', (2002) 4(3) *University of Pennsylvania Journal of Constitutional Law* 451, 454-60.

[73] Letizia (n 68) 38.

[74] The Pashupathinath cases involve six Nepali Supreme Court cases during 2008 and 2009 - *Krisna Rajbhandari v. Prime Minister* (Writ Petition No. 065-WO-0364/16, 2008); *Bharat Jangam v. Prime Minister* (Writ Petition No. 065-WO-0365/16, 2008); *Lok Dhoj Thapa and Binod Phunyal v. Prime Minister* (Writ Petition No. 065-WO-0366/16, 2008); *Bharat Jangam v. Prime Minister* (Writ Petition No. 065-WO-0757/6, 2009); *KrisnaRajbhandari v. Prime Minister* (Writ Petition No. 065-WO-0862/26, 2009) and *Dinesh Thapa v. Prime Minister* (Writ Petition No. 066-WO-0189/19, 2009).

[75] Letizia (n 68) 55-57.

[76] Chiara Letizia, 'Shaping Secularism in Nepal' 39 (2012) *European Bulletin of Himalayan Research* 66.

Like India, Nepal has outlawed slaughtering cows – primarily affecting Muslims - and made stringent anti-conversion laws affecting Christian missionaries. A 2018 law declared that any person involved with proselytizing might be jailed for up to five years and be liable to a fine of up to fifty thousand rupees. Different religious minority groups like Christians, Muslims, etc., have criticized this law, claiming this as a violation of constitutional provisions of secularism and democracy. The 2018 law has tacit support in article 26 (3) of the newly adopted Constitution of 2015. Article 26(3) states that one's fiduciary relationship with a person of another religion could be constructed as a factor that may jeopardize his religion.[77] This provision allegedly provides scope for an expansive reading of the anti-conversion law and suppresses the minorities' right to practice, teach and preach their religion. In *Charles Mendes et. al. v. His Majesty's Government* case,[78] the court took a very narrow view of the freedom of religion by excluding the right to religious teaching from its ambit. In this case, the court reconciled the Nepali secularism by giving Hinduism - the "religion and culture practiced since ancient times" - a special state status. The Court also held that preaching Christianity in Nepal could adversely affect Hinduism.[79]

Like the Indian Supreme Court's *Hindutva* judgments, the Nepali Supreme Court's elevation of Hinduism from a religious tradition to one of national culture has the effect of *de facto* establishment of Hinduism. Given the context, it has been argued that Nepali secularism is a "limited form of secularism" with a predominant place for Hinduism in the Republic.[80] While the *Kumari* case's distinction between culture and religion and the *Pashupathinath cases'* distinction between religion and administration might lend some support for the state's "principled distance" from religion,[81] the *Charles Mendes* decision seems to suggest that Nepal is a pretty close match to India's constitutionalised *Hindutva*.

3.3. Bangladesh's Dilemma with Secularism and State Religion

Unlike India and Nepal, Bangladesh does not endorse "secularism" as the sole constitutional ideal. Bangladesh Constitution accommodates Secularism alongside

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[77] Article 26 of the 2015 constitution provides as follows: "(3) While exercising the right as provided for by this Article, no person shall act or make others act in a manner which is contrary to public health, decency and morality, or behave or act or make others act to disturb public law and order situation, or convert a person of one religion to another religion, or disturb the religion of other people. Such an act shall be punishable by law."

[78] *Charles Mendes et. al. v. His Majesty's Government*, 6 *Nepal Law Journal*, 2046, Decision No. 3855.

[79] International Commission of Jurists, *Challenges to Freedom of Religion or Belief in Nepal: A Briefing Paper* (Geneva: ICJ 2018).

[80] Letizia (n 68) 40. See also: Kanak Bikram Thapa, 'Religion and Law in Nepal', (2010) 3(12) *BYU Law Review* 921.

