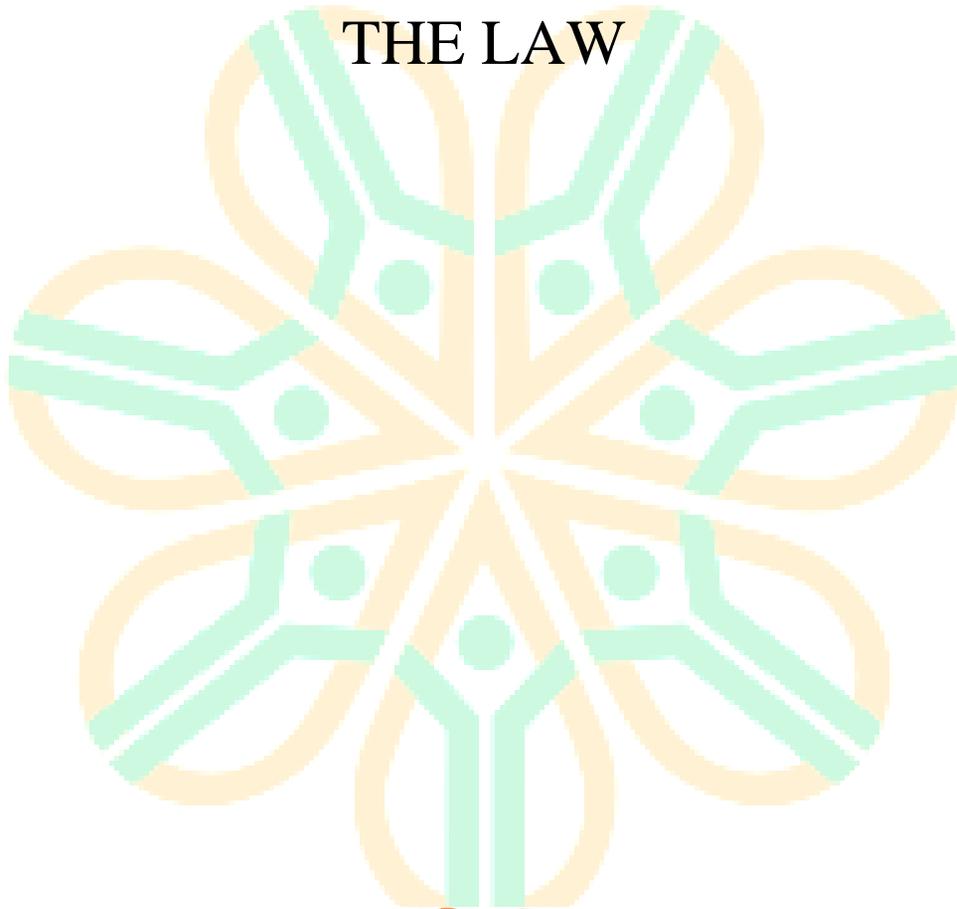


SECULARISM
AND
THE LAW

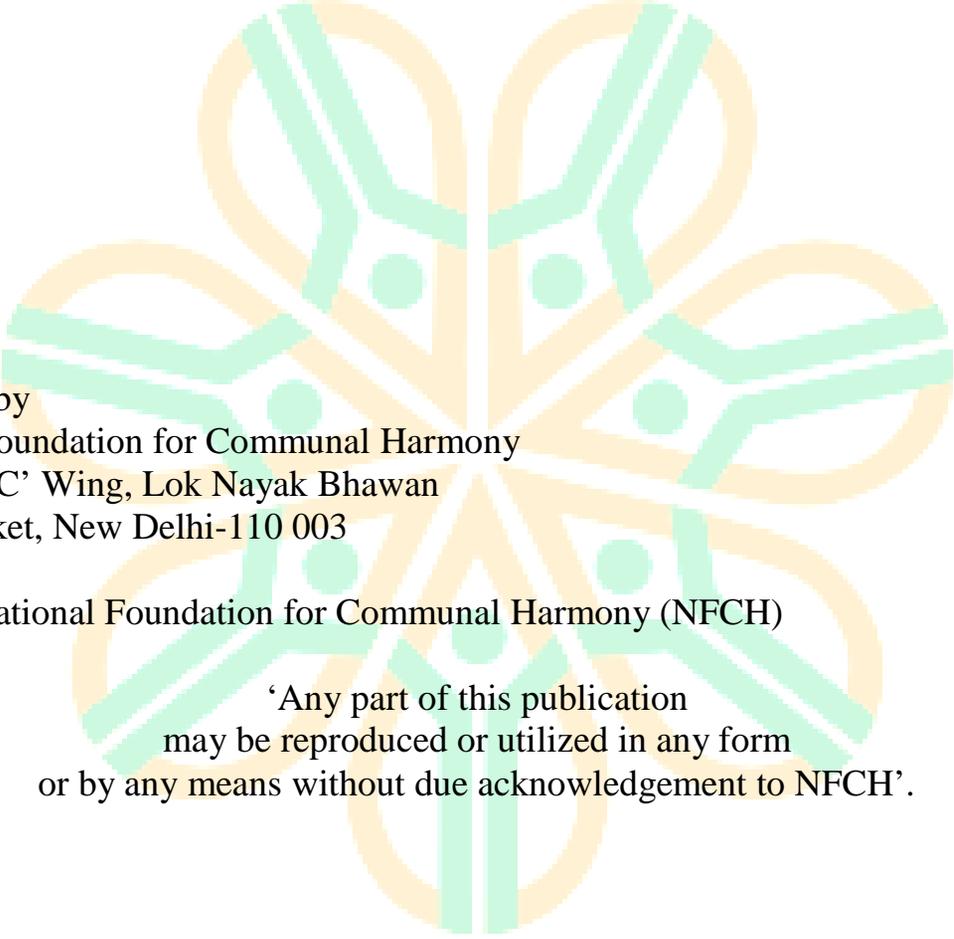


National Foundation
for Communal Harmony

National Foundation for Communal Harmony

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Preface

The National Foundation for Communal harmony (NFCH) has been organizing essay writing competitions regularly among the officers of the All India Services and Group 'A' Central Services, who undergo training at the Lal Bahadur Shastri National Academy of Administration (LBSNAA). This monograph is an outcome of one such essay competition organized during the 78th Foundation Course of the Academy in the year 2006. The subject of the essay competition was "Secularism and the Law". As the subject has become quite topical in the recent years, selected essays have been presented in the form of an e-monograph for wider dissemination.

Since time immemorial people of different faiths, sects, communities and culture have co-existed in peace & harmony in the country and we are proud of our 'unity in diversity' and secular credentials. In spite of such deep-rooted tradition of pluralism, tolerance and syncretism, the land has also witnessed some communal disturbances orchestrated in the name of religion, caste, ethnicity or community, compelling thinkers to revisit the concept of secularism in contemporary context.

We are grateful to the bright young officers, for covering various dimensions of the topic comprehensively in their essays, ranging from the meaning of the concept of 'secularism', its comparative analysis from the Indian and other Constitutions, debates on uniform civil code, rulings of the Supreme Court, role of political parties, etc. Views have been expressed freely with clarity, cogency and precision. These well argued, thought provoking and meticulously designed essays would evoke a wider debate and response on the subject.

The views expressed in these essays are those of the contributors alone and do not necessarily reflect those of the Foundation.



(Lalit Kumar)
Secretary
NFCH

SECULARISM AND THE LAW

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Secularism - Conceptual contradictions need for secular minds

A. AKBAR

A discussion on 'Secularism' seems to be highly pertinent at this moment given the fact that our country is now witnessing fissiparous tendencies apparently based on religion. Although the menace of communalism is not a new phenomenon in the Indian society, yet it is quite baffling and embarrassing that even after more than six decades of independence and despite an emphatic proclamation by the constitution that we are secular, still things are not so bright.

Before proceeding further, it is necessary to have an idea of the nature and meaning of the term 'secularism'. It is interesting to note that there is no agreed and precise meaning of 'secularism' in our country. As Jawaharlal Nehru wrote in his autobiography... "no word perhaps in any language is more likely to be interpreted in different ways by the people as the word 'religion'. That being the case, 'secularism' which is a concept evolved in relation to religion can also not have the same connotation for all".

There are two possible models of secularism. In the first one, there is a complete separation of religion and state to the extent that there is an 'impassable wall' between religion and secular spheres. In such a model, there is no state intervention of religious matters and vice versa. In the other model, all religions are to be treated equally by the state; in other words, the state is equi-distant from all religions. This model is also referred to as 'non-discriminatory' and is particularly relevant for multi-religious societies. In contrast to the former model, the latter allows for state intervention on grounds of public order and social justice.

The principle of 'secularism' as understood in the United States means that the state and the church co-exist in the same human society without having to do anything with each other. In Europe, the vision of secularism evolved as the negation of all things religious, particularly in political functioning. In India, it means the

opposite, i.e., equal respect for all religions. A 'secular state' in the Indian context means one, which protects all religions equally and does not uphold any religion as the state religion. The Sanskrit phrase '*Sarva Dharma Sambhava*' is the most appropriate Indian vision of secular state and society. But it should not be forgotten that the word 'Secular' has not been defined or explained under the constitution either in 1950 or in 1976 when it was made part of the preamble.

Secularism as a modern political and constitutional principle involves two basic propositions. The first is that people belonging to different faiths and sects are equal before the law, the constitution and the government policy. The second requirement is that there can be no mixing up of religion and politics. It follows that there can be no discrimination against any one on the basis of religion or faith nor is there room for the hegemony of one religion or majoritarian religious sentiments and aspirations. It is in this double sense – no discrimination against any one on grounds of faith and separation of religion from politics – that our constitution safeguards secularism.

India is a multi-religious society and the survival of such a society is possible only if all religions are given equal treatment without any favour or discrimination. The partition of the country was apparently based on religion and this was an eye-opener for the makers of the constitution when they were engaged in the task of giving a concrete shape to the constitution of our country. The word 'secular' was not there in our constitution when it actually came into being. It was subsequently incorporated in to the preamble of the constitution by the 42nd Amendment Act of 1976. The formal inclusion of the adjectival terms 'secular' is mainly the result of meeting out the exigencies of the prevailing circumstances, requirement of party politics and ideological window-dressing. To some extent, it also reflects the ignorance and apathy of the ideologues that they added it merely to the preamble, and did not take care to bring about suitable modifications inside the constitution. It can

be pointed out that the term used after the word 'Socialist' is redundant as a socialist democratic state has necessarily to be secular. In view of the various articles appearing in part III of the constitution, it can be said that India was already a secular state and there was no need of such addition. It rather gave a false impression that previously India was not a secular state.

Although, the word 'Secular' was not there initially in the constitution, a mere perusal of the various articles of it would amply demonstrate that 'Secularism' is an integral part of the Indian constitution. At this juncture, it would not be inappropriate to have a glance at the relevant constitutional provisions pertaining to secularism. Article 14 of the constitution provides for equality before law for all people. Article 15, *inter alia*, lays down that the state shall not discriminate any citizen on the ground of religion. Article 16 provides for equality of opportunity in matters of employment under the state, irrespective of religion. Article 25 provides for freedom of conscience and the right to profess, practice and propagate the religion of one's choice. The constitution not only guarantees a person's freedom of religion and conscience, but also ensures freedom for one who has no religion, and it scrupulously restrains the state from making any discrimination on grounds of religion. Article 26 provides freedom to manage religious affairs and Article 27 prohibits compulsion to pay taxes to benefit any religious denomination. The impact of Secularism can also be seen in Article 28, which states that no religious instruction shall be provided in any educational institution wholly maintained out of state funds. The analysis of the above said constitutional provisions makes it amply clear that Indian secularism is unique and it treats all religions alike. In our country, judiciary is the guardian of the constitution and it has been held by the Supreme Court that secularism is a basic structure of the constitution and it can not be altered by a constitutional amendment.

The constitution requires that there shall not be any state religion and that the state shall treat all religions equally. It does not, however, prevent the state from

financially assisting educational institutions sponsored by the 'church' or religious organizations. The state has also reserved to itself and has sometimes exercised the right to interfere in the religious practices of various communities in the interest of their peaceful coexistence and cultural development. Although freedom of religion is granted to all people as a fundamental right under Article 25 of the constitution, Article 44 directs the state to enact a uniform civil code applicable to all irrespective of their religions faith and beliefs. Further, the directive principles contain a special provision-enunciating ban on cow-slaughter as a desirable policy.

Is India truly secular? Well, if we go through the basic feature of secularism as understood in the west, it can be seen that state has nothing to do with religion and there will be no discrimination between citizens on the basis of their religion or form of worship and that everybody will be equal before law. If this is true secularism, India ceases to be secular for it has different sets of laws for different communities. For instance, in the case of Muslims, a separate civil code exists, though Article 44 requires the state to frame a uniform civil code. Moreover, concessions given to certain communities on the basis of religion undermine the theory of secularism and create perhaps, grounds for a rapid increase of majority communalism.

If we analyze the various legislations, which are in vogue in our country, we would find that some of them are not in consonance with the concept of secularism. For instance, under section 494 of the Indian Penal Code, bigamy is an offence and a person, who contracts a second marriage while the first marriage is subsisting, is guilty of the offence. But this provision is inapplicable to those people who can have more than one wife as per their religion. The very fact that operation of a penal provision is not alike among all people and that it is dependent on one's religious faith tantamount to making a mockery of the very concept of secularism. Similarly, the enactment of the Muslim women (Protection of Rights on Divorce) Act, 1986 with a view to circumvent the apex court's decision in the 'Shah Bano case' and to

treat the divorced Muslim women differently from their counterparts in other religious faiths can not be termed as secular. To deny rights to Muslim women which are available to the women of other faiths is a violation of the provisions of the constitution that the state shall not discriminate against any citizens as grounds of religion. Although Article 15 of the constitution prohibits discrimination on the basis of religion, even today the rights and liabilities of people relating to maintenance, inheritance etc. differ according to their religion. This casts a shadow on our claim of being a truly secular state.

It is a matter of great concern that secularism is struggling for survival in our country now. The anti thesis of secularism is communalism, which is gaining momentum in our society at an alarming pace. The mixing of religion with politics and the dangerous growth of communal parties pose a major threat of the secular framework of our country. India is a secular state and yet communalism continues to shape its policies. Frequent occurrences of violence in the name of religion give fatal blows to the very existence of secularism. There have been reports that some state governments were partisan and were instrumental in aggravating communal violence. Such shocking incidents would undoubtedly affect the secular credentials of our country. The divorce of politics from religion is the need of the hour and unless this task is expeditiously accomplished, secularism is bound to have its last breath in our country. The constitution of India does not clearly and explicitly and hence there is hardly any remedy if the state acts in an un secular way.

The Indian concept of secularism is full of contradictions and therefore, is unable to provide a clear, un-ambiguous guidelines either to the individual or to the state. As a consequence, the religious values continue to dominate the day-to-day affairs and in the process generate tension because of plurality of religious views. In such circumstances, it is imperative that serious attention is paid to revive secularism and curb communalism. A secular state in India is not only necessary from the point

of view of the religious minorities by is in the interest of all the people in India including the majority community. In order to permanently banish the recurrence of communal riots, it is necessary to advance the concept of secularism. We need to progress to a stage where politics is completely free of religion and religious freedom of an individual is allowed only to the extent that it does not interfere with the personal freedom of others and betterment of the society in general.

With that end in view, we need to have a second look at the provisions of the constitution concerning secularism. At present, there is hardly any remedy available to us against the state jettisoning secular path or for using the organs of the state for religious and communal purposes. There is nothing in the constitution to stop formation and functioning of communal organizations and groups and their participation in elections. Such loopholes need to be plugged without any procrastination.

Over and above all these measures, there is need for positive change in the attitude and outlook of the society towards Secularism. In a multi-religious, multi-racial and multi-cultural developing society like India, it is necessary that rulers, leaders, administrators and citizens have very clear ideas about Secularism. If we are to evolve a secular state, we need to produce secular minds.

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Secularism - Constitutional provisions and need to strengthen secular values

K. SRINIVASAN

India has a long tradition of secularism. It was not only a cradle of many religions, but also of progressive thoughts, *Charvakas* and *Lokayatas* opposed religious practices. Gautama Buddha and *Mahavira* propagated tolerance and non-violence and equal respect to all. Social reformers like Raja Ram Mohan Roy who opposed the inhuman custom of *Sati*, championed secularization of society and positive interference of the state with a view to curbing antisocial acts of religion. The advocacy of religious tolerance and equal respect for all religions was, in itself a progressive step till independence in India.

Secularism in Indian National Movement

The nationalist movement in India, right from the latter part of the 19th century, drew inspiration from the secular concepts. In fact, in Indian nationalism, secularism was an important strand. Our leaders opposed religious fundamentalism and moves for the partition of the country on religious basis. Mahatma Gandhi considered religion a personal matter and he was for the formation of a secular state. Pandit Jawaharlal Nehru was not only a socialist, but also a great champion of humanism and secularism.

The definition of the word “secularism” in itself is not very clear. It is generally understood that secularism implies religious tolerance. This word is supposed to be coined by George Jacob Holyoake. His original definition the term secularism was – “a form of opinion which concerns itself only with questions, the issues of which can be tested by the experience of this life”. Now the question is whether India is such a “secular” state.

The founding fathers of the Indian Constitution never hesitated to build India on secular foundations. They opposed and defeated the amendment of Mr. H.V.

Kamath to invoke the name of god in the preamble of the Constitution. Pandit Kunjru said that we invoke the name of God, but I am bold to say that while we do so, we are showing a narrow, sectarian spirit, which is contrary to the spirit of the Constitution. The Indian Flag consists of Ashoka Chakra in its center. The wheel has many spokes but, all are of equal length. It indirectly refers to the Indian stand on the principle of equal treatment of all religions. (*Sarva Dharma Samba*).

A constitution is superior to all the laws of the country. Every law enacted by the government has to be in conformity with the constitution. The constitution lays down the national goals of India, i.e. democracy, socialism, secularism and national integration. On the other hand, India's challenge, as described by its first prime minister, Jawaharlal Nehru, has been to build "a secular state in a religious country." Indeed, the Indian constitution, which came into force in 1950, affirms "the right to freely profess, practice and propagate religion."

On the other hand, the Constitution made no mention of the word "secular" until 1976 during Indira Gandhi's brief Emergency rule as the Prime Minister. India's founding fathers were deliberately ambiguous on religious rights – both giving the Muslim minority their own Islamic-based civil code but also promising the overwhelming Hindu majority that the government would work towards a uniform civil code. Because the Constitution gives something to everyone, all sides claiming to march under the banner of secularism. One group says secularism means government intervention on behalf of persecuted minorities. Another group decry this as "pseudo secularism" and say true secularism means government remaining neutral. However, the terms democracy and secularism, as the modern world understands today, do not approve the authority of any religion with temporal power.

"...THE PEOPLE OF INDIA, having solemnly resolved to constitute India into a SOVERIGN SOCIALIST SECULAR DEMOCRATIC REPUBLIC and to

secure to all its citizens...”. So we have decided that we will create India as a secular state. The only other place where the word secular appears in our Constitution is in Article 25 (2) (a) while discussing the “Right to freedom of religion”. Surprisingly in the Appendix II, which discusses the modification to the text of Constitution as applicable to the state of Jammu & Kashmir, the term “Socialist secular” is omitted from the preamble.

What is problematic in this context is the absence of a proper definition of secularism. How can we interpret the term secularism? Do we interpret it as the complete detachment of state from religious activities or do we accept the original definition of Holyoake? What is the stand of the government regarding this? To find answers to these questions, we have to look at the related discussions in the Constituent Assembly. An important amendment (Amendment 566) was moved in the meeting dated December 03, 1948 by Prof. K.T. Shah. “The State in India being secular shall have no concern with any religion, creed or profession of faith; and shall observe an attitude of absolute neutrality in all matters relating to the religion of any class of its citizens or other persons in the Union.” It is now clear that this idea of making India a secular state was not there in the original draft. It was only on December 18, 1976 the word “SECULAR” was added in the preamble of our Constitution. The 42nd amendment Act reads – “In the Preamble to the Constitution, - (a) for the words “SOVEREIGN DEMOCRATIC REPUBLIC” the words “SOVERIGN SOCIALIST SECULAR DEMOCRATIC REPUBLIC” shall be substituted”. So the word secular entered our Constitution only almost 25 years after it had come into effect.

