

The Role of Judiciary in Upholding Secularism And Religious Freedom in India

Neetu Misra¹ and Dr. Sayyad Ismail Nasir²

Research Scholar, Department of Law¹

Research Guide, Department of Law²

NIILM University, Kaithal, Haryana, India

Abstract: *As per the western concept of secularism, secularism can be defined as a strict separation of state from religion. India's case, where religion has a significant role in individuals' personal lives, is quite different from Western ones. In India, there is no discrimination in the treatment of any religion. Religious freedom is a fundamental right in India, and one cannot discriminate based on religion. This paper tries to look into various theories of secularism in India along with the religious freedom as enshrined in the Indian constitution. Furthermore, it highlights the importance of both secularism and religious freedom in India with an overview*

Keywords: Secularism, religious freedom, pluralism, constitutional rights

I. INTRODUCTION

The term 'secularisation' was first used in 1648 at the end of thirty years of war in Europe. It refers to the transfer of Church properties to the exclusive control of the princes. Later in 1789, after the French Revolution, Tallrand announced to the French National Assembly that all ecclesiastical goods were at the nation's dispersal. Moreover, in 1851, George Jack Holyoaked coined the term 'Secularism' and led a national movement of protest. The idea of secularisation was built into the idea of progress. Secularisation, though nowhere more than a fragmenting and incomplete process, however since retained a positive consolation.

Secularisation nowadays is generally employed to refer to, in the words of Peter Bergeri, "the process by which sections of society and culture and removal from the domination of religious institutions and symbols".¹

George Ostler in the Oxford Dictionary of Current English defines 'Secular' as pertaining to this world or the present life, not ecclesiastical, not found by the monastic views', 'Secular' can, therefore, be explained as 'worldly', related to things connected with the present life only. In the negative sense, it implies 'dissociation from religion or religious teaching'.²

D.E. Smith opined that a secular state is a state which guarantees individual and corporate freedom of religion, deals with the individual as a citizen irrespective of religion, is not constitutionally connected to a particular religion, nor does it seek either to promote or interfere with it.³ In the words of V.P. Luthara, it is a state which is separated from, unconnected with, and not devoted to religion. The secular state views its 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 the individual religious beliefs.⁴

Religious Freedom - Religious freedom means that the individual is free to consider and discuss with other the relative claims of differing religions and come to his decision without any interference from the state. The state is excluded from this relationship. The state cannot dictate religious beliefs to the individual or compel him to profess a particular religion. It cannot force him to contribute financially towards the support of a religion by taxation. So there is limited area in which a secular state can legitimately regulate the manifestation of religion in the interest of public health, safety or moral. In a secular state, freedom of association for religious purposes, is safeguarded as carefully as the individual freedom of conscience. All religious groups have right to organize and manage their own affairs in religious matters. It can also acquire properties. Besides, it can establish and administer educational and charitable institutions.⁵

Citizenship - In a secular state, an individual is considered to be a citizen and not as a member of a particular religious group. Religion becomes entirely irrelevant in defining the terms of citizenship.⁶

Separation of state and religion - We have to treat religion and the state functions as basically different areas of human activity. It is not the function of a secular state to promote, regulate, direct or otherwise interfere in religion. In a secular state all religions are in one limited respect, subordinate as well separate from the state, as voluntary association of individual citizens. Religious groups are under the general laws of the state and responsible for the proper discharge of civil responsibilities. In this respect religions are viewed by the state like other voluntary associations based on common, social, cultural or economic interests. While granting basic fundamental rights, a secular state enjoins upon its citizen not to discriminate against any citizen on the grounds of religion, sex, caste, etc. It also grants freedom of conscience and free profession, practice and propagation of religion subject to public order, morality and health. Simultaneously, a secular state may also reserve the right to make provision for the advancement of any socially backward community or make any law imposing restrictions on religious practices in the interest of public peace and morality. Thus, a secular state always exists to safeguard its citizen's welfare and provides them with equal opportunities for the development of self. It does not recognize any other world beyond this world. Thus, it may be enumerated that the following to be the main features of a secular state.⁷

In India, religious freedom has been mentioned in Article 25 to 28 of the Indian constitution. It provides freedom to profess, practice and propagate religious along with freedom of conscience and thought. It is not an absolute right in India. It can be exercised with certain restrictions. Religious freedom in India is subject to public order, health, morality and other provisions of the fundamental rights. It has also been said the government can reform any provision which it deems suitable for the social welfare. These provisions gives another dimension to the secularism of India. The framers of the Indian constitution well debated on the provisions of the religious freedom in India. Each and every provisions then only put in place. On a religious basis, the Constituent Assembly discussed if Hindu family laws should be secularised by the state or held as they are, which are frequently inequitable. Though Nehru saw reforming Hindu traditional family laws as critical to India's growth and modernization, the Congress Party's conservative hardliners and Hindu fundamentalists objected.⁸