[81] Rajeev Bhargava, *The Promise of India's Secular Democracy* (Oxford University Press 2010) 88.

a State Religion. Bangladesh got separated from Pakistan in 1971. At independence, the original constitution of 1972 entrenched secularism as one of "the high ideals" of the nation. This was a radical shift from the theocratic state of Pakistan. The framers of the constitution perceived secularism well beyond mere state neutrality from religion. Bangladesh's definition of secularism included the principles of non-establishment of religion, elimination of communalism, prohibition on the use of religion as a tool of politics, and guarantee of religious non-discrimination.[82] This is unique in the sense that it accommodated a blanket prohibition on religion-based political parties or groups:

> "[N]o person shall have the right to form, or be a member or otherwise take part in the activities of, any communal or other association or union which in the name or on the basis of any religion has for this object, or pursues, a political purpose."[83]

Framers of the Bangladesh constitution perceived non-communalism as a constitutional guarantee against communal hatred, violence, and prejudices while faiths and practices of religions remained protected. Bangladeshi secularism was not meant to foster total privatisation or decline of religious belief among the citizens.[84] The very first government of Bangladesh sponsored religious education, places of worship, and the clergy. The first government of Bangladesh joined the O.I.C. (Organisation of Islamic Conferences), established the Islamic Foundation and national mosques in major cities. It endorsed religious rituals like recitation from the Holy Quran in national events. Therefore, the secularism endorsed by the newly independent Bangladesh appeared to be one of Anglo-American style soft secularism rather than the France-style hard secularism.[85]

After the coup of 1975, military ruler Ziaur Rahman attempted the Fifth Amendment to the constitution and removed secularism as a constitutional principle. He replaced it with the principle of "*Absolute trust and faith in the Almighty Allah*". In the late 1980s, another military ruler H.M. Ershad established Islam as the State Religion through the Eighth Amendment. Fifteen eminent citizens representing The Citizens' Committee for Resisting Communalism and Autocracy challenged the state religion amendment. They argued that the concept of state religion was against the Republic's founding principles and irreconcilably

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[82] Article 12 of the Constitution of Bangladesh, 1972.

[83] A proviso to the article 38 of the Constitution of Bangladesh, 1972.

[84] J Hossain Bhuiyan, 'Secularism in the Constitution of Bangladesh', (2017) 49(2) *The Journal of Legal Pluralism and Unofficial Law* 204, 209.

[85] Habibul Haque Khondker, 'State and Secularism in Bangladesh', in Chin Liew Ten/Michael Siam-heng Heng (eds), *State and Secularism: Perspectives from Asia* (World Scientific Publishing Co Pte Ltd 2009) 219-220.

violated the basic structure of the Constitution.[86] This case was filed in 1989 the Supreme Court declared another part of the Eighth Amendment (decentralization of the Supreme Court) unconstitutional. The court, however, did not take up the state religion case at that time.

Later, the Supreme Court of Bangladesh invalidated Ziaur Rahman's accession to power and his Fifth Amendment in *Bangladesh Italian Marble Works Ltd* v. *Bangladesh*.[87] In this case, the Court declared secularism as a basic structure of the Bangladesh Constitution and condemned its removal by Zia. H. M. Ershad's accession to power was declared unconstitutional in another case the same year.[88] The original case challenging the state religion amendment, however, remained unaddressed until recently. In 2011, the Fifteenth Amendment Act revived the principle of secularism. It, however, kept Ershad's state religion and Zia's "Absolute trust and faith in Almighty Allah" intact. The Fifteenth Amendment also redefined secularism. Unlike the original definition of 1972, the 2011 definition sought to regulate the religion-based political parties rather than prohibiting them straight. Under the new definition, religious parties will be violating secularism if they:

> "(a) [destroy] the religious, social and communal harmony among the citizens; (b) [create] discrimination among the citizens, on the ground of religion, race, caste, sex, place of birth or language; or (c) [organise] terrorist acts or militant activities against the State or the citizens of any other country."[89]