If one makes an attempt to look at the secular aura in our Constitution, the only point to reach is Article 25, which refers “Right to freedom of religion”. It reads thus – “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 to freely profess, practice and propagate religion”. Article 26 (Freedom to manage religious affairs), Article 27 (Freedom as to payment of taxes for promotion of any particular religion) and Article 28 (Freedom as to attendance at religious instruction or religious worship in certain educational institutions) can be considered as the interpretations of the principle of secularism in the constitution.

We have seen how Article 25 gives freedom for all to practice any religion they want. This is a basic right guaranteed in the Constitution. Art. 26 deals with the freedom to manage religious affairs. Accordingly any religious denomination is given right to establish religious institutions, acquire properties (movable and immovable) and manage affairs regarding the religion.

Art. 27 is also very important which reads – “Freedom as to payment of taxes for promotion of any particular religion. – No person shall be compelled to pay any taxes, the proceeds of which are specifically appropriated in payment of expenses for the promotion or maintenance of any particular religion or religious denomination.” The implication and implementation of this article is debatable. We know that government gives donations for all major religious activities. Is this action by government not questionable under this Article? Art. 28 reads – “Freedom as to attendance at religious instruction or religious worship in certain educational institutions – (1) No religious instruction shall be provided in any educational institution wholly maintained out of State funds.” This article prohibits any religious activities in educational institutes. But this limits itself to state-maintained institutes. Nevertheless, this is one important aspect of secularism in India.

In order to completely understand the interpretation of secularism in Indian context, it is important to analyze these Articles. This along with a few judgments of Supreme Court can give us a clear idea on this issue.

Before looking into the Articles in the Constitution that are supposed to interpret the idea of secularism, it will be worthwhile to look into one important judgment given by the Supreme Court of India viz. Kesavananda Bharati vs. Kerala case which was decided by a full Constitutional bench of judges on April 24, 1973. By a water-thin majority of 7-6, the Supreme Court held that the power to amend the Constitution under Article 368 couldn't be exercised in such a manner as to destroy or emasculate the fundamental features of the Constitution. In identifying the features, which are fundamental and thus non-amendable in the constitution was this statement – *A secular State, that is, a State in which there is no State religion* (5(vii)). This was (probably) the first time that the concept of secularism was interpreted by the Supreme Court. Here we get the first authorized interpretation of the word “secular” as mentioned in our Constitution. So our basic idea of being a secular state is that we do not have a state religion.

Every time secular India has demanded that the system of personal laws based on religious injunctions should be done away with, Article 44 which enjoins upon the government to adopt a Uniform Civil Code that should be taken for what it was meant to be a cornerstone of state policy in a modern nation state. However, a countervailing cry has gone up alleging that it is an assault on the identity of minority communities. We know that there is a directive principle in the Constitution that calls upon the government to enact a uniform civil code.

The 42nd amendment to the Constitution introduced by Mrs. Indira Gandhi, the then Prime Minister, reiterated the secular character declaring India as a “socialist, secular, democratic state”. The fundamental duties incorporated in the Constitution through the same Amendment make it the responsibility of every citizen to strive for the promotion of the spirit of enquiry, scientific outlook, humanism and reform. The Constitution of India abolished untouchability and prohibited its practice in any form.

Special preferences in the name of religion do not exist. In India, secularism does not mean mere separation of religion and state but, the abolition of the practice of untouchability and promotion of castelessness. Secularism has been one of the essential elements in the basic structure of our Constitution which lays down that 1) the state has no religion; 2) all citizens have the fundamental right to follow and propagate their own religion; and 3) it is the duty of the state to protect and secure the life, liberty and property of all the citizens of the country. Further, the state will not discriminate between the citizens on the grounds of religion and language. Thus, it may appear that our Constitution has been based on secularism or *dharma nirapekshita*, our society is steeped in religion.

Chief Justice of India A.M. Ahmedi opined in a case that the term secular has advisedly not been defined presumably because it is a very elastic term not capable of a precise definition but perhaps best left undefined.....There are several features of the Constitution which are strongly suggestive of secularism. The prevalent cultural indicators are supportive of secularism. Some other judges have delivered separate but concurring judgments on secularism as basic structure. Secularism is, therefore, part of the fundamental law and basic structure of the Indian political system to secure to its people socio-economic needs essential for man's excellence with material, moral prosperity. Some other judgments read as "secularism is thus more than a passive attitude of religious tolerance."

A conference on secularism was held at Vijayawada on October 22nd 1968, which was inaugurated by Justice V.M. Tarkunde, the then judge of the Bombay High Court and a radical humanist leader. He said that the concept of secular state does not merely imply that the state will be impartial to all religions; it implies that the state will have nothing to do with religion. Mr. Tarkunde said that the constitutional provisions might entitle one to claim that ours was largely a secular state, but merely law could not create a truly secular state. While the constitutional

provisions represented a significant advance towards the ideal of a secular state, a good deal had yet to be done before the ideal could be achieved.

Mrs. Chennupati Vidya, M.P. from Vijayawada introduced a private member resolution in Lok Sabha (House of the People) on the Necessity to strengthen Secularism. It was discussed in the Lok Sabha on April 23, 1982. Keeping in view the secular character of our Constitution and the fact that secularism is one of the basic tenets of our State Policy, this House recommends to the Government to take immediate steps to:-

- a) Promote a sense of castelessness through inter-caste and inter-religion marriages;
- b) Prepare suitable text books to propagate secular ideas by laying emphasis on fundamental duties enshrined in the Constitution; and
- c) Encourage secular outlook among the employees working in Government and Public Sector Undertakings.

Secularism is an indispensable part of the basic structure of India's Constitution. Not only is it postulated in the preamble, the light of this principle radiates in several provisions of the Constitution. As for the National Policy on Education (NPE), formulated in 1986 and revised in 1992, it states that the national system of education will be based on a national curriculum framework, which contains a common core along with other components that are flexible. The common core is to be designed to promote values, which include India's common cultural heritage and secularism. The policy makes an unequivocal statement: "All educational programmes will be carried on in strict conformity with secular values."

In India, secularism receives challenges from many fronts. On one hand, casteism and communalism appear to be losing their credence, because of the spread of science and technology and communication, as well as liberal and progressive outlook. On the other, casteism and communalism are getting a new lease of life

because of the shortsighted policies of power-hungry politicians and the narrow outlook of the administrators and the leaders. Instead of proceeding on the path enunciated in the Constitution, the leaders fanned the communal and caste passions of the people, with a view to reaping the harvest of votes and to achieving their partisan ends. The politicization of caste and religion and pampering of communal leaders is causing great harm to the body politic of the nation. The time has come to strengthen the secular values, institutions and practices in an uncompromising manner and to accelerate the pace of change in India.

India is the largest democratic and secularist country. The Indian Constitution in theory and practice has wholeheartedly adopted the alien concepts of religion and secularism. Therein lies the root of our problems. We talk of ‘rights’ instead of ‘duty’ with an emphasis on “what is in it for me” instead of “what is it that I can do for you.” The need of the hour is creating secular society and not necessarily a secular state, because secular state need not always imply secular society.

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Secularism - A goal and a process

SRIPRIYA RENGARAJAN

“The purpose of the law must not be to extinguish the groups which make the society but to devise political, social, and legal means of preventing them from falling apart and so destroying the plural society of which they are members.”

India is the only country in the world where the issue of secularism has occupied a centre stage in intellectual discussions. Secularism is, as for its genesis, an alien concept for India envisaging separation of the church and the state – an apparently impossible proposition in the Indian situation. In practice, however, all that ‘secular’ means is that the Parliament shall not be competent to impose any particular religion upon any section of population.

Nehru, on a positive note, observed that the state gives protection and an opportunity to all religions and cultures and thus brings about an atmosphere of tolerance and co-operation and equal treatment to all religious communities. *Sarva Dharma Samabhava* is the central idea of Indian secularism, however unpalatable it is to concept puritans.

Secularism and Law through the ages

The secular character of kinship was emphasized by the social contract theories of ancient India. There is no doubt that *dharma* and *sasana* were inextricably interwoven in ancient times. But, the king had a distinct identity and functional realm of his own. Moreover, *dharma* did not signify any established church. Kautilya, with his unending sense of realism, describes king as the fountain of justice (*dharmapravartaka*) and lays down that whenever the sacred law is in conflict with rational law or the ‘king’s law’, the latter shall prevail. The post-Vedic period, particularly, abounds in religious polemics and dialectical warfare. There appears to have been no continuously organized religious persecution or crusade even though

sometimes there was a measure of state patronage for a particular religion or sect owing to the personal law of the ruling prince or his clan.

The impact of the Islamic faith on the Indian society would have had a different history and reckoning had it not been admixed with subsequent Turkish-Afghan, Turko-Mongol and Mughal invasions which put the assimilative synthesizing capacities of Indian culture to a severe test mainly because these invasions introduced an element of political coercion and domination. The pure theocratic inclinations and the orthodox constitutional jurisprudence attributed to many of these rulers, who happened to be Muslims did not, it seems, allow them freely and fully to integrate their subjects belonging to different religions, sects and races.

During the British rule, notwithstanding the preconceptions of the colonial power favouring the spread of Christianity, a plausible policy of official neutrality was formulated. At the same time existing religious differences were so politicized and encouraged that they led to sharply divisive communal conflicts. Paradoxically enough, the process of secularization gained considerable momentum under the British, partly as a result of the impact of the West, partly due to the exigencies of imperial colonial rule and largely because of the rise of nationalism. On the one hand, the British power thwarted and retarded national integration in India because they found it easier to rule by dividing different sections of the people. On the other, the British ideas and institutions led to progressive unification and secularization of Indian administrative, legislative and judicial institutions, which became the most potent promoters of secularism.

The Constitution of India owes its inspiration to the liberal ideals of our freedom movement, the constitutional evolution and the experience already gained in the process of modernization and democratization and from the British traditions, the French Revolution, the American Revolution and the Russian Revolution and the

worldwide climate for the larger freedom in the wake of the World War II. The Indian constitution embodies the quintessence of diverse facets of secularism. It is a mistake to think that the Indian Republic became more secular when the Preamble of the constitution was amended and the word *secular inserted* by the Forty-Second Amendment Act of 1976. It is also a mistake to think that the constitutional provisions relating to secularism are neatly and separately packaged in the fascicules of provisions beginning with Article 25 and ending with Article 30 of the constitution. Doubtless, the right to freedom of religion and the cultural and educational rights are important and integral part of Indian secularism but Indian secularism extends far beyond the confines of the bundle of rights contained in the aforesaid provisions.

Secularism is a goal as well as a process. As an ideology and a bundle of working norms, it is conditioned by the past legacies and the prevailing realities. Secularism in our country is an ally of nationalism and national integration.

Secularism in the Indian Constitution is Very simple, it asserts that:

1. The state by itself shall not espouse or establish or practice any religion.
2. Public revenues will not be used to promote any religion.
3. The state shall have the power to regulate any economic, financial or other secular activity associated with religious practice – Article 25 (2)
4. The state shall have the power through the law to provide for social welfare and reform or the throwing open of Hindu religious institutions of public character to all classes and sections of Hindus.
5. Article 17 constitutionally outlaws the practice of untouchability.
6. Every individual person will have under Article 25 an equal right to freedom of conscience and religion.
7. These rights are however subject to the power of the state through law to impose restrictions on the ground of public order, morality and health.
8. These rights are furthermore subject to other fundamental rights in Part III.
9. The courts, especially the Supreme Court shall have the final say on adjudging state action as valid or otherwise under the above principles.

In **Keshavananda Bharti**, the full court inscribed secularism as an essential feature of the basic structure of the Indian Constitution; in 1957 Justice Khanna, in **Indira Gandhi vs. Raj Narain** reinforced this view. Both these momentous decisions signify that even Parliament may not modify, by constitutional amendment, these nine features. By this time, the nine features of secularism had marshaled behind them a quarter century of national constitutional consensus. To these features has been now added, a fundamental duty of all citizens under Article 51 A to preserve the rich heritage of our composite culture. Clearly, the redefiners of secularism have not asked for abolition of Article 17 or Article 25(2) (a) or (b) or Article 26, 30 and 290-A. Equally they are not saying that the Supreme Court should not have the power to interpret the scope of rights enshrined under Articles 25 and 26; certainly they are not unhappy with **Hanif Qureshi vs. State of Bihar**, a decision which held that sacrifice of a cow is not an obligatory act enjoined by Muslim religion nor with the result upholding both Orissa and Madhya Pradesh legislations forbidding proselytization by Christian missionaries which involved force or fraud and they were not unduly upset by **Mary Roy's** judgment striking down Christian laws of inheritance on grounds of gender justice. Nor was public dissatisfaction voiced on prohibition on Anand Margi's Tandavnritya accompanied by sharp weapons and human skulls.

No outrage was expressed when prohibition of bigamy was upheld by the Supreme Court in 1966. Further, the redefiners, as well as their brethren pseudo-secularists, were one in rejoicing at Supreme Court verdict on Shah Bano and acted in wholesome concert in denouncing its Parliamentary reversal. Clearly, at one glorious historical moment, secularism had a translucent and compelling meaning. Manifestly, what the re-definers of secularism were directing their energies on what they perceived as unequal exercise of power of the state providing for social welfare and reform of religious practices. And this is, so despite Article 13, which declares

that all laws in force in the territory of India immediately before the commencement of the Constitution, in so far as they are inconsistent with the provisions of fundamental rights, shall to the extent of such inconsistency be void. They consider the inability and the reluctance of the Indian state to subject laws other than Hindu personal law to the constitution as appeasement to minority fundamentalism. Moreover, the post Shah Bano discourse is viewed as tainted by violation of directive principles enjoining the state to endeavor to secure for the citizens a uniform civil code throughout the territory of India.

Secularism and Legal Distortions

Religious tolerance, which is the essence of Indian secularism, presupposes mutual understanding. This mutual understanding is possible if we are aware of the basic principles of our religion as well as religion of others. Secularism has been accepted today as the guiding principle of state policy and action. Indian secularism is the product of our cultural heritage, personal attitudes, historical circumstances and domestic compulsions. All religions are given equal protection in the constitution. Resultantly, there are religious endowment trusts, *waqf* boards etc. established under the law. Secularism, in the positive sense, is the cornerstone of egalitarian and forward-looking society, which the constitution purports to establish. The point is that the Indian state is not supportive of any particular religion or religious community. However, it may be stated that our aspirations for a socialist and secular state have only been wishful thinking or just plain optimism.

Secularism Vs Individual Freedom

Freedom to individuals and religious groups can be granted by the State as long as it does not interfere with the freedom of others and is not detrimental to the maintenance of law and order, public health, morals, safety and sovereignty of the State. At the same time, the State has the right to impose necessary restrictions on this freedom of individuals for its security, sovereignty and the well being of the

majority of its citizens. Besides giving this religious freedom, a secular State refrains from making discrimination against any individual or group on religious grounds. The rights of these citizens are decided in such a state irrespective of their religious beliefs. Now if we take this concept as secularism, India can hardly be categorized as secular state. This is because she is constitutionally bound to give special protection and privileges to religious minorities with regard to their education, employment and personal laws. Similarly, while making laws for its citizens, the state refrains from making interference with the personal laws of religious minorities. Some important changes have been made in the Hindu religious laws but minority personal laws have been left untouched by the lawmakers.

In this context, it is highly pertinent to discuss the two important milestone cases of Sarla Mudgal and Lily Thomas. In the earlier case the decision of the Supreme Court impinged on the issue of conversion when it was held that the second marriage of the Hindu husband after conversion to Islam, without having his first marriage dissolved under law, would be invalid and the apostate husband would be guilty of the offence of bigamy u/s 494 of IPC. The Supreme Court emphasized the need for having a uniform civil code because of the conflict faced by the court due to conflict of personal laws. The conflict could be resolved only through legislative intervention and the result of such an exercise would result in the enactment of a uniform civil code.

The dilution of the Sarla Mudgal case in the subsequent case of Lily Thomas brings out a critical question as to whether the court is competent to draw attention of the State or otherwise issue any direction to the State to make any constitutional amendments to achieve this objective. In the earlier case, the Supreme Court tried to make the government aware about realization of the directive and the pattern of

debate put forward in the latter case is that the uniform civil code though desirable, may be counter productive.

The best cause in this matter would be reforming of the personal laws through the process of rationalization before bringing about the code. The abolition of polygamy and restraining the unilateral power of the Muslim husband to divorce his wife can be the trendsetters in this direction. This may not hurt muslim sentiments as this type of reform had already taken place in Islamic countries like Syria, Morocco, Pakistan and Tunisia and the Islamic Republics of the erstwhile Soviet Union. In the case of **John Vallathom Vs. Union of India**, the absence of a uniform civil code led to discrimination of the Christians for more than fifty years. A law that stood as an impediment to render justice in consonance with Article 14 of the Constitution was needed to be struck down.

Traditionally, the personal laws regulating relationships in the realm of marriage-divorce, inheritance-succession, minority-guardianship, adoption-maintenance are closely tied up with religious practices and any attempt against this pattern will evoke susceptibilities. As discussed earlier the codification of Hindu law and bringing of certain other religious communities like the Jains, Buddhists and Sikhs within the definition of Hindu was achieved by a single stroke of pen and practice of monogamy was implemented in all these religions instantly. Certain reforms like equal property rights to women under *Mitakshara* law in all the States and abolishing conversion as a ground for divorce under section 13 of the Hindu Marriage Act could be introduced as envisaged under other minority personal laws.

However the crucial question is how to go about this critical exercise. The basic premise of the promised common civil code is that there is no necessary connection between religious and personal laws in a civilized society. This indeed is a profound statement. This simply means that in a civilized society which is invariably multi religious, multi-racial, multi-lingual and multi-caste, the social

relations are required to be regulated on a basis that cuts across all such considerations as of religion, race, caste, sex etc. Moreover envisaged common civil code under Article 44 need not be taken as anti-religion, foreclosing all association of religious sentiments with the institution of marriage. In sum, in view of the clear and categorical commandment of Article 13 of the constitution, the State under article 44 should have no alibi to move in the direction of securing a uniform civil code. The envisioned code would indeed be invaluable input for augmenting human resource development at no expense of State resources. Else, the principles so prudently prescribed by the founding fathers of our constitution shall cease to be fundamental in the governance of the country.

Sixty years after independence women continue to be governed by religious laws in matters of marriage, divorce, maintenance and inheritance. In the process they get deeply enmeshed in deciphering religious texts and interpreting them as happened in the **Shah Bano** case.

Is such excessive entanglement with religion by the State and its judiciary constitutionally permissible?

Relegating matters of family law into the realm of private law as opposed to public law and linking it up with religion ensures the hands off policy of state to the women's issues and consigns them to the mercy of *mullas* and *pandits*.

Is there anything in the Indian Constitution that permits such State sponsored support of religion and religious laws, even when they blatantly violate other Fundamental Rights?

Essential Core Test: The current judicial analysis of the scope of the right to freedom of religion, its meaning, content and limitations is entirely wrong. While deciding whether a particular law violates freedom of religion, judges have got hopelessly entangled in finding out whether the law interferes with the essential core or practice of the religion. If it does, the law is held to be bad; it does not, the law

passes the test and is held valid. This test for determination of the constitutional validity of a law alleged to violate freedom of religion is hopelessly incorrect and leads to dangerous conclusions. For example, a law is enacted abolishing polygamy or unilateral *talaq* among Muslims or conferring equal rights to men and women on matters of inheritance. Can it be argued that a law abolishing them is unconstitutional because they form essential core of religion? Therefore the true test would be whether there is compelling state interest in making the law and if the state's interest is compelling then the regulation stands or else it fails. To date this principle was followed in **National Anthem case** where the judge proceeded to find out whether there is compelling state interest to expel the children for not singing the National Anthem on grounds of public order, health or decency. The answer was in the negative and the children's rights were upheld. The attitude of the Indian State to personal laws reflects its inability to separate itself from the religious affairs, thus making religion a convenient tool for the oppression of women.

Indian secularism is religion affirming and not religion negating. The necessary corollary to the absence of state patronage to any religion is the freedom of religion to all. The Constitution permits practicing and propagating religion. But the right to propagate one's religion does not give right to convert any person to one's own religion. The practices of conversions from Hinduism to Christianity, Islam and Buddhism are against the secular provisions of the Constitution. Furthermore unlike in India, the constitutions of many countries in the world that provide freedom to religion do not guarantee the right to propagate as a fundamental right. **The Swiss Constitution simply declares through Article 49 "freedom of creed and conscience is inviolable"**. The Constitution of Ireland and Japan says that the freedom of religion is guaranteed to all and so is the case of China but it is the hitch that nowhere religious propaganda is a fundamental right. (Art. 20 and Art. 44). The

spirit of this right available in our country is in consonance with the provisions of the Universal Declaration of Human Rights.