Understandably the ruling party of 2011 had to accept the reality of the time. Numerous strong religious parties have already been established since Zia's Fifth Amendment. The new definition was tested in 2014 against the biggest Islamist party of Bangladesh, Jamaat Islami. In *Maulana Syed Rezaul Haque Chadpuri v Bangladesh Jamaat-e-Islam*,[90] it was argued that the militant Islamic ideologies of Jamaat Islami would violate the constitution of Bangladesh.[91] Jamaat discriminated the non-Muslims by barring them from membership in its Executive Committee and access to its top leadership.[92] The Court accepted the argument

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[86] Shah Alam, 'The State-Religion Amendment to the Constitution of Bangladesh: A Critique', (1991) 24(2) *Verfassung und Recht in Übersee/Law and Politics in Africa, Asia and Latin America Quarterly* 209.

[87] *Bangladesh Italian Marble Works Ltd v Bangladesh* (2006) BLT (Special) (HCD) 1; *Khondhker Delwar Hossain v Bangladesh Italian Marble Works Ltd and Others* (2010) 62 DLR (AD) 298.

[88] *Siddique Ahmed v Bangladesh* (2011) 33 BLD (HCD) 84.

[89] Proviso to article 38 as revived by the Bangladesh Constitution (Fifteenth Amendment) Act 2011.

[90] *Maulana Syed Rezaul Haque Chadpuri v Bangladesh Jamaat-e-Islam* 66 (2014) DLR (HCD) 14.

[91] ibid, para 346.

[92] ibid, para 347.

and held that Jamaat Islami failed the mandatory requirements for legitimate political parties as per the Constitution.[93] Pending its appeal against the judgement, Jamaat Islami's registration with the Election Commission was cancelled. Jamaat is barred from participating in elections in Bangladesh since then.

However, the exclusion of Jamaat Islami from politics may not foreclose the debate on the religious parties' place in Bangladeshi secularism. The allegation of discrimination against non-Muslims in accessing party membership is likely to be applicable to all other Islamist parties that are still allowed to operate. Hence, Jamaat Islami may claim that they have been singled out for vindication. Therefore, it is doubtful whether *Maulana Syed Rezaul Haque Chadpuri* case would be considered a decisive precedent against communal and religion-based politics in Bangladesh.[94] The Supreme Court's hesitation over other Islamist parties would become evident soon.

In 2011, a High Court Division bench of the Supreme Court took the 1989 challenge to the state religion amendment for consideration. A rule was issued upon the government asking why the state religion clause would not be declared unconstitutional. A larger bench was formed in 2015. It took the matter for hearing on 28 March 2016 and dismissed the case in its first hearing. It argued that the petitioners lacked their standing to sue.[95] This was clearly in contradiction with series of Bangladeshi precedents on the *locus standi* issue. Over the years, Bangladesh Supreme Court had widened the *locus standi* rule in public interest litigation cases.[96] It has been argued that the ground reality of political polarisation in Bangladesh, Islamisation of the social psyche, and the Fifteenth Amendment's acceptance of state religion alongside the modified definition of secularism might have encouraged the Court to duck the issue and dismiss the case on a superficial ground.[97] The Supreme Court might have been wary of public backlash against any religiously sensitive judgment.[98]

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[93] ibid, para 441.

[94] Kumar Updendra, 'Religion and Politics: A Study of Bangladesh Jamaat-e-Islami' (2017) 7(5) *Asian Journal of Research in Social Sciences and Humanities*, 146; Arshi Saleem Hashmi, 'Bangladesh Ban on Religion-Based Politics: Reviving The Secular Character of the Constitution, Spotlight on Regional Affairs' (2011). <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1971325> accessed 20 January 2022.

[95] Maher Sattar and Ellen Barry, 'In 2 Minutes, Bangladesh Rejects 28-Year-Old Challenge to Islam's Role', *The New York Times* (New York: 29 March 2016).

[96] Eusef R. Huq, 'The Legality of a State Religion in a Secular Nation', (2018) 17(1) *Global Studies Law Review* 245, 259-64.

[97] Ridwanul Hoque, 'Constitutional Challenge to the State Religion Status of Islam in Bangladesh: Back to Square One?' (*International Journal of Constitutional Law Blog*, 27 May 2016).

[98] Smruti S Pattanaik, 'Majoritarian State and the Marginalised Minorities: The Hindus in Bangladesh', (2013) 37(4) *Strategic Analysis* 411.

This brings us to the central argument of this paper once again. Has Bangladesh and its judiciary walked away from the original ideal of soft secularism and endorsed the established religion model? Case laws of the Supreme Court and the Fifteenth Amendment of 2011 combined suggest that this is perhaps the case. Though some support the development,[99] the problem of this paradigm shift is its repercussions on the capacity and willingness of the Supreme Court to protect minority rights. It is seen that the Bangladesh Supreme Court has shown sensitivity to minority rights during the rule of secularist governments. During the current secularist regime, Bangladesh has finished the trial of war crimes and crimes against humanity conducted by Jammat Islami during the liberation war in 1971.[100] The court, however, remained largely inactive during the anti-minority violence of the early days of the BNP-Jamaat government in 2001. With one religion constitutionally established, the possibility of judicial inaction over religious violence and discrimination is not withering away.[101]

3.4. Sri Lankan Secularism vis-a-vis a Religion in the "Foremost Place"

Sri Lanka has not declared Buddhism as a state religion, but Article 9 of the Sri Lankan Constitution has given it a "foremost place" and cast upon the state a duty to "protect and foster Buddha Sasana".[102] The Sri Lankan Supreme Court, on the other hand, views the state as a secular one and, on this basis, has resisted any attempt to declare Buddhism as the state religion.[103] However, the Supreme Court's actual commitment to secularism and religious equality is doubtful. As Abeyratne puts it, the court's "schizophrenic"[104] perception of a "secular state" without any state religion, but with the foremost place for one, has yielded a very

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[99] Pundits argue that given the Bangladeshi peoples' historic reverence for their areligious *Banglaee* nationhood and their awareness of the hybridity of their Islamic identity, the existence of a state religion might not affect the state's commitment to secularism, religious freedom and tolerance. See: Werner Menski, Bangladesh in 2015: Challenge of the "iccher ghuri" for Learning to Live Together', (2015) 1(1) *Journal of Law and Policy* 7; Iftekhar Ahmed Chowdhury, 'Bangladeshi Courts: Reaffirmation of Democratic and Secular Norms', (2010) 13 *ISAS Insights* 1.

[100] A Hossain Mollah, 'Judicial Activism and Human Rights in Bangladesh: A Critique', (2014) 56(6) *International Journal of Law and Management* 475, 481-82.

[101] Pattanaik (n 98).

[102] Article 9 of the Constitution of Sri Lanka states, "The Republic of Sri Lanka shall give to Buddhism the foremost place and accordingly it shall be the duty of the State to protect and foster the *Buddha Sasana* (Rule of Buddha), while assuring to all religions the rights granted by Articles 10 and 14(1) (e).

[103] The Nineteenth Amendment to the Sri Lanka soguht to declare Buddhism as the state religion (*SC Determination No. 32/2004,* SC Minute of 17/12/2004.) The Sri Lankan Supreme Court held that despite the special status of Buddhism under article 9, such declaration of state religion would violate the freedom and quality of the non-Buddhist minorities under article 12.

[104] Rehan Abeyratne, 'Rethinking Judicial Independence in India and Sri Lanka', (2015) 10 *Asian Journal of Comparative Law* 99, 124.

confusing bulk of judicial precedents.[105] Religious freedoms for the minorities are guaranteed in articles 10 and 14 of the Sri Lankan constitution. These include a right to "adopt or choose" religion and also a right to "manifest" one's religious beliefs through "worship, observance, practice or teaching." However, the anti-conversion and minority rights cases of the Supreme Court show a disturbing preference for the dominant majority. The court's approach is essentially based on how much space the minorities could be given out of the benevolence of the dominant group.