The decision arrived at by the judges in the S.R. Bommai's case and Ismail Faruqui's case reemphasized the concept of secularism being the basic feature of the Constitution. There was no dissent by any judges in this regard and the proposition laid down by the court can be hardly regarded as *Obiter Dicta* but the law of the land. The only issue relating to the basic feature was whether secularism is a basic feature of the Constitution, which was answered in the affirmative. It would be thus clear that Constitution made clear demarcation between religious part personal to the individual and secular part thereof. The State does not extend patronage to any religion; State is neither pro-any particular religion nor anti-any particular religion. It stands aloof, in other words, it maintains neutrality in matters of religion and provides equal protection to all religions subject to regulation and actively act on secular part. Acquisition of certain land under *Ayodhya Act, 1993* was held to be negation of law and therefore invalid and the court held that the greatest religious tensions are not those between any one religion and another; they rather are the tensions between the fundamentalist and pluralist in each and every religious tradition.

The intention of the constitutional guarantee on minority rights, as we understand it is to promote and to protect the distinctiveness of religious and linguistic minorities in the country. Over the years, various court judgments have done much to clarify the gray area lying between minority rights on the one hand and the larger social good on the other. The question on reservation also becomes another hotly debated issue. Should minority groups be excluded from reservations merely on the basis of their religion? Such question needs to be answered clearly after further discussion until a national consensus is reached. To use minority defensively to resist the requirements imposed at times, be it running the educational institutions

or other institutions in the long run, undermines the very legitimacy of minority rights themselves.

In conclusion, it is religious communalism that undermines minority rights, often with attacks from the outside by religious communalists from the majority community, but also with mis-adventures from the inside by extremists from the minority itself.

From a nationalist perspective we must be ashamed that the Indian tryst with the secular destiny of wiping every tear from every eye is making head way steadily backwards in law and much more in life. Why not ban at least the religious symbols in the elections, forbid political parties with communal labels from the hustling, plead with Gandhi salesman and Marx merchants to avoid coalition with caste and religion oriented groups? Can't we begin the battle for a secular political culture and public life? Can't we mass-vaccinate, through a big movement and people's mobilization, every Indian against anti-secular disease? Blush, if you can, in a higher dimension than the author meant, I conclude with a quote from VICTOR HUGO: "I am for Religion against Religions".

National Foundation
for Communal Harmony

Secularism - Complex relation between Religion and Law

KUMAR RAVI

The concept of secularism is not new to India. The vision of secularism - '*sarwa dharma sambhava*', i.e., tolerance for all religions - has always been there in our country and has its roots in the *Yajur Veda*, *Atharva Veda* and *Rig Veda* and *Akbar's Din-e-Ilahi*. However, the word 'secularism' was not used in the Indian Constitution until the 42nd Amendment in 1976, which incorporated the word explicitly in the Preamble. This does not mean that the concept of secularism was not evident in the Constitution or Indian laws. The whole philosophy of Indian Constitution is based on the three tenets of Equality, Fraternity and Justice. The concept of secularism is encapsulated in the broader concept of right to equality i.e. no citizen shall be discriminated by the state on the grounds of caste, sex, religion, race or colour. The right to freedom of religion is a natural corollary to this concept, which lays down the basic principles of secularism in India. Indian laws, which include union and state laws, have been enacted in this broader definition of secularism. Since secularism in India does not completely separate religion and state, and the country had a bitter experience of partition because of religious animosity just before its political birth, the functioning of secularism has not only been a complex issue but also very sensitive political agenda. Many questions have been raised: Are the Indian laws really secular in all aspects? How has the state endeavored to secure the religious freedom of all citizens? How have the laws functioned in the last 50 odd years? How the rights of religious minorities have been protected? Has the concept of secularism been politicized? Do we really have any concrete definition of secularism? And many more such intriguing questions which has made the relation between secularism and law much more complex.

Before looking at the relation between secularism and law, it is important to consider what secularism in India means. This concept in India is very different from

what is practiced in the West. According to Encyclopedia Britannica it means: 'Non-spiritual, having no concern with religious or spiritual matters... anything which is distinct, opposed to, or not connected with religion'. Thus, a secular state is one, which is not connected with and not devoted to religion. It means separation of religion and state in the West i.e. state shall not involve in any religious activity. This is, however, not true in India. The Indian Constitution does not envisage an irreligious or non-religious state. It only tells that all religions shall be treated equally and there shall be no discrimination among the citizens 'only' on the basis of their religion in any form or manner (Art. 15). The difference lies, therefore, in the fact that whereas in the case of western states the discrimination by state is absolutely banned, the constitution of India permits discrimination on condition that the religious ground is accompanied by another reasonable ground. By virtue of this, the state is empowered to legislate different laws applicable to different communities. This further means that the state can accord legal recognition to its people not only as citizens but also as members of different communities i.e. as Hindus, Muslims, etc. The Constituent Assembly also discussed the prospects of banning religious legislation but ultimately the state was left free to enact such kind of legislation as part of unique secular polity of India. Thus, the concept of secularism in India has been defined in accordance with multi-religious, multi-cultural and multi-lingual identity, and the ancient religious tradition of the country.

After the 42nd Amendment, India came to be characterized as a 'Sovereign, Socialist, Secular and Democratic Republic'. The precise sense in which the word secular is used is clarified by the corresponding term '*pantha nirpeksha*' (denominationally neutral) in the Hindi version of the document. Besides Preamble, the Constitution contains many provisions to establish the secular character of the Indian polity. Article 15 of the Indian Constitution prohibits discrimination on grounds of religion, caste, sex, or place of birth; Article 16 guarantees equality of

opportunity in matters of public employment irrespective of one's religious identity; and Article 17 abolishes the practice of untouchability. Articles 25 to 30 deal specifically with the freedom of religion which are as follows: "Freedom of conscience and free profession, practice and propagation of religion" (Article 25); "Freedom to manage religious affairs", which includes the right "to establish and maintain institutions for religious and charitable purposes" (Article 26); "Freedom as to payment of taxes for promotion of any particular religion" (Article 27); "Freedom as to attendance at religious instruction or religious worship in certain educational institutions", with the clarification that "No religious instruction shall be provided in any educational institution wholly maintained out of state funds" (Article 28); "Protection of interests of minorities" (Article 29); and the "Right of minorities to establish and administer educational institutions" (Article 30). However, all the freedoms and rights conferred by Articles 25-30 are "subject to public order, morality and health". Not only that they are to be exercised in a manner that is progressive in spirit. Clause 2(b) of Article 25 provides for state intervention within the framework of the said article to promote 'social welfare and reform', for example, throwing open the Hindu religious institutions of a public character to all classes and sections of Hindus.

Article 44 of the constitution is an important stone in the Indian secular fabric. It requires the state to 'endeavour to secure for the citizens a uniform civil code' throughout India. It is, however, included in the chapter of Directive Principles of State Policy, which has no legal enforceability. The spine of controversy revolving around UCC has been secularism and the freedom of religion enumerated in the Constitution of India. Article 44 is based on the concept that there is no necessary connection between religion and personal law in a civilized society. Marriage, succession and like matters are of secular nature and, therefore, law can regulate them. The UCC will not and shall not result in interference of one's religious beliefs

relating, mainly to maintenance, succession and inheritance. This means that under the UCC a Hindu will not be compelled to perform a *nikah* or a Muslim not to be forced to carry out *sindur-daan*.

The issue of Uniform Civil Code opens discussion on the nature and working of Personal Laws in India. The subject of personal law is related to a very important feature of secularism, i.e; the protection of minorities in a plural setting. Secularism sans protection to minority religious and cultural groups creates majoritarianism. To protect minority interests, special protection measures need to be undertaken to cover the need for different identities and cultures and this is at odds with strict secular principles. The Constitution is ambiguous on the issue of personal laws, as arguments in favour and against are both based on provisions laid in the Constitution. Opposition to reform of personal laws is based on the freedom of religion and conscience, whereas the guarantee to citizens of equal protection from the law and before the law supports a uniform civil code. This issue also raises questions concerning the hierarchy of rights - can the right to be governed by personal laws (a component part of the right to freedom of conscience) have precedence over the right to equality - and legal pluralism in a diverse society.

In the Constituent Assembly debates, there were wide differences amongst the members on the issue of personal laws. On the one hand, there were demands to protect religious freedom, especially minority interests and on the other, to have a uniform civil code for all, based on a notion of homogenized citizenship. Unable to arrive at an agreement, a uniform civil code was seen as a goal to be implemented and was included in the directive principles. Personal laws of minorities were maintained and thus, the whole gamut of family, property, marriage, divorce and adoption rights were left within the fold of religious legislation.

Judicial pronouncements are important in determining the essence of the implications in our Constitution. As early as 1954, in the State of Bombay vs '*Narasu*

Appa Mali' case, it was held that personal laws do not fall within the ambit of laws in force and therefore, are not void even if they conflict with fundamental rights. Religious denominations had autonomy and personal laws were recognized as extra constitutional laws. The judicial perception was that personal laws did not fall within its purview; scriptures and religious texts were not subject to judicial review.

However, the Shah Bano judgment of 1985 overturned this view and the Supreme Court took up the role of bringing in reform. The Shah Bano case concerns an old Muslim woman who went to court against the way her husband had divorced her. In 1978, 65-year old Shah Bano filed a petition demanding alimony from her husband, who had abandoned her for another woman after over 40 years of marriage. According to Muslim law, Shah Bano was entitled to three months maintenance. The Supreme Court heard the matter years later and upheld her right to maintenance. It ruled that Section 125 of the Criminal Procedure Code overrides Muslim Personal Law (shariat) in matters of divorce. While doing so, the court also referred to the need to enact a uniform civil code to promote social justice. It held that no community is likely to bell the cat by making concessions on this issue; it is the state that is charged with the duty to do so. The political aftermath of this judgment - protest by patriarchal sections of the Muslim community - inverted the efforts of the court. The Rajiv Gandhi government, giving in to pressure, adopted legislation that abrogated the right of the Muslim woman divorcee to maintenance under section 125 of the Criminal Procedure Code by passing the Muslim Women's Protection Bill.

The judiciary has been very vocal in giving its opinion on the need of uniform civil code in the country. Justice Kuldeep Singh stated in a case that the uniform civil code was required for national integration. It was stated that minorities should give up their commitment to the two-nation theory and accept reforms in a similar manner as the Hindus and thus promote national unity. In the recent judgment of July 2003, the chief justice V N Khare observed that it was a matter of great regret that Article 44 of

the Constitution has not been given effect. It was argued that the common civil code will help national integration by removing contradictions based on ideologies.

The issue of religious personal laws reflects yet another aspect of secularism, i.e., it is limited secularism. In principle, secularism means equal respect and freedom of all religions, non-discrimination, and the separation of the sacred and secular but without special protection to minorities, it is a form of majoritarianism.

The right to Freedom of conscience and free profession, practice and propagation of religion under Article 25 is subject to public order, morality and health, which has generated enough controversy in the past. The Supreme Court decreed in a case that Muslims of India couldn't be given the freedom to kill cows by way of '*Qurbani*' as part of *Id VI Adha*. The court contended that the killing of cows could not be regarded as essential practice of Muslims. Also, under Article 48 of the Constitution, which sought to promote animal husbandry, the court has a reason to ban cow slaughter - an unacknowledged recognition of Hindu belief in the sanctity of the cow. Thus, Indian legal system has to make a compromise between the conflicting interests of different religious groups.

Similarly, the court has intervened in the affairs of *Anand Margis* by restricting their religious right to practice *Tandav* on the grounds of maintenance of public order. The court in one case allowed the believers of Jehovah faith the right not to sing the national anthem on grounds of genuine conscientious religious objection as there was no provision of the law that obliged anyone to sing the national anthem. This has resulted in the transformation of the laws regarding religious freedom into an over assimilationist mould, to pave the way for an extensive control of religion and religious affairs by the state. It has been pointed out that in the name of national culture and a homogenized notion of citizenship, the state has overridden the toleration of religious, ethnic and cultural differences. In fact, even the decision of

what is religion and what is not lies no longer with the religious group/individual; the court determines it. Also, the legitimacy of a secular state to control religious institutions, even if the denominations agree, is questionable and so, what should be the extent of intervention. While it is argued that the secular state should be kept out of interfering with religious denominations, and the maximum interference that can be allowed is supervision only, social reforms necessitate state intervention. The difficulty of restricting the state, separating religion from the secular and the inconsistency of the judiciary has undermined secularism. The legal issues related to secularism went to courts very frequently. In a major judgment the Supreme Court three-judge bench held that Bal Thackeray's speech in the election campaign in 1990 asking Hindu voters to vote for Ramesh Prabhu, a Hindu, and making derogatory remarks against Muslims, amounted to corrupt practice. This was a bright spot in free and fair conduct of elections and in restricting the role of religion in election speeches.

In another case, the Supreme Court held that *Hindutva* should be understood as a way of life or a state of mind and was not to be equated with or seen as religious Hindu fundamentalism. It held: "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".

The endorsement of the decision of Union of India to dismiss four BJP-ruled governments after demolition of *Babri Mosque* was the high point of the Supreme Court's protection for secular ideals. The court here justified the dismissal of the Bharatiya Janata Party (BJP)-led state governments of Uttar Pradesh, Rajasthan, Madhya Pradesh, and Himachal Pradesh in the aftermath of the *Babri Masjid* demolition. It was further added that the use of religion and caste to mobilized votes in the elections by any recognized political party would amount to corrupt practice

and was unconstitutional.

In the landmark judgment of *S R Bommai vs Union of India*, in 1994, a nine-judge bench again reiterated that secularism is a part of the basic structure of the polity. More importantly, here the court strongly held the opinion that secularism undeniably sought to separate the religions from the politics.

The issue of conversions of poor and illiterate people in remote and tribal areas especially in Orissa, Madhya Pradesh and Tamil Nadu has been a major area of controversy in last few years. The state governments have reacted in different ways to counter this problem under the pressure of majority religious groups. The constitution allows freedom of choice of religion to every person in India, which means that a person is free to make his/her choice of religion/sect and hence conversion is per se legal. However, a person can change his religion/sect only on his own wish without coming under influence of allurement, force or threat.

Under the cloak of social service and charitable activities, the missionaries in the areas of education and health were seen linked to the objective of conversion. They became the basis of new legislation on the issue of freedom of religion in Orissa (1967) and Madhya Pradesh (1968). When challenged in court it was ruled that "what is freedom for one, is freedom for the other, in equal measure, and there can, therefore, be no such thing as a fundamental right to convert another person to one's own religion", because doing so "would impinge on the 'freedom of conscience' guaranteed to all the citizens of the country alike. The latest attempt in this direction, the Tamil Nadu Prevention of Forcible Conversion of Religion Act (2002), goes well beyond the Madhya Pradesh and Orissa Acts to render conversions, particularly of or by the *dalits*, virtually impossible. This is so because of the stringent reporting obligations imposed upon the converts and the converted, the discretionary powers conferred upon law enforcement officers. Thus it is evident that law has encroached a bit far into the secular principle of freedom of religion guaranteed to the citizens.

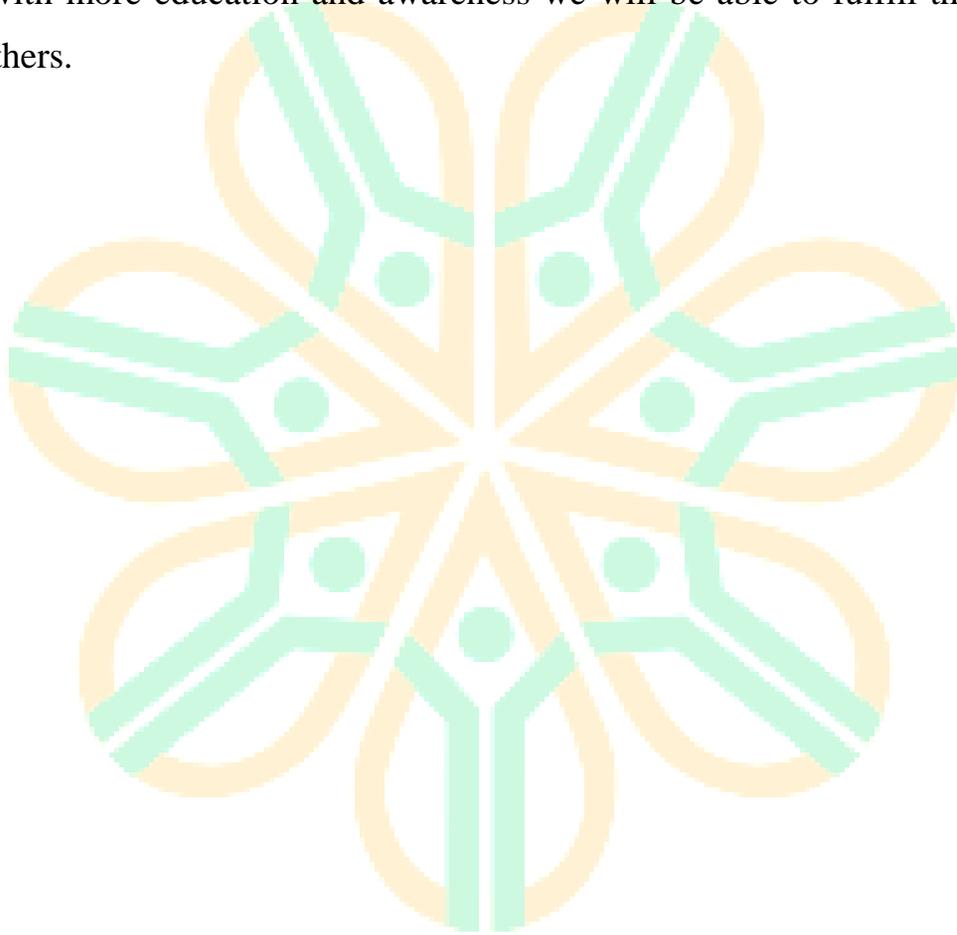
The preventive detention laws like TADA, POTO and POTA were although enacted without any religious colour in the beginning but their functioning has not been communally unbiased. It is alleged that these laws were targeted against certain communities, which made specific community skeptical towards such laws.

The relation between religion and law is complex. Sometime the governments fail to protect the ideals of secularism enshrined in the constitution. The legal enforcement agencies themselves connive with the miscreants to shake the foundations of Indian democracy. Such instances indicate that despite fifty odd years of working of the constitution for bringing secularism in a natural way, the country has lost its way somewhere and religious discrimination by state still remains a bitter truth. It appears that all hard work done in the past has gone waste and a deep chasm has been created between the two largest communities posing a big danger to the secular framework.

Several questions crop up in the mind: What is the future of secularism in India? Will fundamentalism go down or go up? How will law protect minority rights? What is the future of UCC? Do we need another model of secularism?

The fundamental limitation in our quest of answers to the above questions is very clear: we have no other option. We as a nation must adhere to the idea of secularism in the present context only i.e. giving equal treatment by the state to all religions. We are a multi-cultural, multi-lingual and multi-religious society. We have to respect the differences without compromising on national integration. We have to consolidate opinion on secular issues. The issue of uniform civil code is deeply associated with maturity of secular idea. Uniform code on maintenance, heritage etc. is secular in nature and hence requires immediate consensus through debate and active participation by all political parties. In democracy, the political parties play a key role in smooth functioning of system. Every party has its own tailor-made definition of secularism and, when in power, follows suitable appeasement policy

without giving any real benefits to people. It is high time that they rise above petty political considerations. The media and judiciary have critical role to play without any bias. Despite some dark spots we have been able to keep our country on secular path and with more education and awareness we will be able to fulfill the dream of our forefathers.



National Foundation for Communal Harmony

Secularism and the Law - Options ahead

DAREZ AHMED

It is not entirely clear what is meant by secularism. It is defined extremely narrowly by some as the separation of religion from the policy and practice of the state, with out reference to values justifying separation. Others believe that secularism is a normative purposive concept because of which the values advanced by separation in part constitutes its meaning. For a third group, deeper second order justification is also integral to the definition of secularism. The first two distinguish political from comprehensive secularism but the third group finds such a distinction untenable.