Sri Lankan anti-conversion laws primarily target Christian missionaries, churches, schools, hospitals, etc.[106] In 2001, three private member bills seeking to incorporate some churches were challenged in the Supreme Court. The question in those cases was whether the declared objectives of those churches to do some commercial and economic activities and uplift the conditions of life of people – not only the Christians – could be considered a valid exercise of religious freedom. The court answered in the negative.[107] In one of the three cases, *The Menzingen Bill*, the Supreme Court was particularly cognizant of the Church's proposed aim to sheltering orphans, children and aged people irrespective of religion. The Court interpreted this type of activity as posing a threat of conversion by undue influence and contrary to the state's duty to protect and foster the *Buddha Sasana*. Accordingly, the bill was declared inconsistent with article 9 of the Constitution.[108] Apparently, the Court assumed, without any empirical evidence, that Churches' charitable activities aimed to convert Buddhist people into Christianity.

Pitching article 9 against the minorities' article 10 rights was troubling for secularism and religious freedom.[109] When weighing the minority's entitlement against the dominant religious interest, the court did not consider the proportionality of the restriction *vis-a-vis* the interest of protecting Buddhism. It was also not considered that article 10 of the constitution did not restrict the

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[105] Deepika Udagama, 'The Democratic State and Religious Pluralism: Comparative Constitutionalism and Constitutional Experience of Sri Lanka' in Sunil Khilnani, Vikram Raghavan and Arun K. Thiruvengadam (eds), *Comparative Constitutionalism in South Asia*, (Oxford University Press 2013) 145.

[106] For a critique of the legislative approach to control religious conversion see: Alexandra Owens, 'Using Legislation to Protect against Unethical Conversions in Sri Lanka', (2006-07) 22(2) *Journal of Law and Religion* 323.

[107] *Christian Sahanaye Doratuwa Prayer Centre (Incorporation)*, S.C. Determination No. 2/2001; *New Wine Harvest Ministries Incorporation*, S.C. Special Determination No. 2/2003.

[108] *Provincial of the Teaching Sisters of the Holy Cross of the Third Order of Saint Francis in Menzingen of Sri Lanka (Incorporation)*, S.C. Special Determination No. 19/2003.

[109] Udagama (n 105) 166.

minority's religious freedom.[110] Another implication of the *Incorporation Cases* is that those resembled the essential practice cases of the Indian Supreme Court. Like the Indian court, the Sri Lankan secular court tried to decide which activities of the minorities were essential for them and which were not. As mentioned earlier, the problem with this approach lies in the risk of considering anything unacceptable to the dominant religious group as non-essential for the minorities.[111]

After the *Menzingen* decision, the Jathika Hela Uru-maya (J.H.U.) - a Buddhist political party, drafted an anti-conversion bill. After tabling the bill in parliament, it was challenged in the court.[112] While upholding the bill, the Court interpreted the minorities' religious freedom restrictively. It argued that one's religious freedom must not mean the right to distort others' faith. In the Court's opinion, conversion by the use of "force, allurement or fraudulent means" would not be protected by articles 10 and 14(1)(e) of the Sri Lankan constitution. The Court upheld the bill subject to a condition that the definition of "allurement" in the bill would be limited by including a phrase "for the purpose of converting a person from one religion to another".

The Sri Lankan courts' interpretative technique in minority rights claims also is controversial. The courts usually considered those claims within an administrative and procedural rather than constitutional law context.[113] The Sri Lankan Supreme Court ignored the proportionality test while judging the reasonableness of any restriction proposed.[114] Rather, the Sri Lankan Supreme Court tried to define "secularism" in a way that favours *Buddhism* as the dominant ideology. In

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[110] Sabrina Esufally, *Judicial Responses to Religious Freedom: A Case Analysis* (Colombo: USAID 2015) 10.