Secular is a word that finds its original meaning in a Christian context 'Saeculum'. The ordinary Latin word for century or age, took on a special meaning as applied to profane time, the time of ordinary historical succession. This time was interwoven with higher times, the time of ideas, or of the origin, or of God. Government was more in the saeculum by contrast with the church. The secularism of today is built on this original distinction. The origin point of modern western secularism was the wars of religion.

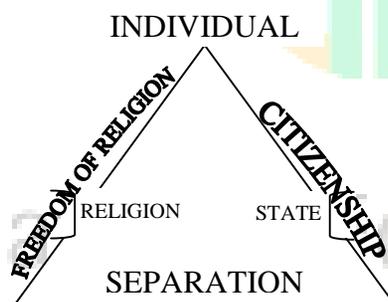
There were in fact two ways in which this could be done. The first one can be described as the common ground strategy. The aim was to establish a certain ethic of peaceful coexistence and political order, a set of grounds for obedience, which while still theistic were based on those doctrines which were common even to all theists. There was, however, a second strategy, which consisted in trying to define an independent political ethic. This allows us to abstract one religious beliefs altogether. We look for certain features of human condition, which allow us to deduce certain exception less norms, including those of peace and political obedience. "*etsi Deus non dassetur*"... even if God didn't exist these norms would be binding on us. We have the basis of an independent ethic.

Law may be defined as the body of principles recognized and applied by state in the administration of justice. The law consists of rules recognized and acted on the courts of justice. The term law consists of principles/rules. The law presupposes a state. Those rules, which are recognized and applied by state, may be called law. To ascertain the nature of law one should go to the courts. The purpose of law is to secure justice. Law is means whereas justice is the end.

Conceptually analyzing the terms secularism and law, it is implied that these terms presupposes existence of a state. The secular state is a state that guarantees individual and corporate freedom of religion, deals with the individual as a citizen irrespective of his religion, is not constitutionally connected to a particular religion, nor seeks either to promote or interfere with religion. So on close examination we can see that the conception of a secular state involves three distinct but interrelated sets of relationships concerning the state, religion, and the individual.

The three sets of relations are:

1. Religion and the individual (freedom of religion)
2. The state and the individual (citizenship)
3. The state and religion (separation of state and religion)



FREEDOM OF RELIGION: In the relationship between religion and the individual, the third factor (state) is ideally excluded. The state cannot dictate or compel any individual to profess a particular religion. It cannot impose religious tax. There is a limited area in which secular state can legitimately regulate the manifestation of

religion in the interest of public health, safety or morals. In a secular state freedom of association for religious purpose is safeguarded.

The Indian constitution provides for the individual as well as collective freedom of religion. The basic guarantee of this right of individual freedom is in Art. 25 (1). This freedom extends to all persons including aliens underlined by Supreme Court in *Ratilal Panchand vs. State of Bombay*. The Indian Constitution makes freedom of conscience as well as right to freely profess, practice and propagate religion subject to state control in the interest of public order, morality and health. But Supreme Court has made it clear that state can have no power over the conscience of individual – this right is absolute.

The Indian Penal Code (sections 295-8) makes it a crime to injure or defile a place of worship or to disturb a religious assembly etc. even though these actions might be sanctioned by offender's own religion. Practices like *devadasi*, *sati* may have religious sanctions but the state still has constitutional power to ban them.

Art. 25(2) grants to the state broad, sweeping powers to interfere in religious matters. This reflects peculiar needs of the Indian society. The extensive modification of Hindu personal law has been by legislation based on this provision. Art. 25(2) thus authorizes the state to regulate any secular activity associated with religion, to legislate social reforms. Individual freedom of religion is further strengthened by Art. 27 which prohibits religious taxation. Art. 28(3) which forbids compulsory religious instruction or worship in state aided institutions strengthens Art. 25(1).

Collective freedom of religion is spelled out in Art. 26.

Citizenship is a relationship between state and the individual and here again exclusion of the third factor is essential. The secular state views the individual as a citizen, and not as a member of a particular religious group. Religion becomes entirely irrelevant in defining the terms of citizenship; its rights and duties are not

affected by individual's religious beliefs. The sum total of these individual-state relationships constitutes the meaning of citizenship.

After guaranteeing in Art. 14 the right to equality before law and the equal protection of the laws, the constitution goes on in Art. 15(1) provides that the state shall not discriminate on grounds only of religion, race, sex, caste, place of birth or any of them. The existence of different personal laws contradicts the principle of non-discrimination by state contained in Art. 15(1). Art. 326 declares that elections shall be on the basis of adult suffrage. Supreme Court in *Nainsuleh Das vs. State of U.P.* held that the constitutional mandate to the state not to discriminate on the ground, *inter alia*, of religion extends to political as well as other rights.

The underlying assumption of separation of state and religion implies religion and the state function in two basically different areas of human activity, each with its own objectives and methods. The democratic state derives its authority from a secular source (the consent of the governed) and is not subordinate to ecclesiastic power. In a secular state all religions are, in one limited aspect, subordinate to as well as separate from the state. Under the principle of separation, both religion and the state have freedom to develop without interfering with one another.

The separation of state and religion is the principle that preserves the integrity of the other two relationships, freedom of religion and citizenship. The unstated principle embodied in Indian Constitution is that found in 1931 Karachi resolution of the Indian National Congress, "The state shall observe neutrality in regard to all religions".

CRITICAL EVALUATION OF SECULARISM AND LAW IN CONTEMPORARY INDIA

British power in India had a reasonably firm policy of not involving the state in the matters of religion. In 1858 the most significant step was taken in instituting

equality before law by enacting uniform codes of civil and criminal law. The reason why personal law was not brought within scope of uniform civil code was reluctance of the colonial state to intervene in matters close to the very heart of religious doctrine and practice.

In second half of the 19th century, rise of nationalism led to the refusal on the part of Indian elite to let the colonial state enter into areas that were regarded as crucial to the cultural identity of the nation. This meant a shift in agency of reform – from the legal authority of the colonial state to the moral authority of the national community. This underlines the basic assumption in nationalist thinking about the role of state legislation in religion – legal intervention in the cause of religious reform was not undesirable per se, but it was undesirable when the state was colonial. One of the dramatic results of this cumulation of reformist desire within the nationalist middle class was the sudden spate of new legislations on religions and social matters immediately after independence.

Even as the new constitution was being discussed, enactment of laws like *Madras Devadasis (Prevention of Dedication) Act 1947*, *Madras Temple Entry Authorization Act 1947* were enacted. It was possible to justify some of these laws on purely secular grounds. In bringing about this purification of Hindu religion, the legislative wing of the state was seen as the appropriate instrument.

After independence apart from reformist legislation of this kind, an enormous increase in the involvement of the state administration in the management of the affairs of Hindu temples, the most significant enabling legislation was the *Madras Hindu Religious and Charitable Endowments Act 1951*, which created an entire department of government devoted to the administration of Hindu religious endowments. Clearly the prevailing views about the reform of Hindu religion saw it as entirely fitting that the representative and administrative wings of state should take

up the responsibility of managing Hindu temples as it were the “public interest” of general body of Hindus.

This reformist agenda was carried out most comprehensively during the making of the constitution and in the enactment in 1955 of what is known as the Hindu Code Bill, which was series of laws called the Hindu Marriage Bill, The Hindu Succession Bill, etc. New code legalized intercaste marriage; legalized divorce and prohibited polygamy, inheritance to daughter and permitted adoption. In one and the same move it sought to rationalize the domain of religious discourse and to secularize the public domain of personal law. Here the violation of the principle of separation of state and religion was justified by the desire to secularize.

ANOMALIES OF SECULAR STATE

What are the characteristics of a secular state? First is the principle of liberty, which requires that state permit the practice of any religion, within the limit set by certain other basic rights. Second is the principle of equality, which requires that the state do not give preference to one religion over other. The third principle is neutrality which is best described as the requirement that the state not give preference to the religions over non religions and which leads in continuation with liberty and equality principles, to what is known in US constitutional law as the Wall of Separation doctrine namely, that the state do not involve itself with religious affairs or organizations.

The liberty principle can only be limited by a secular state by need to protect some other universal basic right, and not by appeal to a particular interpretation of religious doctrine. The urge to undertake reform of Hindu Personal Law made it difficult for the state not to transgress into the area of religious reform itself. The desire was in fact to initiate a process of rational interpretation of religious doctrine and to find a representative and credible institutional process for the reform of

religious practice. That the use of state legislation to achieve this purpose comes into conflict with the principle of freedom of religion is anomaly of secular state in India.

The equality principle recognized by constitution was questioned in early 1950s. The fact that the use of state legislation to bring about reforms in only the religion of the majority was creating a serious anomaly in the very notion of equal citizenship. As J.B. Kripalani argued “If we are a democratic state I submit we must make laws not for one community alone....” If it was accepted that the state could intervene in affairs of one religious community then why not of others? Clearly, the first principle – that of freedom of religion – could not be invoked only for minority communities when it has been set aside in the case of majority community. This anomaly has provided one of the most potent ammunition to the charge of appeasement of minorities. Within the minority communities there were organized attempts to put an end to local customary practices among various parts of India. e.g. The culmination of these campaigns for a uniform set of personal laws for all Muslims of India was reached with passing of the so-called Shariat Act by 1937.

Thus even while resisting the idea of Uniform Civil Code the Muslim leadership has not shunned state intervention. But the minorities are unwilling to grant to a legislature elected by universal suffrage the power to legislate the reform of their religions. On the other hand, there do not exist any other institutions, which have the representative legitimacy to supervise such a process of reform. This is the impasse on equality principle.

The third principle of separation of the state and religion has also been stretched. Art. 290(A) makes specific provision of money to be paid every year to Travancore Devasom Fund by governments of Kerala and Tamil Nadu. The conclusion is inescapable that the wall of separation doctrine of US Constitutional Law can hardly be applied to the present situation. This is precisely the ground on

which the argument is made that Indian secularism has to have a different meaning from western secularism.

The Shah Bano case has bearing on two issues of India as a polity made up of plural religions and cultural communities.

- a) Should there be a uniform civil code or should the customary personal laws prevail?
- b) Art. 13(1) of the Indian Constitution says that all laws in force so far as they are in consistent with fundamental rights shall be void: the fundamental right include the level of equal protection of the laws for all citizens.

In India there are many views about the desirability of a uniform civil code. The first view underlines need for a uniform civil code by many sections that do not share similar views and interests. Secondly, there are the pragmatists who shy away from imposing a general principle. Finally there are supporters of possibility of multiple and flexible interpretations.

CONTEXTUAL SECULARISM

“When India is said to be a secular state, it does not mean we reject the reality of an unseen spirit or the relevance of religion to life or that we exalt irreligion. It does not mean that secularism itself becomes a positive religion or that the state assumes divine prerogatives. Though faith in the supreme principle is basic to Indian tradition, the Indian state will not identify itself with or be controlled by any particular religion. We hold that no one religion should be accorded special privileges in national life or international relations, for that would be a violation of the basic principles of democracy and contrary to the best interests of religion and government. No person should suffer any form of disability or discrimination because of his religion but all alike should be free to share to the fullest degree in the common life. This is the basic principle involved in the separation of church and

state”. This is an elegant exposition of meaning of secularism by S. Radhakrishnan. It is consonant with Gandhi’s faith in the supreme and the reality of the unseen spirit.

Contextual secularism is the view that under certain conditions religious and political institutions must be separated on the basis of non-sectarian principles. Separation does not always mean exclusion; principled distance is also one of its forms. Those who define their identities in terms of traditional practices or modern institutions are not automatically debarred from public sphere. This is so because the idea of separation qua principled distance is built into a commitment to participatory democracy. Any intermingling of religion in whatever form with politics that violates the basis of equal participation in the democratic process is to be abjured.

What does a right based secularism look like? It acknowledges difference – difference between religious communities and between religious and non-religious communities – it is unmistakably distinguishable from hyper-substantive secularism. Because it abstracts not from every substantive content but only from those that are identifiably controversial or posing to be universal, it is not the same breed as ultra procedural secularism. Nor does it exclude religious communities from political arena. Indeed it readily brings them in. Under certain conditions it grants immunity, privileges and guarantees to these communities, particularly to smaller ones. Surely it cannot protect the good of small religious communities unless they come into the political arena – there would be no one to be protected and nothing to guarantee if the good was antecedently expelled from political sphere. But the good of all communities must also be safeguarded against the whims of their own members as well as the fancies of others. No religious community can hope to bring its internal or external fancies into the political arena.

Furthermore, a minimally overlapping good exists, namely the ordinary but dignified life for all that cannot be undermined in the name of any ultimate ideal.

When this is threatened, all ultimate ideals including those infused with religious flavour, need to be expelled from public arena. In this sense, a right-based secularism requires that political institutions keep a principled distance from religious institutions and practices.

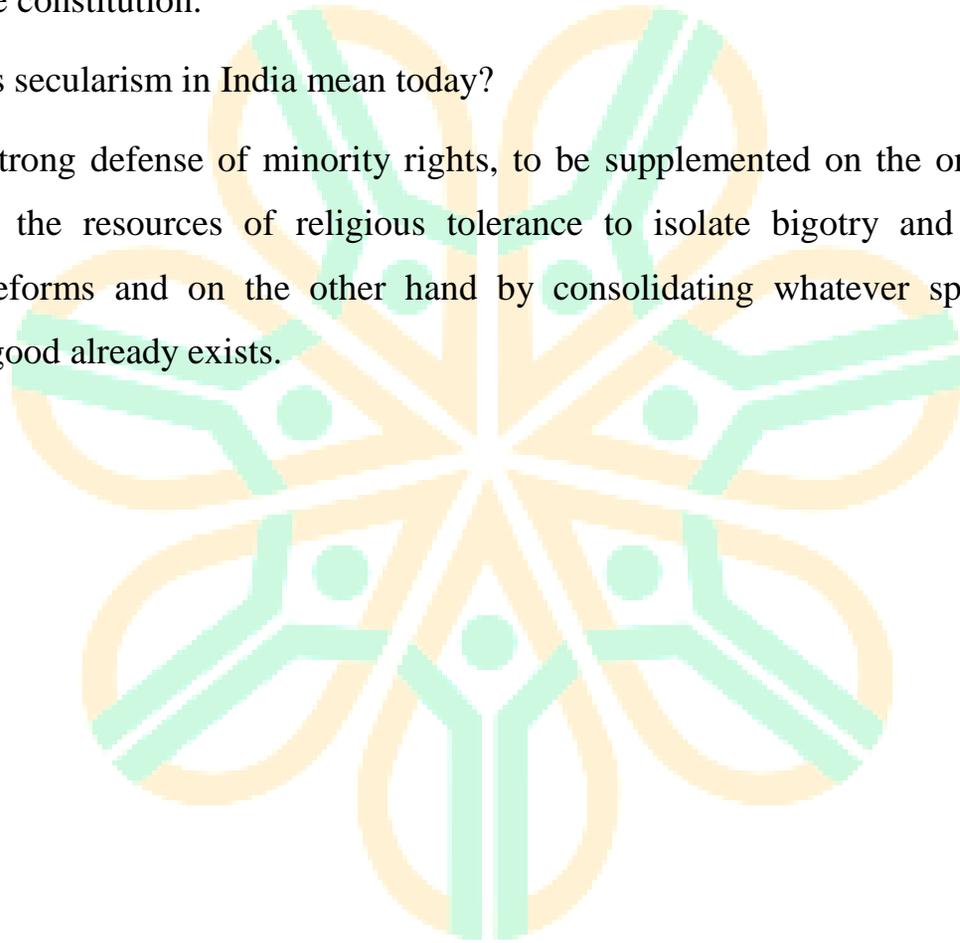
Right-based secularism does not foreclose the possibility of working out a genuinely common good. Rights enter the political arena precisely when different individuals and groups have abandoned deliberation once the common good; currently, differences cannot be overcome. But adhere to of rights have not given up hope that whenever favourable circumstances arise they will pick up the threads from where they snapped. In other words, an implicit commitment to conduct a dialogue in future exists within the discourse of rights. The discourse of rights occupies the space where people have neither given up the hope of living together not yet arrived at agreement once crucial substantive issues that could bind them into a reasonable and vibrant unified existence. They abjure the use of force against others, shun action in haste that snap whatever tenuous bonds exist between groups and individuals and in full knowledge that common good is currently non-existent remain committed to its existence in future.

Before a heterogeneous society such as ours, five options exist at any time. By far the best option is to forever and only have the politics of common good. The next best when conditions persist, is to have a politics of common good and deploy a fall back strategy, the politics of right. Next to make do exclusively with the politics of right. The fourth to altogether abandon participation and rights. Here, individuals and groups are shut out from participatory democracy and are unable to get courts to enforce their claim. Under such conditions, discrimination, subordination and exploitation thrive. Finally, a society may plunge into what Hobbes famously called the war of all against all – in other words a Bosnian suicide. Most of the societies are

stuck at level-4. India is fortunate to have a constitution that envisions and supports a society that has raised itself to level-2. The least we can do is to stay at level-3, continuing in the meanwhile to refurbish, by critical interpretation of its article, our faith in the constitution.

What does secularism in India mean today?

A strong defense of minority rights, to be supplemented on the one hand by deploying the resources of religious tolerance to isolate bigotry and encourage internal reforms and on the other hand by consolidating whatever space of the common good already exists.



National Foundation
for Communal Harmony

Implementation of Secularism related Laws depends on collective conscience of the people

V.M.V. NAVAL KISHORE

Secularism may be defined as the neutrality of the state in matters relating to religion or creed. It may also be understood as non-patronizing attitude of the state to any one religion. In a secular state, there is no state religion and every citizen is free to preach, practice and propagate any religion. Thus, secularism defines the way the people of a country carry on their individual affairs as also their behaviour towards others.

Law may be defined as a set of principles that are laid down for the purpose of ordering the life of the people in a country. Law may be understood as a combination of those rules and principles of conduct passed by the legislative authority, derived from court decisions; and established by local customs. Law defines the do's and don'ts for the people of a country in various spheres like business, work, religion etc. In case of modern state, law also states whether the country is a secular country or a theocratic one. But, the pertinent question here is, whether a law can really make a country secular?

India is a multi-cultural, multi-religious and multi-caste society. It has been so from times immemorial. India has always kept her doors open to people of any religion and assimilated them into its mainstream. India has also been the birthplace of religions like Buddhism and Jainism. Thus, it can be said that India was a secular country in the past when her citizens were not only free to follow any religion but also respected the choice of others in following their own religions; this secular state was established despite there being no laws to ordain so.

The Preamble of our constitution proclaims India to be a secular state. The word 'secular' was incorporated into the constitution *vide* an amendment. However,

the non-inclusion of the word did not make the country a theocratic state. The constitution itself, and later legislations, made provisions for the treatment of all religions on an equal platform.

Secularism in India is based on the rich heritage and culture steeped in its various religions. The secular fabric of the country is very well reflected in the phrase '*Vasudhaiv Kutumbakam*' which means that the whole world is one family. India has always been an inclusive society, which has welcomed people of all religions and faiths with open arms, never discriminating among religions and never considering any religion or faith to be a threat.

But this secular fabric has not meant that there is no communalism in India. In spite of a number of laws treating people of all religions *at par*, India has had a long history of communal riots, the worst of them being at the time of partition of the country when blood flowed as rivers. In a land where tolerance is byword for life, when did this hatred for fellow beings arise? The answer to this question lies in the British rule of the country, particularly post-1857. Prior to 1857, the British rulers restrained themselves from interfering in the social structure of the country. Post-1857, they realized the importance of dividing the people of the country in order to weaken them. This gave rise to the (in) famous 'divide and rule' policy, which they used, on religious lines thus distancing Hindus and Muslims. The persistence of this policy of the Britishers is reflected in the painful partition of the country and the displacement of a large number of people from their hearths and homes. This has continued even after the independence of the country in spite of the government being neutral as far as religion is concerned and the constitution ensuring that there is no discrimination on the basis of religion as far as employment, education etc. are concerned.

This is apparently on account of minimal social interaction between various religious communities leading to a distorted view of other communities and its

practitioners. Such a social interaction is especially important to heal the scars and pain of the partition. The delicate secular fabric could not withstand the body blow of the partition.

This situation was sought to be remedied through the provisions of the constitution. The pain of the partition revisited the country in the form of communal violence riots from time to time, as if not to let people forget their wounds. The action or inaction of the political leaders and the administrative system at times also added to the communal frenzy. Some major events which changed the way world viewed India were based on communal frenzy viz. *Babri Masjid* demolition, the Gujarat riots, Delhi (Sikh) riots.

Babri Masjid located at *Ayodhya* in Uttar Pradesh was demolished on December 6, 1992 by *kar sevaks* under the guidance of some of our leaders who are facing trial in the case. The demolition of the *Babri Masjid* made the fabled respect for all religions that Indians have a thing of the past. The fact, that a religious shrine of any religion could be demolished, raises questions about the secularity of the people of the country as also the conviction of the state towards secularism.

The Gujarat violence of 2002 is a matter of great shame for the country. The fact, that people were massacred only on account of their belonging to a particular religion, is unacceptable in any secular nation. The fact, that the administration reacted late, also raises questions regarding the State's belief in secularism.

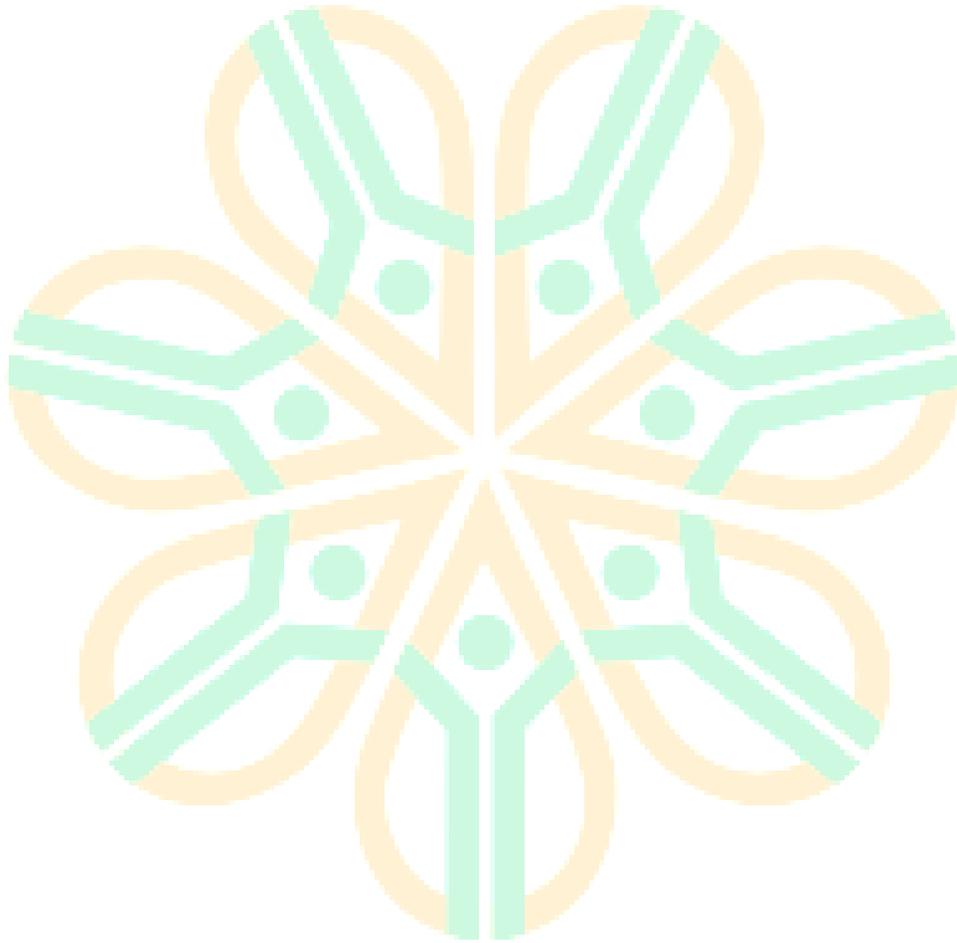
A similar incident, which happened about two decades prior to the Gujarat violence, was the riots of Delhi in 1984. Sikhs were brutally slaughtered on the streets of Delhi just because the person who assassinated the then Prime Minister of India, Smt. Indira Gandhi happened to be a Sikh. It is ironic that this killing happened to exact revenge for the death of the person who was instrumental in incorporating the word 'secular' in the Indian constitution.

This shows that law has only an enabling impact on making a country secular. Whether a country is secular or not is dependent on the way of life of the people, which is a result of their values, upbringing, culture etc. and it cannot just be imposed by law. Secularism is more about humanism, i.e. treating fellow beings as human beings irrespective of their religion. It is not about following different faiths; it is about letting others follow their faiths. Secularism can be aptly embodied in the phrase: 'Do unto others that you want others to do unto you'.

If the people of a country are secular, the legal system of the land, which is nothing but the collective conscience of the people, would be for the best interests of all people, irrespective of their caste, creed or religion. People who belong to the same society, which is secular in its thinking and outlook, would then implement these laws. Such people would then implement the laws in their spirit rather than in letter. The existing laws would give the functionaries the requisite authority to give an impetus to secularism.

Thus, we can see that secularism and law are not unlike chicken and egg. The laws, if defined as the values and way of life, give rise to secularism as respect of other religions firmly entrenched in values. These laws would give rise to a large population of enlightened secular people. These secular people would then implement the formal law of the land, which is secular, i.e. legislation. At the same time, it has to be kept in mind that promulgating laws cannot impose secularism. Both secularism and the laws for this cause are dependent on the people and their values. Though it is not possible to turn every person into a secularist, what is required is that the collective conscience of the people resists any attempt to polarize people in the name of religion. I conclude by saying that the values of the people, i.e. informal law promotes secularism which in turn gives rise to formal laws to uphold secularism. This formal law gives teeth to the state functionaries to implement the laws and further secularism through other steps which increases people's confidence

in the secular state. Thus, secularism and law require each other for the peaceful co-existence of the people of various faiths and the consequent development of the country.



National Foundation for Communal Harmony

Building a secular state in a religious society

APPU JOSEPH JOSE

Jawaharlal Nehru in a conversation with the French intellectual Andre Ualraux said that the toughest part of his job as Prime Minister was to build a secular state in a religious society. The observation was extremely prescient. One does not have to be a sociologist to know that the religion pervades every aspect of life in India. Yet, India's commitment to secularism implies that we seek to exclude religion from the sphere of the state. This separation of religion and politics is not a natural Indian response to the challenges of governance. It is a learned response; something we have imbibed from the western political theory and practice. Therefore, we need the buttresses of law to hold the structure of secularism together.

Secularism is the doctrine that the spheres of politics / state and religion must be separate. According to D.E. Smith, one of the finest scholars of Indian secularism, "a secular state is one that guarantees individual and corporate freedom of religion; deals with individuals as citizens irrespective of their religion; is not institutionally connected to a particular religion; nor seeks either to promote or interfere with religion." From Smith's definition, it follows that a secular order has three components: (1) individual and corporate freedom of religion; (2) citizenship that has no religious association; and (3) separation of state and religion. Secularism is a concept that defies easy summarization. There are contending ideas about what secularism is and should be. Nevertheless, Smith's definition is useful and has the advantage of clarity and wide acceptability. We shall use it as a reference point while exploring the theory and praxis of Indian secularism.

If Indian society is stridently religious, why should we have a secular polity? Several arguments may be put forth in defense of secularism:

- (i) Political institutions and religious institutions are both extremely powerful; hence, mixing the two would, therefore, undermine

individual liberty. So any society that values individual autonomy has to be secular.

- (ii) In a religiously plural society, people of all faiths must have equal say in matters of state, which affect all citizens. Hence, state should be an arena where one's religious identity has no significance.
- (iii) If religion and politics are not separated, political decisions will favour religious majorities and democracy will deteriorate into majoritarianism.
- (iv) Religion and politics work on fundamentally different premises, viz., faith and reason. It is not wise to mix the two.
- (v) Finally, in a society of many religions, the co-existence of different religious communities demand that in matters that concern everyone, religion be kept away.

In brief, pragmatic considerations (such as co-existence of diverse religious communities) as well as commitment to ideals such as individual autonomy, equality and democracy – ideals that all modern societies hold dear – demand a secular order.

In the Constituent Assembly debate, there was a tussle on the issue of secularism between those who wanted a strict separation between state and religion (no links theory) and those who wanted India's centuries old religious traditions to be reflected in its polity. The latter group proposed an 'equal respect theory' of secularism which respected all religions and granted religious liberty to all. What came out of the deliberations was a compromise that leaned towards the latter group. The thinking of the Constituent Assembly on the issue is well brought out by a statement made by Shri K.M. Munshi in the Assembly, "We are a people with deeply religious moorings. At the same time, we have a living tradition of religious tolerance - the result of the broad outlook of Hinduism that all religions lead to the same God

... In view of this situation, our state could not possibly have a state religion, nor could a rigid line be drawn between the state and the church as in the U.S.”

An examination of the provisions of the constitution relating to secularism shows that while they fulfill the three criteria for a secular state laid down by D.E. Smith, they fail to establish a clear cut separation between the spheres of state and religion.

Individual freedom of religion is assured by Article 25 (1). It provides that ‘subject to public order, morality and health and all the provisions of this part, all persons are equally entitled to freedom of religion and the right to profess, practice and propagate the religion of one’s choice.’ However, clause (2) of Article 25 imposes limitations on the right guaranteed by clause (1) and reflects the peculiar needs of Indian society. Clause (2) provides that, ‘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 throwing open of Hindu religious institutions of a public character to all classes and sections of Hindus.’

Thus, clause (2) of Article 25 appears to have allowed the state to interfere in the sphere of religion subject to public order. Making use of Article 25 (2) (a), state manages temples and other religious institutions. In fact, several state governments have full-fledged department for temple administration. By virtue of Article 25 (2) (b), State has enacted temple entry laws and affected changes in the personal laws of communities.

Article 26 provides collective freedom of religion. It provides that ‘subject to public order, morality and health, every religious denomination or any section thereof shall have the right – (a) to establish and maintain institutions of 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.’ However, this Article also affords considerable scope for state intervention in matters of religion. The question that which practices can be regarded as part of religion so as to merit protection under Article 26 as matters of religion has often been decided by the Supreme Court. The position it has taken is that a practice must be an essential attribute of religion to merit protection; otherwise the state is entitled to regulate and restrict such practices. Thus, ironically, Supreme Court in secular India has become the arbiter of what constitutes the essentials of a religion.

Article 30 is another Article that seeks to protect corporate freedom of religion. Clause (1) of this Article, provides that ‘All minorities whether based on religion or language, shall have the right to establish and administer educational institutions of their choice.’ Clause (2) provides that ‘state shall not, while giving grants in 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.’

The second criterion laid down by D.E. Smith for a secular state, viz., citizenship that is free of ties with religion, has been provided for in the Indian Constitution. Articles 15 (1), 16 (1) and Article 326, which provides that election shall be on the basis of universal adult suffrage, ensure this.

The third aspect of Smith’s concept of secular state, viz., separation of religion and state is imperfectly realized in India. In India, there is no explicit provision in the constitution, which provides that the state shall not have an official religion. Article 27 is an important article for separating state and religion. It provides that “no person shall be compelled to pay any tax the proceeds of which are specifically appropriated in payment of expenses for the promotion or maintenance of any particular religion or religious denomination.” But this article only forbids taxation for the benefit of any particular religion. Non-discriminatory taxes for the benefit of all religions would be

constitutional. Even if there is no religious tax, legislature can appropriate funds for the promotion of religion out of the revenue of the state. This would be in order. As per Article 30, state can extend grants in aid to schools run by religious bodies. Although Article 28 places some limits to religious instruction in state schools, it provides for religious instruction in state funded schools in certain circumstances.

What this analysis shows is that Indian constitution provides for a wall of separation between state and religion that is extremely perforated. The Constitution makers knew the value of secularism, but they could not make a wholehearted commitment to it. Indian Constitution does not contain a straightforward separation between state and religion as provided by the 1st Amendment of the US Constitution. The relevant part of the First Amendment reads, “Congress shall make no law respecting establishment of religion or prohibiting the free exercise thereof...”

Our constitution clearly reveals the limits of law in the face of intransigent tradition. Secularism as it emerges from our constitution is unique. As Rajiv Bhargava points out, Indian secularism is ‘contextual secularism’ - a pragmatic secularism whose object is not so much the realization of ultimate ideals but to create a livable polity. The imperfect buttress of law has not managed to hold together the edifice of secularism. It has been steadily crumbling.

Indian secularism, as we have seen, is the outcome of a compromise between modernists and traditionalists. But like all compromises, it has not found favour with either camp. The imperfect (porous or perforated) wall of separation between state and religion has resulted in the state interfering too much in the sphere of religion. D.E. Smith points out that the state has emerged as the church so far as Hindu religion is concerned.

With political parties, whose commitment to secularism is weak, increasingly coming to power, the imperfect wall of separation has allowed them to change the character of the state in favour of the majority religious community.

The Supreme Court has unfortunately played second fiddle to the majoritarian deviation of secularism. In *Ismail Faruqui Vs Union of India* (1994), the Ram Janma Bhoomi case, the court endorsed a version of secularism that has its rationale in Hindu scriptures. The court accepted the claim that secularism in India exists because of Hindu tolerance. In *Suryakant Venkat Rao Mahadhik Vs Smt. Saroj Naik* (SC, 1996), an election case, appeal to Hindu sentiments and promise of '*Hindu Rashtra*' were tolerated by the Supreme Court. It held that *Hindutva* was to be understood as a way of life or state of mind and not to be equated with Hindu fundamentalism. *Hindutva*, the court held was the way of life of Indian people and a synonym for Indianization.

In *Manohar Joshi's* case (*Manohar Joshi Vs Nitin Bhanu Pate* 1996), Supreme Court ruled that the defendants promise during election campaign to establish the first Hindu state in Maharashtra did not amount to appealing for votes in the name of religion. In case such as *S.R.Bomma Vs Union of India* (1994), Supreme Court has affirmed secularism as a basic feature of the constitution, however, its recent judgments are deeply disturbing. Supreme Court has, it seems, brought the argument that symbols of Hindu India stands for Indian culture and history as a whole. Is the Supreme Court, the guardian of the constitution, becoming a willing accomplice in the majoritarian project? On the other hand, the emphasis on minority rights, an essential aspect of our version of secularism has come under increasing attack. Critics describe it as 'pseudo secularism', 'appeasement of minorities' and such like. The Supreme Court seems to share this view as evidenced by its repeated strictures to implement the uniform civil code. (*Sarla Mudgal and others Vs Union of India*, 1995; *John Vallamattom and others Vs Union of India*, 2003).

Secularism is meant to allow people of different faiths as well as non-believers not merely to co-exist, but to live together as well. However, secularism is increasingly no guarantee for peaceful co-existence of religious communities in today's India. Communal riots are breaking out frequently and its perpetrators go scot-free. This should make us wonder if the legal buttresses that we have created to hold together the edifice of secularism are any good. Indian secularism is based allegedly on '*sarva dharma sambhav*' and 'religious tolerance'. What we need is true secularism. The need of the hour is to insist that the law applies equally to everybody and that even the high and mighty should be answerable to crimes against citizens. We have a whole gamut of laws such as sections 153, 153 (A), 153 (B), 155, 295 of the IPC to prevent incitement of communal hatred. There are also the laws against murder, mayhem and arson. These constitute our secular foundations, not 'Hindu tolerance'. Secularism can be strengthened only if we respect the rights of citizens and stick to the due process of law.

Perhaps the truest indication of the erosion of secularism is that the doctrine has come under an intellectual onslaught. Secularism is no longer the commonsense of India. Secularism has truly become a beleaguered doctrine in India. Two of the most influential intellectual attacks on secularism were launched by sociologists, T.N. Madan and Ashis Nandy. Madan argues that there is no civilizational niche for secularism in India. He suggests that institutions of secularism are linked to the dualistic conception of Christianity. Since Christian doctrine recognizes the distinction between spiritual and mundane, it facilitates the development of secular ideas about the division of church and state. He argues that a secular constitution which denies any role for religion in public affairs is at odds with popular commonsense in a deeply religious society. Secularism, therefore, is an ideal of highly westernized elite and sits uncomfortably in Indian society. Ashis Nandy argues that by forcing religion out of the public arena, secularists have deeply offended the

religious people. They in turn have turned religion from faith to ideology. Only in its latter version can religion find a place in public arena. It is the transformation of religion from faith to ideology that is the cause of religious discord and violence. Nandy wants the resources of tolerance inherent in traditional religion to be revived. An engagement with or rebuttal of these two well-known arguments is not in order at this place. Suffice it to say that 55 years after the introduction of the constitution, secularism, one of its cardinal principles, has not won universal acceptance. There must be something fundamentally wrong with the secular order that we have created.

Trying to build secularism through law is a project that is bound to fail. So long as Indian society remains intransigently religious, secular polity will remain vulnerable. As of now, there is a wide gap between constitutional norms of religious neutrality and civic equality and the religion inspired hierarchical values by which people order their lives. If we need to move from an uneasy secularism to secularism of conviction, Indian society itself must get secularized. That is to say, science and reason must regulate social life and religion must become at best a private consolation. What India needs is nothing short of cultural revolution inspired by the values of enlightenment. In the initial years of independence, the state actually promoted these ideas. Pandit Nehru's call to develop a 'scientific temper' must be seen in this context. But we abandoned the project soon enough.

Secularization is not the eclipsing of God. It is a demand for God to vacate those areas of life where she/he does not belong. Secularization is a matter of delimiting, not eliminating the province of God. If a secular polity is desirable - and I have tried to argue that it indeed is - we should go the whole way and try to create a truly modern and secular society as well.

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Secularism and the Law in a multi-religious society

TUKARAM HARIBHAU MUNDHE

At the twilight of Dark Age and dawn of the modern one, emerges the concept of materialistic world. It focused on the present life instead of contemplating the life after death. This concept of looking at the life, later on was termed as secularism, with certain modifications. It implied, to look at the life from materialistic attitude. The religious considerations did not come into play while leading a life.

Secularism has different connotations. It means different things to different people and countries, depending on the socio-cultural background and its milieu. Yet, it has certain central features, which constitute the core of secularism.

1. Secularism envisages that state should not have its own religion;
2. State should not treat individuals on the basis of religion;
3. State should treat every individual equally i.e. give equal opportunity to everybody irrespective of religion.

Secularism, thus, contemplates the separation of public and private life. An individual can pursue religious practices in private life, but when it comes to public sphere, religion is kept at backburner. Secularism in a way, subscribes to the theory of 'wall of separation' between religious practices and public activities of individual.

Though the concept of secularism originated in fifteenth-sixteenth century, it has not acquired uniform character throughout the world. It means certain things to the United States, different things to France and still different to India. Secularism takes different meaning in different countries.

In the United States, secularism implies the concept of liberty and equality in religious matters. It contemplates that every individual concedes the liberty to choose religious practice in his discretion. Neither the state nor society will come in the way of individual. Similarly, the state provides equal treatment to every individual. No religion is superior or inferior in the eyes of law. This is called 'wall of separation'

between the individuals and private life and public sphere of action. Religious principles, in France are not recognized. There is little tolerance of religious principles at public places. For instance, in public schools and institutions religious symbols cannot be displayed as it affects public life. On the same basis, the *sikh* students are not allowed to wear *kirpan* in public schools. However, Indian concept of secularism is of different variety. Indian society being multi-religious and multi-cultural could not accept the concept of neutrality nor that of indifferent attitude towards religion. India, therefore, has accepted the concept the secularism which suits its conditions.

India, being a developing society, needs to undertake social reforms. The social reforms in India necessarily mean socio-religious reforms. Hence, the neutral attitude of state towards religious matters would not be fruitful. Therefore, state does not interfere in religious matters; it can reform the secular aspect of it. State can regulate secular and material spheres of religious activities. For instance, bringing in secular and positive changes in religious practices, law regarding marriages and the property rights fall within the ambit of the state. Thus, the concept of Indian secularism is one of positive neutrality towards religious matters.

India is a multicultural country, wherein the diverse religions, castes, creeds, etc. are prevalent. Yet, India has maintained its identity as one nation, but none of the cultural facet is subservient to other. The 'unity in diversity' is its manifestation. Since ancient times, India has upheld the concept of 'tolerance' and equal respect for all religions. Mutual respect for one another is its cardinal principle. The spirit of tolerance later on came to be known as 'secularism'. In a way, Asoka's "*Dhamma*" or Akbar's "*Din-i-Ilahi*" are nothing but manifestation of secularism.