[111] Abeyratne (n 104) 126.

[112] *Prohibition of Forcible Conversion,* S.C Determination No. 4/2004.

[113] For example, in the case of *Foursquare Gospel Church* (CA Writ Application 781/2008 [2009]), the court reversed cancellation of permit for the Church because it was done without any allegation of specific violation of the construction permit. In *De Silva v. Lankapura Pradeshiya Sabha* (SC Appeal 10/2009 [2014]), the court refused a petition to demolish an "unauthoirsed" church on the ground that it did not require any construction approval. Similarly, in *Ven. Ellawala Medananda Thero v. District Secretary, Ampara And Others* (2009) 1 Sri L R 54 (The Deeghavapi case) the Sri Lankan Supreme Court cancelled the settlement of around 500 Muslim families in the vicinity of a Buddhist heritage site on the allegation of the Buddhist and Tamil communities. While the Court relied on the administrative law principle of good faith decision making in this case, it effectively bypassed the consideration of the minority Muslim's constitutional right not to be unequally treated under articles 10, 12(1), 12(2) of the Sri Lankan Constitution. Nor did it explain, how the majorities "right to live in the vicinity of a temple" could overtrump the minorities right to be treated fairly and without discrimination. For a rather detail analysis of the case see: Sindhu De Livera, *Religion, State, and a Conflict of Duties: A Constitutional Problem in Sri Lanka*, LL.M. Thesis (Ontario: University of Windsor 2019) 62.

[114] Esufally (n 110) 18.

Kapuwatta Mohideen Jumma Mosque v. O.I.C. Weligama (Noise Pollution case), a mosque was barred from using loudspeakers[115] on the excuse of causing noise pollution and violating the residents' right to quiet enjoyment of property. The Chief Justice particularly emphasised that restriction on loudspeakers would not violate Sri Lankan secularism. He quoted Buddhist teaching about the proper practice of religious worship through silence.[116] Thus, much like the Indian Supreme Court, the Sri Lankan Supreme Court drew from the country's majority faith to define the contours of religious freedom and then imposed it upon the minorities.[117]

4. Conclusion

Unlike other purely theocratic states (like Pakistan, Afghanistan, and Maldives) in South Asia, India, Nepal, Bangladesh, and Sri Lanka have secularism expressly or impliedly endorsed by their respective constitutions. However, case laws from these countries suggest that irrespective of their constitutional position on secularism, their highest courts have sided with the dominant religions, often at the expense of the non-dominant religions. The Indian judiciary has walked away from its original "wall of separation" understanding of secularism and adopted a soft secularist view. Later, it walked away from the soft secularist view and adopted the Established Religion Model of secularism. Likewise, the Nepali Supreme Court has endorsed the Indian model as "the proper model" for them. The Sri Lankan Supreme Court also define secularism in line with the established religion model and limits the minority rights, if convenient.[118] After a long acquiescence to the Islamization process of the military era, Bangladesh Supreme Court has recently declared secularism as a basic structure of the constitution. It, however, refused to entertain a constitutionality challenge to the state religion clause in the constitution.

Taken together, South Asia's secular and hybrid secular courts have come to one common ground - the establishment of the dominant religion at the cost of equality and freedom for religious minorities. If secularism is minimally understood as religious neutrality, if not a "wall of separation", the highest courts in secular and hybrid secular South Asian countries are trying to give their constitutions a secular or neutral outlook, while in reality, they are neither secular nor truly neutral. Therefore, constitutional secularism in the region seems to be coming to a dead end – at least in its "wall of separation" and "state neutrality" sense, and the "Dominant Religion Model" of symbolic secularism is gaining a deep root here.

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[115] SC Application No. 38/2005 (FR) SC Minute of 9/11/2007.
[116] ibid.
[117] Abeyratne (n 104) 125-26.
[118] Esufally (n 110) 13.