The framers of the constitution i.e. the makers of modern India were secularist to the core. This ideology has been reflected in the constitution. Indian constitution is a secular document. The constituent assembly debates amply reflect the secular

ideology of the constitution. Though the phrase ‘secularism’ was not specifically mentioned in the constitution earlier but the spirit of the constitution was thoroughly ‘secular’. The wall of separation has been followed in the making of the constitution. The endeavour of constitution makers was noteworthy, particularly making constitutional provisions in the backdrop of religious carnage and holocaust. Despite the unfortunate partition of the country on religious grounds, Indian constitution is thoroughly secular. The right to equality as enshrined in the chapter of Fundamental Rights envisages the ideal of secular society and state. Equality before law, equal protection of law, equal opportunities and absence of discrimination based on the principles of religion, race, caste, sex, etc. makes the Indian constitution thoroughly secular. These principles constitute the very base of the philosophy of the constitution.

The Indian constitution even goes to the extent of making right to profess, practice and propagate religion as a fundamental right. Every individual in India has right to follow any religion, practice it and the state will not come in his/her way. Even right to propagate one’s own religion is a fundamental right. However, the fundamental ‘right to religion’ is not absolute right. It has certain restraints in public interest, morality, public order and decency. One’s right to religion cannot breach the public order and morality otherwise it will lead to total chaos. The right of minorities to establish the educational and cultural institutions has been incorporated as a fundamental right. This provides the platform for cultural minorities to protect their respective cultures. The secular aspect of Indian constitution goes beyond fundamental rights. It, in particular, pervades political rights. Everybody in India is enfranchised equally, without whatsoever considerations for religion. When a person attains eighteen years of age is provided with right to vote. The delimitation of constituencies is territorial and not communal. The secular aspect of any constitution or law can be enforced vigorously only if the society is secular to the core. The

Indian society is religious to the core, though not anti-secular. The religiosity of Indian society can be depicted by the religious practices prevalent in the society. Therefore, the constitution makers contemplated the provisions to make Indian society a secular and in the form of 'Uniform Civil Code' as enshrined in the directive principles of the state policy.

Article 44 of Indian constitution contemplates a uniform civil code for the Indian society. A lot of controversy and heated debates have taken place, both in public and private spheres on the desirability of a 'uniform civil code'. The issue, which has created much controversy is whether the 'Uniform Civil Code' would be accepted as the common code of the country as a whole or will it be Hinduism, Islam, Christianity or any other or combination of all. The personal laws of different religions have led to heated debates. Every religion practices its own personal laws, which many a times, if not in confrontation, are in contrast with other personal laws. In a way, it leads to different personal practices among different religions. Whenever a question of uniform civil code arises, the issue of marriage comes up. The Muslim personal law permits bigamy, whereas the Hindu personal law does not.

Bigamy and polygamy had been prevalent norm among Muslims. It goes against the concept of Human Rights as well as Rights of Women. There is a need of reform in this matter. However, the hard liners in the Muslim community are opposed to it on the ground that it amounts to interference in the personal matters of Muslims, which is banned by the secular nature of the Indian constitution and it interferes in Shariat. However, it must be remembered that the secular nature of Indian constitution does not prevent state from bringing about reforms in 'secular aspects' of religion. On the same grounds, Hindu code bill has been implemented and numerous changes brought about in different spheres of Hindu life. For instance the prohibition of dowry, ban on bigotry, etc. Nevertheless, the reforms in Muslim personal law may gain momentum once the Muslim community is more enlightened

on the issue. The present chaos is due to the lack of information and education. There is a need of information and education. There is a need for spread of education in Muslims. Educational reforms will help to a great extent in reforming Muslim community per se.

Along with the issue of marriage, the controversy regarding 'divorce' also looms large. The laws regarding the 'divorce' are different for different religions. While there are well-established laws for divorce among *Hindus* and *Christians*, it is not the case with Muslims. The '*triple talaq*' practiced by the Muslims goes against human rights, women rights and free and fair justice. Of late, there has been some debate in this regard within the Muslim community itself. Though not sufficient, it can be considered as a starting point of the reform process in the Muslim community.

Yet another issue regarding the personal laws is the right to inheritance of property. The controversy is regarding the rights of women in case of inheritance. Do women possess right to inherit parental property among Muslims? What is the issue in case of Hindu women? Shah Bano case is pertinent in this regard. A great opportunity was lost to reform Muslim personal law in regard to right to property of women. As per the laws passed by the Indian parliament, Hindu women have right to inherit property of parents. All these issues have become stumbling blocks in the formulation of uniform civil code. It is the duty enjoined upon the government of the country to formulate uniform civil code as enshrined in Directive Principles of the state policy. The governments of country have not been able to stand upto the expectations in this respect Indian society has also not lived upto the expectations as society as a whole should push for such reforms. Unless social forces rise to the occasion, the political class may not undertake such 'hard' reforms. Unless social organizations, civil society and enlightened citizens embark on the mission, no political class will push for such issues. Political change must be brought about by the social forces rather than political class.

Even though the role of legislature and executive has not been worthy in this respect, judiciary has pronounced certain judgments, which augur good for contemplating 'uniform civil code'. It has questioned the rationale of the executive and legislature for not performing its constitutional duties to implement 'uniform civil code' as per Article 44 of the Indian Constitution. The role of judiciary as one of the three wings of the government is to legislate as well. It is either through the interpretation of laws or by filling up the vacuum in the legislation or it can be through generating public opinion in favour of certain legislation. Indian judiciary, particularly the supreme court of India is garnering public opinion in favour of uniform civil code by giving verdicts in its favour and advocating its necessity. The issue of uniform civil code requires the wider considerations. Neither can decisions be taken in haste nor can they be taken without wider public debate. There is a need for wider and greater debate on the issue at various levels and among various religious communities.

However, uniform civil code must not be imposed, but it should be evolved. It should not be a patch of religious principles brought in from different religious scriptures. Rather, it should be reasonable, logical, rational and above all only secular principles that must be framed as the principles of uniform civil code. These principles must be acceptable to religious communities and across all sections of society. The issue of secularism is also intricately interwoven with the socio-religious reforms. In Indian society, social and religious issues cannot be separated because religious principles also determine social values like the concept of *Karma*, sin, sacredness, etc. Therefore, social reforms invariably take the form of socio-religious reforms.

Secularism and the Law - A process in nation building

DEEPAK RAWAT

Despite various ambiguities enveloping the meaning of secularism, it may perhaps best be understood as a positive ideal of a modern society. In a society, the ideal of secularism facilitates the transition from tradition to modernity. In very broad terms, secularism means that the state is not going to make any discrimination whatsoever on the ground of religion or community against any person professing any particular form of religious faith. Law, on the other hand is one of the various means to move towards a secular society. In the context of India, which has a heterogeneous society including divergent outlooks and differing convictions, law has a very special role to play in fostering secularism. Law is also an instrument of socio-economic change, and Roscoe Pond rightly regards it as a branch of social engineering. The central purpose of law is to satisfy the legitimate desires and ambitions of millions of its citizens in satisfying these desires and ambitions, law takes a lead and proceeds to find out solution to the problem of poverty, ignorance and unemployment purely on secular lines.

Secularism had its origin in the West and developed as a philosophy in reaction to a strong hold of religion on the state and the necessity of setting up a more elastic set of moral values for the immediate needs of the developing mercantilist society in the west. As a concept, it was then equated with rationality, positivism, mercantilism and utilitarianism.

Machiavel (1469-1527) wanted the state and religion to be separated and the state to be absolutely independent of the church. However, it was in 1851 that George Jacob Holyoake, in his book, 'Principles of Secularism', introduced secularism as a new 'ism' to the world. Holyoake stated that the secularist is

intended to be a reasoned. The term secularism was chosen to express the extension of free thought to ethics. According to him, secularism has three central tenets:

- (i) The improvement of life by material means;
- (ii) It is good to do good
- (iii) Science was the available providence of humans.

Secularism, according to him, differed from Christianity in so far as it accepts only the teachings, which pertain to humans, and are consonant with reason and experience. He attempted to define secularism as that which seeks the development of the moral and intellectual nature of man to the highest possible point, as the immediate duty of life. In the American context, secularism developed as a way of life based on the premise that religion and religious considerations should be ignored or purposely excluded. The state is not supposed to have an official religion and should exercise neutrality in matters pertaining to religion.

In short, we can say that secularism emerged in the West as a concept antagonistic to religion and as a by-product of materialism and industrialism. Many Indian and Western Marxists continue to think that religion is dope and the progress of human society can be made if religion is completely expunged from the human mind.

Religion, in India is said to be constitutive of society, and this makes secularism extremely difficult to define in the Indian context, and still more difficult to outline as a programme of action. All that can be done is to create appropriate legal institutions.

Colonial rule and the ensuing brutalities unleashed by the partition of the nation have left India as a highly communalized society. Though secularism pervades it, the Indian constitution, initially, neither defined secularism nor used the expression secular. Perhaps, this was because of the peculiarity of the Indian

situation. The Western concept connotes a separation between state and church; while the Indian concept of secularism means the acceptance of all religions (*Sarva dharma sambhava*). The negative Western notion presupposes the existence of a church. In India there is no specific church.

The constitution makers could not arrive at a consensus regarding secularism. Nehru defined secularism in the dual sense of keeping the state, politics and education separate from religion, making religion a private matter for the individual; and for showing equal respect for all faiths and providing equal opportunities for their followers. Mahatma Gandhi also viewed politics from the non-communal point of view. However, his idea of a secular state was different from that of Nehru. Secularism for him meant the spirit of religious tolerance, which he postulated on the basis of universal ethics of Hinduism. The constitution makers, therefore, looked upon secularism as a functional concept, and provided for it a flexible framework that would facilitate its evolution or adaptation to the changes taking place in a developing nation.

The constitution establishes no state religion; creates no category of preferred citizens, throws citizenship open to all, guarantees status of equality and opportunity and promises to promote the dignity of the individual. It opens to all communities all public offices, prohibits discrimination by any agency on the basis of religion. It provides to all religious denominations freedom of religion, forbids the state from laying taxes to promote any particular religion. Thus, various secular provisions are inbuilt in the constitution. However, certain one-time provisions in the constitution could hardly deal with Indian society and its complexity. This is where the importance of law in promoting secularism really increases.

State may not have an official religion, but it cannot really afford to be completely neutral in matters of religion because state is also supposed to remove

obscurantism and promote modernity. In achieving these objectives, the state uses law. In all the religions of India, there are obscurantist elements which create obstacles in the way of human progress. They are unwilling to accept new ideas. The worse thing is that, even the persons in high positions of government are under this influence. Law, being a prominent form of social control has an important role in secularization. Law must remain distinct from religion, but it must also cherish religion, or risk the destruction of society itself.

When the Hindu Code Bill (1951) was before the parliament, conservative and traditional people raised the cry that Hindu religion was in danger, but the pressure notwithstanding the Bill was passed. Thus, the principle was established that personal law is a secular institution and has to be based on secular and rational considerations. The Hindu community has now accepted the position that matters of law included in the Hindu code are secular matters with which religion is not concerned. Conservative Hindus pleaded to apply it to the whole of India. The motive for this was to defeat the bill itself. The reformers argued that it was impractical to apply the code to the Muslims, as the Muslim community had not been adequately informed and educated in this regard.

Secularism does not believe in absolutes. It realizes that in dealing with socio-economic problems, competing and conflicting principles have to be reconciled. This theory of establishing a harmonious relationship is always prescribed in Sanskrit as *samanvaya*. The philosophy of *samanvaya* proceeds on the assumption that there may be an element of social truth in different competing concepts. However, others argue that making laws for only one community is discriminatory. Secularism implying neutrality of the state in religious matters does not, however, rule out legislation for common national goals, on discriminator social legislation to meet the demands of social justice. This is also implied in the Directive Principle (Article 44)

relating to Uniform Civil Code Diversity of personal laws in India, is against the spirit of the constitution, that guarantees equality before law and equal protection of law. A uniform civil code is a must for establishing a secular-social order. Personal laws have to be extracted from the clutches of religion.

The Supreme Court has time and again stated and ordered the legislature to make provisions for implementing a Uniform Civil Code. We already have a Uniform Criminal Code, so why not a uniform civil code. However, our political parties, including national political parties, do not allow secularism to take precedence over their political interests. The Supreme Court has even declared (1994) secularism to be the basic feature of the constitution. (SR Banumai Case). The famous Shah Bano case (1985) illustrates how our political parties sacrificed national interests favouring their own electoral gains. In this case the Supreme Court ordered the granting of maintenance to a Muslim woman divorced by her husband. The case became controversial as it was opposed by orthodox Muslims on the grounds that it interfered with Muslim personal law.

The government of the day, pandered to communal sentiments and reversed the Supreme Court judgment through a constitutional amendment, and by opening the gates of the disputed Ayodhya Mandir-Mosque structure, in 1986. However, what is noteworthy is that opposition brought to the streets lakhs of people, while the supporters of Shah Bano could muster only a few. The issue cropped up once more in the recent Imrana Qadir case in a village of Muzzafarnagar.

Our educational institutions do not radiate secularism. There are always pulls and pressures by the governments in power to project their brand of history – writing and vision of the past. It is important to have a legal opinion on this, and it will be an important step towards secularizing our institutions. However, the Supreme Court order that such matters ought to be discussed by scholars of the respective fields and

not by politicians is good. Regarding education, reservation quotas related to minority seats in minority run educational institutions often create a lot of bad blood. There is need of a clear unambiguous law on the issue.

Another area, which requires extremely clear laws are religious conversions. A person's religion is a personal and a very delicate issue and needs much detailed attention. India has already witnessed a number of communal riots; Meerut; Jamshedpur and Bhagalpur to name a few. The case of Dara Singh and Graham Stains is still fresh in our minds.

Secularism is also a process of national awakening, modernization and nation building. Secularism through legislation implies an element of force. Therefore, legislation may not be the most effective means for secularization. There may be legislation for secularization of social institutions, but it would be ineffective if not implemented timely and properly.

For secularism to thrive in India, it is necessary to find proper institutions through which economic motivation of the individual could be channelized into other interest group motivation. If law is seen as one of the methods of social control in the hands of political power, it is clear that it must stand in need of social and moral justification in the same way as political power itself. Therefore, rule of law and legal theory, cannot be used as mere justification of political power as it happens today. Law in turn, derives its inspiration from secularism; it helps to herald the arrival of a welfare state, and hopes to achieve socio-economic justice, by means of progressive and dynamic legislation. We must, however, remember that though law is a powerful weapon in the hands of a democracy, by itself it will not achieve its objective. It must receive the full cooperation of our public conscience, and the public conscience has to be awakened by the progressive intellectuals of society.

Secularism and the Law - Theory & Practice

AKASH DEEP

The essence of secularism in Indian context can be understood by the lines written by famous poet “Iqbal” “*Majhab nahin sikhata, aapas mein bair rakhana*”. Yes, it is indeed true, that religion doesn’t aim to divide people on their beliefs, but unfortunately it has been used as a platform to divide people and to extract mileage out of it by some vested interests.

Before we look at secularism in Indian context, let us first explore the meaning attached to this word in different parts of world and in different contexts. In philosophy, secularism is understood as that life which can be best lived by applying ethics and world best understood by process of reasoning without reference to a god or gods or other supernatural concepts. George Jacob Holyoake was first one to coin this concept of ‘secularism’.

From sociological point of view, it is a range of situations where a society less automatically assumes religious beliefs to be either widely shared or a basis for conflict in various forms that in recent generations of the same society.

In government, it is viewed as a policy of avoiding entanglement between government and religion, of non-discrimination among religions (providing they don’t deny primacy of civil laws) and of guaranteeing human rights of all citizens, regardless of the creed (and, if conflicting with certain religious rules, by imposing priority of the universal human rights).

Thus, secularism can be thought as the practice of working to promote any of these three forms of secularism. But it should not be assumed that an advocate of secularism in one sense would also be a secularist in any other sense. It is also important to remember that secularism doesn’t necessarily equate to “atheism”, indeed many secularists have counted themselves as religious.

In practice, things do not operate in a clear-cut way. There can be a complicated mix of all these three positions, leading to different positions, which often conflict with one another.

In India, the theoretical premise of secularism that life should be lived by ethics and applying reasoning and god should be avoided is partially accepted. On one hand it believes in living by ethics and reasoning but on the other hand it is believed that religion is a personal matter of an individual and it should be left to him/her to pursue the path of his/her choice. As far as second meaning of secularism is concerned, the situation, which had emerged in recent years is potentially dangerous. Even though, our literacy rate has gone up, and economic standards have substantially improved, but intolerance especially in matters pertaining to religion has also increased. But it is a matter of anxiety that the country seems to be divided or rather polarized between 'secularism' and 'fundamentalism'.

At this point, I would pause and would try to discuss the root cause of fundamentalism (impact communalism more appropriately in Indian context). Historically, the partition of India in August 1947 was based on religious lines only. It was the concept of two-nation theory devised on the grounds of different religions followed by people. Even though the country was divided, we were unable to eradicate hatred for others' religion, which resulted in fundamentalism of today. Fundamentalism nurtures communalism, which in turn opposes the idea of secularism.

The third concept of secularism has been accepted fully by India, that religion and state are different matters and they should not be allowed to mix with each other. It is this strength, which has withstood the assaults of communal forces and retained the true character of India, which are tolerance, brotherhood and good for all mankind.

Our constitution makers were aware of the prevailing socio-political situation in the country at that time and very wisely gave India a secular image by various constitutional provisions. It was a step in the right direction as Indian civilization is known for its ability to assimilate other cultures, beliefs and religions. Throughout the centuries people from various parts of the world came and became part of the Indian tradition and culture.

Our constitution doesn't proclaim any religion as religion of the state even though partition of 1947 was based on religion and a new state Pakistan was born which declared Islam as its state religion. Many argued, India by default became a Hindu nation, but it was resisted and we decided not to be a Hindu nation but a nation where everyone irrespective of his/her religion, race, caste, sex, creed or place of birth would enjoy same rights and opportunities. Thus secularism as one of India's basic characters was introduced in our constitution. The Preamble, which is the soul of our Constitution, also proclaims our country as s Sovereign, Socialist, Secular Democratic, Republic.

To implement it effectively various articles were made. Part III of the Indian Constitution, which talks about Fundamental rights of citizens of India is an important measure for above cause. "Right to Equality" is a fundamental right. Any discrimination by the state only on the basis of "Religion" (also other factors) is not allowed. "Right to freedom of religion" is dealt in Article 25 to 28 about religion and state in length. It prohibits the state from levying and collecting any taxes to promote any religion. It also gives freedom to any individual to practice, profess and religion of his/her choice, but subject to morality, public order and national interest.

Thus we see that India by constitution has a truly secular image. Again in Directive Principles for State Policy, it is advised to state to introduce Uniform Civil Code for all sections of society, but by adding a clause that it should be done by persuasion and not by compulsion. But at the same time Article 29 and 30 give

special rights to minorities based on language or religion to protect their interests and culture.

It is these special rights and the concept of Uniform Civil Code, which has been the cause of controversy. So-called fundamentalists and secularists derive different meanings out of these provisions. The fundamentalist says that in order to give true secular character. Uniform Civil Code must be applied and accuse secularists to appease one minority religious group and neglecting the majority religious group. The secularists accuse the government of neglecting the interest of the majority religious groups and appeasing minority religious groups. The “secularists” accuse other groups as fundamentalists as communalists trying to create hatred and suspicion in the society in the name of religion.

It seems that “secularism” and “fundamentalism” are used to suit one’s convenience and are used and understood differently by different people. Whatever be the case, there are enough provisions in the law of the land (Constitution) to safeguard the secular character of the nation. Clear and precise meaning of these provisions must be redefined keeping in mind the three universal definitions of secularism. Finally, it is not the law but the people who should be changed by sensitization and awareness to retain the character of Indian civilization and culture of universal brotherhood, tolerance and compassion.

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Uneasy relation between Secularism and the Law

VISHAL GOGNE

The analysis of the relationship between secularism and law is essentially a search for answers to two troublesome questions. Firstly, whether secularism, as we understand it, is a logical offshoot of modern law and that they are the two sides of the same coin or whether there is in fact an anti-thesis between the two concepts in practice, if not in theory (especially in the context of attempts by the State to “enforce” secular practices). These are vexing questions, particularly in the present scenario of global terrorism, which has given a severe churning to issues of identity, especially religious. Such identities are now perceived by many to be under ‘threat’ due to the attempts made by many states to enforce an international ‘secular’ legal structure.

But before focusing attention on these two questions, one may examine the meaning of secularism. The traditional western concept of secularism envisages a complete separation of the church and state where the state subscribes to no religion and disunites it self from any religious activity on a public/official platform. An integral component of such policy is the provision of adequate safeguards, protection and sometimes – special provisions in favour of minorities (whether religious, ethnic or otherwise). For instance, the indigenous Americans in USA enjoy certain benefits on the “reservations” earmarked for them.

India, which is considered a successful model of secular laws and practices, offers a unique case study in terms of how the term secularism is understood in theory and also the way it is practiced. Unlike the Western model, where the state is expected to be completely religious and is even anti-religious as in communist countries), in India the state does not shirk away from involvement in religious affairs of communities/religious groups. The interesting feature here is that the ordinary

citizen does not resent state involvement, especially support for religious endeavours. The only rider is that the state now appears to be even headed. Thus, state subsidy for one community's religious pilgrimages is matched by similar subsidy for other religious groups. As a result, India offers a *sui generis* model where the government may give grants for religious celebrations, involve itself in temple administration, organize religious pilgrimages, and host functions for/in presence of religious leaders; and all this without any resentment from the populace. The only qualification as mentioned earlier is that the state action must balance the legitimate expectations of different communities. The Indian State is, therefore, not expected to be completely neutral in religious affairs.

In this context, Article 25 of the Indian constitution enumerates the fundamental right of every person to freedom of conscience and the right freely to profess, practice and propagate religion. But equally importantly, it provides that the state may regulate any economic, financial, political or other secular activity associated with religious practice. Article 26 grants the freedom to manage affairs to every religious denomination. Article 27 prohibits any taxation on the basis of religion and Article 28 provides for freedom as to attendance at religious instruction in certain educational institutions.

The rights of minorities are protected under Articles 29 and 30 which provide for conservation of any distinct language, script or culture and also the right of minorities to establish and administer educational institutions of their choice. The above-mentioned Articles, combined with Articles 15 and 16 which prohibit discrimination on religious grounds (among other grounds) and also Article 14 (right to equality) form the bedrock of the Indian secular mandate. India was intended, by its founding fathers, to be a secular republic notwithstanding that the term

“secularism” was added to the Preamble of the constitution only in 1976 by the 42nd amendment.

Having discussed the features of secularism and also the legal basis for secularism in India, we may now examine the relationship between ‘secularism’ and ‘the law’. The “secular” debate being in the spotlight the world over, this issue is best analyzed illustrating the plethora of available case studies.

The first logical question is whether secular practices/laws are a logical corollary of the modern legal system. In recent decades as the world has moved from imperialism to democracy, and as the number of dictatorships have considerably diminished, modern laws are assumed to be more fair, representative and equitable. The assumption is that democratic practices promote objective law making. The second development has been the incorporation of the “reasonableness” principle in law making, especially in the Indian context. The tempting corollary therefore seems to be that if all laws are essentially and increasingly rational and fair, they must also be secular, for they would involve no discrimination or bias. It is then a easy conclusion that law and secularism are the two sides of the same coin and there exists no conflict between the two. This conclusion would, however, be fraught with the danger of massive generalization. For, if this supposed harmony were a reality then the path to a Uniform Civil Code in India would have been an expressway and not a road made of pot holes, speed breakers, diversions and blockages.

The constitution mandates a uniform civil code in spirit if not in letter. However, this issue highlights the challenges faced by the state in harmonizing the opposing demands of law/fairness and religious/personal law interests. In a scenario where internal reform in most communities is more of an agenda than a reality, state intervention through legislation is perceived as interference and not reform. It

becomes evident, therefore, that the law and secularism do not necessarily share a consequential relationship.

Another instance in this context in the ongoing debate among the Iraqi lawmakers as to whether Islam should be one source of law or in fact an overriding influence over all other sources. The other extreme is occupied by Turkey, which despite being an Islamic state is considered among the more successful secular polities of the world, notwithstanding the recent rise of religious parties. This brings us to the second question, that is, whether there actually exists great conflict between law and secularism in practice. The multitude of examples seems to answer the question especially in situations where the state has attempted to enforce what it considers a secular practice/safeguard.

The France Government recently banned the use of conspicuous religious symbols by students in the state run schools, generating great resentment among minorities. The stated reason was to enforce a secular standard but the widely understood motive was the desire to discourage use of headscarves by Muslim girl students. This in turn raised fears of targeting the minorities in France.

Another illustration of the uneasy relation between secular percepts and legal codes is the recent action of the Alabama Supreme Court Judge, Roy Moore, in installing the “Ten Commandments” inside the court premises. This decision was later overruled by the United States Supreme Court but it highlighted the sensitive relationship between personal laws and the general secular laws.

Closer home, the recent Aligarh Muslim University controversy, the Ayodhya dispute, and the Shah Bano case point to the difficulties in legislating on religious/personal law matters. The extent of polarity among the contending groups is a reflection of the challenges facing law makers. For instance, those who supported reservation in Aligarh Muslim University would categorize it as safeguard for a minority and safeguards/protection being a critical element of minority rights in

secular set up. The opponents of reservation in AMU would also justify their stand by claiming that reservation on religious grounds breeds communalism.

Similarly, very few would support legislation as a measure of resolving the Ayodhya dispute and it would be construed as state encroachment on a domain, which is perceived as strictly being within the control of religious leaders of the communities concerned.

The Shah Bano case too brings forth the limitations of the law, whether by way of judicial pronouncement or legislation in secularizing practices, which are within the ambit of personal codes.

The above discussion leads to the inescapable conclusion that law and secularism do not necessarily share a comfortable and symbiotic relationship. The attainment of secularism through state action is not a feasible option because the law can at best provide for some substantive rights and a few safeguards. The path to harmony lies in democracy, for in a democratic set up the laws are more reflective of diverse needs. However, it is more imperative that democratic functioning is encouraged among religious and community leaders. This would facilitate secular reform and practices among different groups. The state can then truly operate as a harmonizer and not be seen as an interferer.

National Foundation
for Communal Harmony

Secularism and the Law - Question of attitude

VISHAL VASANT SOLANKI

Vinoba Bhave, a saint and spiritual Guru of Mahatma Gandhi was once asked, “What do you prefer – *Dharma Nirapekshta*’ or *Sarvadharm-Samabhava*?” (Neutrality towards religion or equal tolerance of all religions) He replied, I uphold “*Sarva dharma samabhava.*” Once such an attitude comes, all controversies, ideological struggles, disputes over legal interpretations would be redundant.

Indian nation has seen a continuous conflict over the last six decades about various questions: What exactly is Secularism? What is the scope of law? Is religion only a personal affair or is it above the state? What’s the difference between law and Dharma? Is Secularism an Indian notion? What’s exactly Hinduism and Hindustan? All such questions deeply impact our nationhood, determine the character of our polity and indicate future direction of our society. So it would be necessary to see what exactly is ‘Secularism and Law’.

‘Secularism’ is essentially a western notion as Nationalism. Historic relations between the church and state gave rise to this concept. Both the institutions tried to dominate life of common people, which led to conflict between the two. Finally, both carved out their own spheres as famously put in this preaching “Reader therefore to Caesar the things that are Caesars and to God the things are Gods”. It separated the spheres of the state and the religion. In the era of Renaissance, secularism was seen as a philosophy, which emphasized reason, scientific attitude, reality of this world and material existence. It implied neutrality towards religion, aloofness from spiritual faculty of human brain, agnosticism about different planes of reality. In 1851, George Holyoake introduced this term upholding reason as its basic tenet. With secularization of western society, science took an ascending position over the religion.

Indian viewpoint was on a different plane altogether. India sharply distinguishes between Religion & Dharma. Dharma is defined as “that which upholds” – it is that universal order, condition which preserves the existence. A human being has his own *Manav Dharma*. Irrespective of whatever religion he may belong to, his basic Dharma – nature of duty in life remains the same. This broader viewpoint has naturally given Indians an all compassing, synthesizing ability. Through philosophy of *Anekantavada*, Jainism clearly accepts different dimensions of truth. As social reformer Mahatma Phule puts it, “Even if there are as many religions as human beings on earth, it doesn’t disturb peaceful coexistence if right conception of truth is adopted.” Ideal like ‘*Vasudhaiva Kutumbakam*’ would flow only through such attitude. As Arnold Toynbee puts it, “This broad minded approach to reality is the unique characteristic of India. The most devout *shaiva* and the most zealous *Vaishnava* would each recognize that the other is seeking truth and salvation in his own way.... It is this total openness that is consequence of total faith and firmness!”

Gandhiji was *annis mirabelis* of secularism in India. Being the most religious man, it wasn’t difficult for him to appreciate ultimate truth, which all religions teach. Thus his religiosity was never an obstacle to be secular. Thus, true secularism doesn’t mean absence of religion or neutrality towards religion. It only means not to allow one particular religion to dominate over others, to have equal respect for all religions and to uphold harmony amongst all.

There are different viewpoints over what exactly constitutes secularism. There is dominant class of *Hindutva* nationalists in India who consistently feel that India is primarily a Hindu entity and its culture, language, traditions are all testimony of its Hindu identity. Thus for them, loyalty towards this Hindu civilization constitutes secularism. Savarkar defines a Hindu as follows:

“आसिंधुसिंधुपर्यन्ता यस्य भारतभूमिका
पितृभू पुण्यभूश्चैवस वै हिंदू रिती स्मृतः।।”

Thus one whose ultimate loyalty is placed at India and for whom this entity is fatherland and sacred land is a Hindu. This ‘Hindu’ can also be a Muslim, Christian etc. Basically, term ‘Hindu’ itself doesn’t connote any religion but probably, a way of life, an attitude towards it. It is a synthesis of culture, civilization that flourished here for five thousand years.

Another version of secularism completely rejects the idea of religion. It gives no place for spirituality in human life. Leftists and communists hold such view. Such view has not found much acceptance in overwhelmingly spiritual country like India. There also exists something called ‘Pseudo-Secularism’. Some sections assume that secularism means to appease minorities, giving them special status and concessions which are not available to majority. It can be as dangerous to a secular polity as communalism.

Now we turn to what exactly constitutes Law. There is no universally applicable code of conduct or rules, which we can call Law. Social norms and standards of behaviour are bound to be culture-specific and change according to time and place. Every religion has its personal law, which deals with civil matters like marriage, inheritance, etc. Such personal laws were formulated in historic times but were never revised to suit to changing times. Hence they became anachronistic. Laws like *Shariyat* in *Islam*, which permitted polygamy cannot address the current needs. On the other hand, there are modern laws, which contain basic principles of natural justice, equality of sexes, separate private life and public life. Modern legislations are flexible in nature and are constantly reviewed to suit the requirements of dynamic society. Thus we have rigid, orthodox personal laws, which are

antithetical to modern secular laws. Nature of polity is determined according to the preference it gives to either of them.

It was one of the greatest challenges before Indian polity to keep itself secular in the aftermath of partition. It was a tough test to convincingly establish equality of all religions. Our constitution makers really did a tremendous job to lay the foundations of a secular India. Putting freedom of religion as one of the fundamental rights really strengthened our secular credentials.

There was a historic evolution of laws in British India, which subsequently minimized the role of religion in public life. Laws like prohibition of sati, widow remarriage act, minimum age of consent act, etc. slowly removed unjust religious laws and replaced them by modern rational enactments. This tradition of reforms was continued even in post-independence India when Hindu Code Bill gave equal status to women.

Ideal scope of religion and nature of secularism is rightly defined in our constitution. There are three angles to it – positive, negative and neutral. The positive religious freedom includes 3 Articles viz. Art. 25, 26 and 30 which deals with the “freedom of conscience and free profession, practice and propagation of religion”, “freedom to manage religious affairs” and “the rights of minorities to establish and administer educational institutions”. Negative freedom of religion includes Art. 15(1) and (4) which prohibits discrimination on the grounds of religion, Art. 16 assures equality of opportunity for people belonging to all religions in matters of public employment, Art. 17 abolishes untouchability, Art. 29(2) caters to “protection of the interests of minorities”, and Art. 325, 330(1) and 332(1) order no communal electorates. Neutral provisions include Art. 27, 290(A) and 28(1) (2) (3) which emphasize that “no religious instruction be imparted through the institutions run or aided by the state.” Provisions of Art. 44 directs State to bring common civil code which strengthen the secular foundations of society, Ban on cow slaughter under

Art. 47 recognizes sentiments of majority Indians. Thus we have a balanced basic framework of secularism in our constitution.

The constitutional provisions upheld the spirit of secularism fairly well in the last sixty years, but there are serious issues and areas where we have failed miserably. Hindu Code Bill was enacted after much agitation and opposition. Then why we fear to touch and modify unjust personal laws in other religions? Shahbano case was a litmus test of our convinced stand that religious laws should not discriminate against women. But our political establishment faltered us. In Kerala, a new district was created only on a single criterion of having Muslim majority. Does that follow spirit of secularism? Even though constitution forbids forcible conversion, has it stopped in tribal, *dalit* areas? Some sections oppose *Saraswati Pujan*, *Vande Mataram* on ground of religion, when all these are rich symbols of our ancient cultural heritage. This confusion between religion and culture has been a great source of controversy in our country. The demarcating line between the two is very unclear and hence creates many conflicting situations. But if we broadmindedly look at 5000-year-old tradition of this civilization, no sane person will oppose the best heritage we derive from it – whether it is *Sanskrit* language or Muslim architecture or Christian passion for service to the downtrodden.

Art. 30 which gives minorities fundamental right to establish their educational institutes, forbids state from confiscating them. Such provision is absent in case of majority educational institutions. This clearly violates the true spirit of secularism. Another example is Bangladeshi illegal refugees. Only to cherish vote bank, politicians underscore serious threat they pose to national security and integrity. All the border districts of West Bengal, Assam, Tripura have dramatically changed demographic ratio. State Government machinery has seriously failed to protect minorities in times of communal riots as happened in *Godhra* or in Kashmir where Pundits have fled from their native lands. With the rise of religious extremism in

country, state is failing in its duty to check those organizations like RSS *Shakhas* or Islamic *Madarasas*, which impart extremist, fundamentalist notions.

Most striking failure to enforce law for upholding secularism has been in case of uniform civil code. Even after so many “obiter dictas” passed by courts insisting on its implementation, we still couldn’t enforce it. Lack of political will and vested interests are responsible for this. If it is applied in the State of Goa so successfully from 1860, why not for the whole India? Failure of State to increase literacy and awareness amongst minorities has come in the way of general acceptance of common civil code. A system like marriage, status of women, inheritance exclusively depends upon the current phase of society and has nothing to do with religious prescriptions. Art. 13 provides that all laws in force prior to Constitution, which violate fundamental rights (like Art. 14 which upholds equality of women) shall become void. Then how some laws, which allow polygamy, unjust procedure of divorce, discrimination against women, are still in force? We cannot wait till general consensus emerges because it will never happen.

Indian constitution also lacks provisions, which make it obligatory on individual to perform his national duty even though it may be against his religious beliefs. Art. 49 of Swiss Constitution clearly state it. Hence conscription is avoided on religious grounds.

With current law provisions, we can say India is one of the most truly secular countries in the world. It is an immensely difficult task to combine this billion plus diversified populace in one national bond. Still, we have done it successfully notwithstanding ugly memories of partition. Finally, we can say that true law always upholds true spirituality, which brings peace, harmony and goodwill amongst all ethnic communities. Poet Iqbal has rightly said,

“मज़हब नहीं सिखाता आपस में बैर रखना।”

Secularism - Strong law required to contain communal crimes

SAKET KUMAR

The relation of a person and his maker-at best, is a relationship in private domain. But history has witnessed that religion is the single issue, which has generated maximum conflict and tremendous bloodshed. As modern civil society we can't allow that to happen. Hence law steps in. It regulates individual and group action, provides a level playing field to all religions and ensures harmony and peaceful coexistence. This modern view in which the state remains non-partisan and encourages freedom of conscience and practices secularism.

India has traditionally been a multicultural society. It is a 'tossed salad' in which various religions, cultures and ethnicities came together but still retained their identities. From time immemorial we have been a tolerant society. Enlightened rulers like Ashoka and Akbar have practiced secularism in letter and spirit. Secularism was also one of the fundamental underlying principles of our freedom struggle. It was only natural that at the time of framing our Constitution our forefathers provided us the right to religion as a fundamental right.

The relation between Secularism and Indian Law can be examined under 3 heads:

- Constitutional Law
- Civil and Personal Law
- Criminal Law

Each area has generated its share of controversies and fundamental questions of law. It will be pertinent to examine them one by one.

The preamble of our constitution proclaims that we are a 'secular' republic. But at the outset "secular" word was not incorporated in the preamble. The omission was deliberate. One of the members Mr. K.T. Shah made two attempts to introduce

the word “secularism” but it was opposed by Dr. Ambedkar. Constitution makers might perhaps have felt that it was not necessary to use the word “secular” or “secularism” particularly as it might give the impression of establishing a state structure in consistent with the cultural ethos of Indian people. This aspect of “secularism” as understood in India was empathically asserted by the great philosopher statesman Dr. Radhakrishnan when he said – “I want to state authoritatively that secularism does not mean irreligion. It means we respect all faiths and religions. Our state does not identify itself with any particular religion. However, within 25 years we found it essential to reiterate our secular credentials via an amendment (42nd amendment, 1976) probably as a response to the growing communal strains. Therefore, since 1976 it is a proclaimed fact that India is a secular republic. But mere proclamation does not mean anything unless there are adequate provisions in the text of the constitution.

Art. 25 lays down that all persons – not only citizens – are equally entitled to freedom of conscience and the right to freely profess, practice and propagate religion. Interestingly in the draft phase it does not include the right to propagate one’s religion and it also included a negative provision – “no communal organization, which by its constitution or by exercise of its discretionary powers vested in any of its officers or organs admits to or excludes from its membership persons on ground of religion, race and caste or any of them should be permitted to engage in any activities other than those essential for bonafide religious, cultural, social and educational needs of the community.” It is debatable that whether dropping this clause from the final draft is responsible for some of the maladies that we are facing today specially in political sphere. Issue of conversion has also been a sensitive issue, which is justified under the right to propagate religion. Supreme Court (SC) had to clarify that right to propagate religion does not include right to forcible conversions. (Stainclaw vs. State of M.P. 1978)

The right to religious freedom is however subject to public order, morality and health. These principles have been reiterated by Supreme Court in cases like *Anand Margis* case, *Mohd. Hanif Quareshi vs. State of Bihar* etc. Art. 25 then seeks to balance the legitimate claims of religion with realities of State craft.

Article 26 flowing from Article 25 bestows a fundamental right on all religious denominations and sections thereof to establish and maintain institutions for religious and charitable purposes, to manage their own affairs in matters of religion, to own, organize and administer property. But the administration of property has to be according to law. This right is also subject to public order, morality and health. But this again raises fundamental questions of law. What exactly religion means and what is the meaning of the expression “matters of religion”. Secondly, what practices can be regarded as part of religion so as to merit protection of Article 26. Courts have to decide on these critical aspects. Supreme Court prohibited the processions of *Anand Margis* with garland of human skulls in their necks. But it upheld the objection of children belonging to the faith of Jehowh’s witness against singing the national anthem. To disengage secular from the religion is certainly not an easy task but other considerations also creep in. In *Shah Bano* case while Supreme Court allowed secularism to triumph; the govt. succumbed to vote bank politics and enacted a law, which set aside this decision. Another important issue is what should be the criterion by which a religious group can be identified as a new religion distinct and separate from an existing religion or only as a religious denomination within the existing religion. This question is not only relevant for Article 26 but also for getting a minority status under Article 30(1). These questions arose in *Auroville* case in Supreme Court and *Arya Samaj* case in Delhi High Court. In the latter it is was ruled that *Arya Samaj* could not be said to be a minority based on religion and therefore not

entitled to the right under Article 30(1). This decision was widely discussed by jurists. Hence these are tricky issues where clear-cut criterion is difficult to identify.

Article 27 says that no person shall be compelled to pay any taxes for expenses on promotion of any particular religion. Here an important conclusion is that the wall of separation between state and religion is not absolute. Under the 1st amendment in the US the Congress can't make appropriations in aid of religious bodies at all. There, the doctrine of separation between Church and State is wholly accepted. But in India, under Article 27 there would be no objection if the taxes were used for promotion of all religions.

Article 28 imparts secular flavour to state sponsored education by prohibiting religious instructions in any institution wholly maintained by state funds.

Article 29 and 30 confer important rights to minorities in respect of their language, script or culture. This right however is equally available to all sections of society – minority or majority (Ahmedabad St. Xaviers College Society vs. State of Gujarat 1974). So it has not generated much controversy. But Article 30 is strictly in nature of minority right. Article 30(1) says that all minorities, whether religious or linguistic, shall have the right to establish and administer educational institutions of their choice. Clause 1(A) added by 44th amendment in effect provides that if the property of any such institution is acquired, the compensation paid would be proper and adequate. Clause (2) provides that in the matter of giving aid, the state shall not discriminate against minority, managed institutions.

Article 30 lets several important points to be raised in respect to this right. First, who is a minority? What is the frame of reference – country, state or district? Secondly, what is the right? Does it allow a minority to establish and administer an educational institution to teach its religion and culture or lucrative subjects like medicine, engineering or management also. Thirdly, what makes an institution a

minority institution – management by minority community or majority of students from minority community? And last but not the least, why this right has been denied to majority community. Groups like *Arya Samaj* and Ramakrishna Mission have to claim independent minority status to enjoy benefits of Article 30 (DAV College vs. State of Punjab).

In relation to professional minority institutions some more questions can be raised. Whether they can have their own fee structure, own methods of selection for admission and the right to fill 100% of their seats according to their wishes. Whether minority and non-minority educational institutions stand on the same footing and have same rights. Supreme Court in Islamic Academy case interpreted Article 30 liberally and ruled that minority and non-minority institutions do not have an equal footing. Former have preferential right to admit students of their own community/language. No such right exists for the latter. Supreme Court has further clarified that a minority professional college can admit in their management quota, a student of their own community/language in preference to another community even though that student is more meritorious. However, while admitting students of their community/language the inter-se merit of these students can't be ignored. So in case of professional education, Supreme Court has balanced national interest with minority rights. To summarize, it can be said that adequate safeguards have been provided in our constitution and a plethora of rights have been conferred on religious minorities. Supreme Court has also declared secularism as one of the 'basic features' of our constitution (S.R. Bommai case). It has also, from time to time, by a liberal interpretation strengthened the secular credentials of our society.

Coming to civil and personal law, Article 44 of Directive Principles of State policy makes the promulgation of a uniform civil code throughout the country a constitutional goal. The merit of making it non-justiciable in the communally

changed environment of the independence period is understandable but even after 60 years of independence this goal is surprisingly distant. Still today a Muslim woman can be divorced by *triple talaq* and the right to maintenance are grossly inadequate. Tax benefits accorded to Hindu undivided family are restricted to Hindu community. Adoption laws and succession laws vary from community to community and have generated intense controversy.

There are at least six schools of jurisprudence among Muslims. Four among the Sunnis and two among the Shias. The Indian Muslim personal law is a curious amalgam of principles from different schools, but most particularly the Hanafi branch of Sunni legal belief. At least half of all Muslims are badly served by Muslim personal laws. Cases like Imrana Rape case make a mockery of our legal system in the name of religion. Not only this, the ridiculous Muslim personal law is a convenient stick for Hindu communalists to beat Muslims with. Giving Muslims the right to be governed by their own personal law gives them the right to claim that they are some kind of a privileged minority.

Supreme Court has issued *obiter dictums* in at least three cases for the need to pass a uniform civil code. *Md. Ahmad Khan vs. Shah Bano Begum* 1985 where it granted the woman the right to maintenance under section 125 of Cr Pc. In *Sarla Mudgal vs. Union of India* in which it prevented the misuse of personal laws in relation to marriage and in *John Vollamattom* case 1997 where it quashed certain sections of Indian Succession Act.

It is often said that in relation to civil code the changes should come from within the community. It is seen as an attack on the religious sentiments. But if a chiefly Muslim country like Turkey can adopt modern personal laws, why can't we? Few people know that in the state of Goa there is a uniform civil code and is working perfectly fine. In my opinion it must be done in one sweep. Not only Muslim

personal law but discriminatory practices like Hindu undivided family, Indian Succession Act and special rights of other communities should go only in one stroke. One nation – one law principle is essential for good governance and the right to equality. If the time is not yet ripe, it probably never will. But do we have the political courage to do it? That fundamental question remains unanswered.

The last area is the area of criminal law. There is no mention of ‘communal crimes’ or ‘hate crimes’ in IPC or Cr Pc Sections pertaining to rioting are applied to most of these crimes. Since independence we have witnessed several incidences of communal riots. A set pattern emerges. State is held morally responsible, not legally. The state machinery especially police is often accused of partisan behaviour. It is difficult for the minority community to register FIRs. Doctors and Public Prosecutors are also accused sometimes. After that an enquiry committee is set up. It lingers on for decades. It has no real powers. Its recommendations are not mandatory and in the end the whole process turns out to be mere eyewash. Srikrishna commission probing Mumbai Riots of 1992-93 indicted 23 policemen. They were later promoted. Recommendations of Nanavati Commission probing Sikh riots of 1984 did little to solace the aggrieved. The recent carnage in Gujarat has again raised these issues.

McPherson Committee was formed in UK after their last racial riots to recommend ways to overcome institutional racism. One of its major recommendations was that complaint should be lodged at places other than police stations and also electronically. A group of NGOs in the aftermath of Gujarat riots have proposed a law on communal riots and have submitted a recommended draft to United Progressive Alliance government. Main features are legal responsibility for the state; ban on hate propagating speech/educational material; punishment to offending policemen, doctors and lawyers; provide more teeth to enquiry

commission; communal crimes/hate crimes to be added in criminal justice system. In the light of these recommendations, Communal Violence (Suppression) Bill is being tabled by the government. Hopefully this will act as a deterrent to the communal forces in the country.

To conclude, I would like to make some recommendations in the light of the preceding discussions:

- (i) Meaning of the terms “Secularism”, “matters of religion” and “minority” to be clearly explained in Constitution.
- (ii) Negative clause under Article 25 to prevent an organization which admits to or excludes from its membership persons on grounds of religion, race or caste or any of them to engage in any political/public activity.
- (iii) Clear criterion pertaining to minority institutions. Preventing misuse of protection of Article 30(1) for monetary benefits and with regard to professional education.
- (iv) Clear-cut guidelines for good management of religious institutions/monuments and systems of audit.
- (v) Promulgation of a uniform civil code.
- (vi) A strong act regarding speedy trial and fair process with respect to communal and hate crimes as well as rioting.

In the end I would like to say that our secularism, despite temporary setbacks, has stood the test of time. Here we stand united, and the world looks to us with amazement and appreciation. The Human Development Report 2004 states this fact in unambiguous terms -

“the so called semi-illiterate or illiterate majority of India is more prudent in showing respect to followers of other religions than in the case of many rich, developed and prosperous nations of the world.”

These words are a tribute to our society and its institutions of polity and judiciary.

Secularism - indispensable for peace & prosperity

GOVINDA RAJU NS

For the development of the country both external security and internal peace are most important, otherwise any amount of government efforts for development go in vain. So in this context internal peace and communal harmony are prerequisites for the overall development and progress. Keeping this in mind our forefathers while framing the Constitution provided sufficient provisions fundamental rights for the people to profess, practice and propagate their faith. Although we don't find the definition of secularism in the Constitution, but in 1976 by amending the Constitution, the word secularism was included in the preamble.

In the absence of a definition of secularism, the Supreme Court's reading of it is noteworthy. Judicial interpretations, have declared secularism as the fundamental law of the land and sought to delineate the boundaries of the sacred and secular. In some cases the Court has come out strongly on the issue, declaring secularism as an un-amendable feature of the Constitution.

On the one hand, religious and cultural diversities made secularism indispensable for democracy and national integration. On the other hand was the impending task of modernizing our traditional society and bringing in social reform that required state intervention in religious affairs. What does secularism mean to India? "Secularism" as an essential attribute of state means that the state remains neutral on religious issues both in its thought and action. Secular state does not appeal to religion but a secular state as the one which is neither religious, nor anti-religious, not irreligious but NON-RELIGIOUS". So India is a non-religious state.

The benefit of being secular is that it prevents the state from being subordinated to a single religion. A truly democratic country should be secular. Secularism is needed for maintaining pluralism, it presupposes the religious tolerance. Secularism recognized the religion; state (secular) imposes the

responsibility of religion, duty of practicing religious tolerance and co-existence of religions.

In our Constitution, the Articles 25-28 specifically talk about secularism but secularism is also reflected in Art. 14, 15, 16, etc. So the whole set of fundamental rights are linked to secularism. So, secularism is one of the pillars of the Indian state.

Impediments to Secularism

Communalism is treating the interests of other religions differently and also as inimical to one's own religion.

Politics has two sides: One democratic, which is based on issues of real life and second is communal, based on religious community that is monolith – having same interests. It is projected that interests of one community are common and are different and hostile to the interests of another community. To carry these interests forward, this kind of politics is harboured.

It is the intolerance in human beings for others supremacy and clear mindedness in cases where the others opinion is given more weight. Due to various reasons man starts developing a feeling of being better than people of other community and in order to suppress them, he resorts to communal violence.

Due to anonymity of mob people tend to do whatever they want in a group. An average person in society believes in what politician says, people in mob tend to look their rationality and turn violent.

The members of a minority feel insecure about the continuance of their community and they believe that they have to struggle for existence. Also the misinterpretation of sacred verses and perverted readings etc. add up to such conditions.

1. Strict possible steps by the Election Commission, against the political parties which try to assume power through inflammatory speeches and communal propaganda.
2. Strict punishment to police personnel found guilty of neglecting their duty, or encouraging communal violence.
3. All other officers who intentionally infatuate controlling violence.
4. Make media more responsible, so that it brings true picture of the violence
5. School text books should be in-coloured/un-prejudiced
6. Promote communal harmony by organizing inter-religious meets, festivals, *jathras*, broadcasting such events through media so that people become aware of harmony.

It is one of the unfulfilled tasks on the part of Legislature to enact this law as mentioned in the Chapter IV of Constitution. The Govt. should take consent of all religions and may give options for the religions to adopt the Law and time period for adoption.

These articles (25 & 28) emphasize the secular character of the state. Art. 25 guarantees 2 types of freedom of religion (i) freedom of conscience and (ii) right to profess, practice and propagate a religion of one's choice.

Art. 26 states that subject to public order, morality and health, every religious discrimination or any section of it shall have following rights, (i) to establish and maintain institutions for religious and charity purpose; (ii) to manage its own affairs in matters of religion (iii) to own and acquire movable and immovable property; and (iv) to administer such property in accordance with law. Art. 27 provides that no person shall be compelled to pay any tax for the promotion or maintenance of any particular religion. The article emphasizes the secular character of the state. Art. 28 prohibits religious education in state aided institutions.

Much has been left to the judiciary in determining the essence of secularism, while the Constitution has only articulated it as a goal and is silent on its connotation. Interestingly, judicial use of the term predates its inclusion in the Constitution.

Supreme Court's first recognition of secularism was in 1962, in the Sardar Taharuddin Syedna Saheb vs. State of Bombay case. Art5. 25 & 26 embody the principle of religious toleration. Besides they serve to emphasize the secular nature of the Indian democracy. Again in Keshavananda Bharati vs. State of Kerala in 1972, the 13 judge constitutional bench, in no uncertain terms declared secularism to be the fundamental law of the land and as one of the basic features of the Constitution. Their judgment declared secularism to be an amendable feature of the Constitution.

In the landmark judgment of S.R. Bommai vs. Union of India 1994, a nine judge bench again reiterated that secularism is a part of the basic structure of the polity. This case was the high point of the Supreme Court's protection of secular ideals. This judgment also stated that secularism in India is based on tolerance.

Further, in a recent judgment on the NCERT text book case, the Supreme Court decreed that all the faiths are equal. The majority view was that the essence of every religion is common, only the practice differs. This is against the faith of tolerance because it is assimilative in its intent and does not give an individual the autonomy of self. There are different beliefs, cultures, viewpoints and groups in our country and these differences need to be respected so that they do not lose their identity.

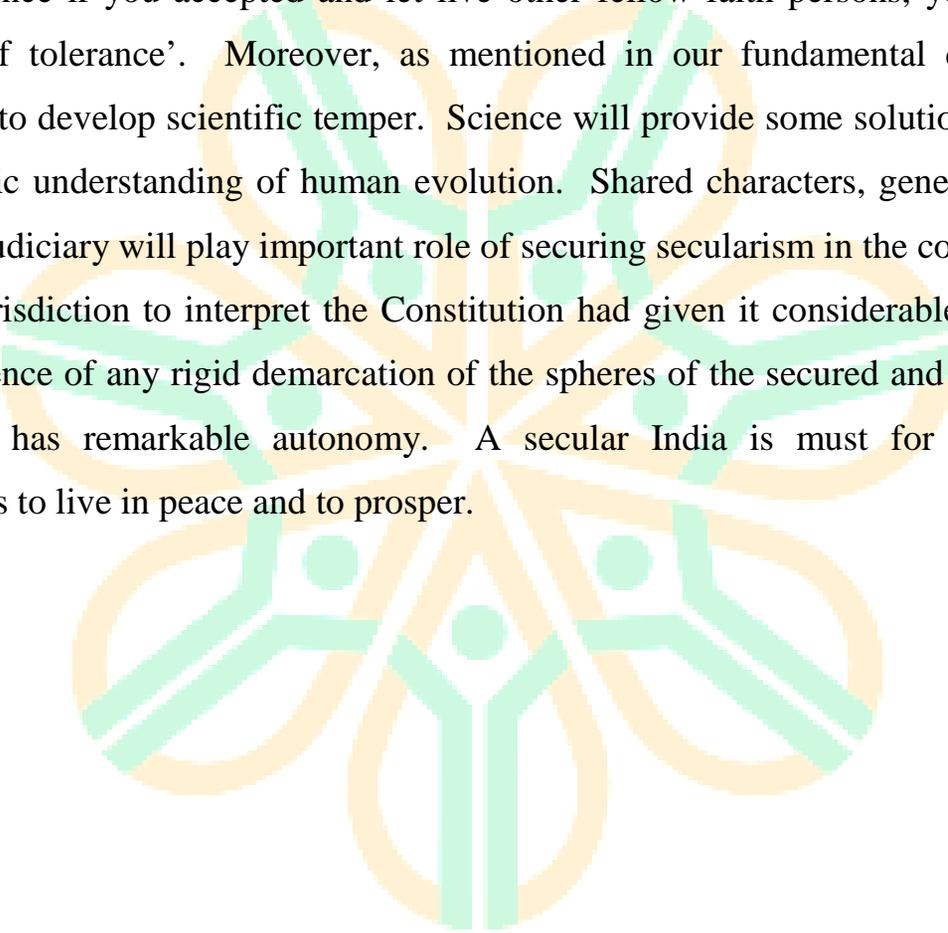
Interestingly it is the judiciary in India that tells us what constitutes religion. It is of the view that the problem with secularism in India is the demarcation between 'what are matters of religion and what are not'. Religion is not defined in the Constitution and it is a term that is hardly susceptible of any rigid definition. While in principle the Court seeks to protect the religious beliefs of all, they are subject to limitations imposed by the state on grounds of social welfare, public order, morality, health and any other provision of the fundamental rights of the individuals. The judiciary evolved the doctrine of essentiality of religious practices to be the basis of

protection of the freedom of conscience and profession, practice and propagation of religion to manage religious affairs. While in the early cases, *Sirus Math Jagannath temple* and *Bombay trust* cases of Justice B.K. Mukherjee, the Court assured all religions protection of their belief. Practice and management of their religious institution, in the later years, like in the *Nathdwara temple* cases, the Court profounded that only the essential practices of a faith would be protected, while the non-essential features such as carrying lethal weapons and human skulls (by *Ananda Margis*) was believed by the Court to be non-essential.

The subject of personal law brings out yet another feature of secularism i.e. the protection of minorities in a plural state. Secularism sans protection to minority religions and cultural groups creates majoritarianism. To protect minority interests special protection measures need to be undertaken to cover need for different identities and cultures. Opposition to reform personal laws is based on the freedom of religion and conscience, whereas the guarantee to citizens of equal protection from the law and before the law supports a uniform civil code. This issue also raises questions concerning the hierarchy of rights – can the rights be governed by personal laws, or have they precedence over the right to equality and legal pluralism in a diverse society.

In *Sarla Mudgal, President, Kalyani and others vs. Union of India*, the Court reiterated the need for a uniform civil code; Justice Kuldip Singh stated that the uniform civil code was required for national integration. In the recent judgment of July, 2003, *John Vallomattom and Anr. S. vs. Union of India*, Chief Justice V.N. Khare observed that it was a matter of great regret that Art. 44 of the Constitution has not been given effect. It was argued that the common civil code helps national integration by removing contradictions based on ideologies. While in the *Shah Bano* case the objective of Court was social reform and the Court took upon itself this task.

India aspiring to become a developed nation in near future, need to achieve first the internal harmony in the society. Swami Vivekananda told ‘to achieve religious harmony we need acceptance rather than tolerance, because tolerance has limit but once if you accepted and let live other fellow faith persons, you have no problem of tolerance’. Moreover, as mentioned in our fundamental duties, one should try to develop scientific temper. Science will provide some solutions to some of our basic understanding of human evolution. Shared characters, genes etc. apart from our judiciary will play important role of securing secularism in the country. The Court’s jurisdiction to interpret the Constitution had given it considerable authority. In the absence of any rigid demarcation of the spheres of the sacred and the secular the Court has remarkable autonomy. A secular India is must for our future generations to live in peace and to prosper.

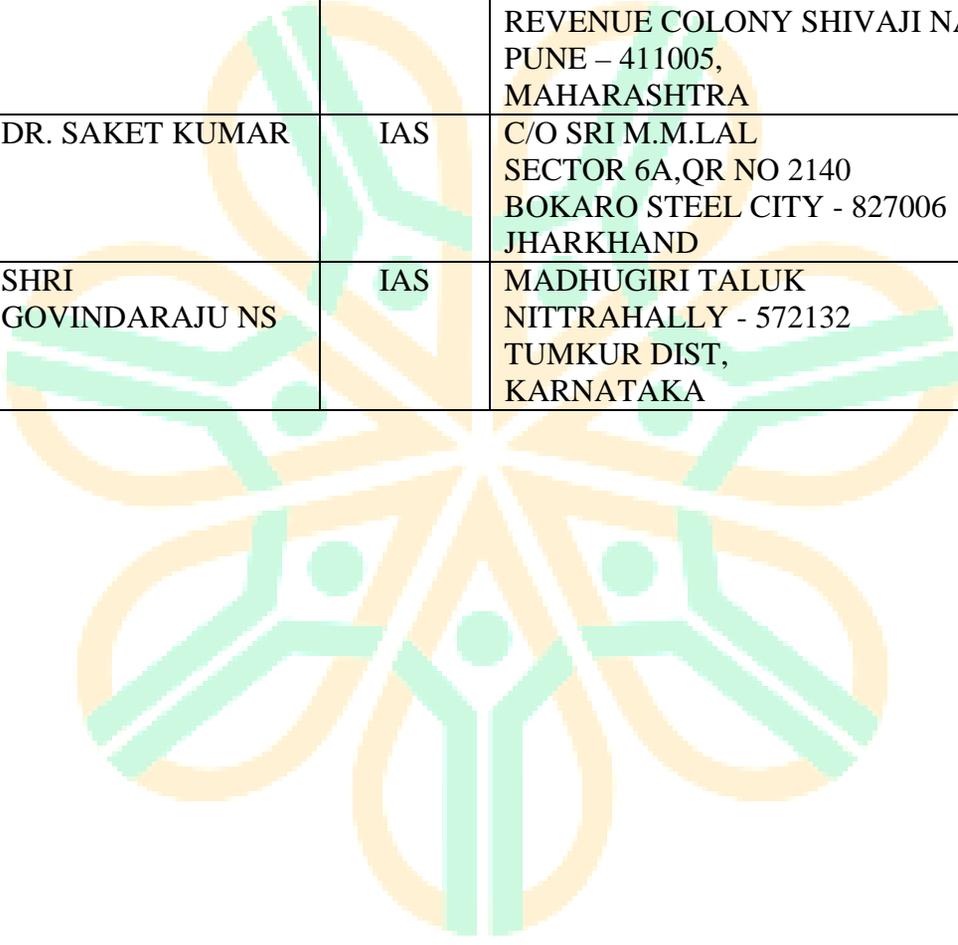
The logo is a stylized, symmetrical emblem. It features a central vertical axis with a small circle at the top. From this axis, several lines extend outwards, forming a shape reminiscent of a lotus flower or a stylized human figure with arms raised. The lines are colored in shades of green and yellow. The overall design is clean and modern, symbolizing unity and harmony.

National Foundation
for Communal Harmony

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