The constitution's possible power to rule on the state's secular character was directed back to the political sphere by the drafters, who opted to take an evolutionary rather than transformative constitutional approach. These left future parliamentarians to determine whether and how to enact the constitution's recommendations. Indeed, in the 1950s, the legislature began to debate the Hindu Code, gradually dividing it into four separate pieces of legislation that were enacted between 1955 and 1961, bringing amendments to marriage and divorce, inheritance rules, and adoption. On the other hand, the Uniform Civil Code was never applied and it remained in the Directive Principle of the State policy. As a result, each religious community in India has its own code of personal rules, with only slight changes to the conventional Muslim and Christian personal laws.⁹

India is among those countries where the relationship between state and religion is contested. Indian secularism is different from France, where there is a strict division between the state and religion, as well as, like other European countries where one religion is given more prominence than others. The closest to the Indian model is the American model of secularism.¹⁰ Different thinkers have put down their status on Indian secularism.¹¹ It is impossible to understand religious freedom without understanding the wider process of the political management of group life. Many years ago, when India's Constitution was being drafted, B.R. Ambedkar, who piloted various drafts through the Constituent Assembly, stated that the individual rather than the group was the basis of the Indian Constitution.¹²

The Constituent Assembly's vacillation between strict separation, Hindu majoritarianism, and various intermediate alternatives is widely held to have settled on the notions of Sarva Dharma Sambhava (good will toward all faiths) and Dharma Nirpekshata (religious neutrality), to which duo, a third, the Gandhian Vasudeva Kudumbakam (universal brotherhood), is frequently added. Nevertheless, such formulations greatly understate—and to some extent, misstate—the importance accorded to religion by the Constitution.¹³ At the time of independence, the minority community in India needed assurance that they would be an equal partner to the Indian democracy. They would enjoy the freedom to pursue their religious and cultural way of life.¹⁴

Secularism in the Indian context means an equal status for all religions. According to Dr Radha Krishanana, no religion should be given preferential status or unique distinction, then 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 interest of religion and government.¹⁵

According to Gurpreet Mahajan: the policy of non-separation was not simply a reluctant concession made for the sake of peaceful coexistence or tolerance; rather it was based on the claim that religion is not simply a private or a personal matter: it has a public dimension and the state needs to take cognizance of that... to facilitate the observance of these practices.¹⁶ India chartered a different route where the non-establishment of religion was combined with the absence of separation. Mahajan continued, by placing religion squarely in the public domain, the Indian constitution endorsed a position that was significantly different from that of a dominant liberal framework of that time, the policy of bringing religion to the public arena and state to interfere to engage with matters of religion as well as with the affairs of religious communities.¹⁷

Robert Baird, indeed, found the Indian constitution not only makes provisions for religion in the modern Indian state but is itself a religious document.¹⁸ Nehru believed in democracy as well as secularism. Throughout his life, Nehru fought for secularism.¹⁹ Donald Eugene Smith remarks, "There are many communal and religious groups in India. Therefore, it has not taken to be good to give special recognition to a particular religion." Secularism is the foundation-stone of our nationality. The essence of our human values is the result of the co-existence of different religions for the last thousands of years. Secularism is a unity in diversity. It is an embodiment of our regard to glorious diversities. So, in India, secularism does not mean opposition to religion or irreligion. It means equal respect to all religions - whether it is a religion of majority or minority. Secularism involves full freedom of worship and propaganda of their respective religions. The state has no religion, and it prohibits any discrimination against any person or religious groups on the basis of religion.²⁰ According to Smith, "The secularism depends on two things: religious freedom and equality before the law and the constitution of India fulfils these two conditions. In this way, India is, in fact, a secular State. India is a secular state in the same way as it is a democratic state".²¹

Galanter critiqued Smith's conception of secularism in India. He pointed out that Smith's model of secular India was the belief that the notion of the religious may be readily distinguished from the secular or non-religious. He actually argued that the Indian state was not in the business of promoting freedom of religion but concerned with religious reforms.²² Jacobson in "The Wheel of Law: India's Secularism in Comparative Constitutional context", labels Indian secularism as an ameliorative model that embraces the social reform impulse of Indian nationalism in the context of the nation's deeply rooted religious diversity and stratification.²³

Scholars like Ashish Nandy and T.N. Madan believe that the secular state was doomed to failure in India. As Madan believes that in the prevailing circumstances, 'secularism in South Asia as a generally shared credo of life is impossible, as a basis for state action impracticable, and as a blueprint for the foreseeable future impotent'.²⁴ It is impossible as a credo of life because the great majority of the people of South Asia are, in their own eyes, active adherents of some religious faith. It is impracticable as a basis for state action either because Buddhism and Islam have been declared state or state-protected religions or because the stance of religious neutrality or equidistance is difficult to maintain since religious minorities do not share the majority's view of what this entails for the state. Moreover, it is impotent as a blueprint for the future because, by its very nature, it is incapable of countering religious fundamentalism and fanaticism.²⁵ He further argued, "Secularism is the dream of a minority which wants to shape the majority in its own image, which wants to impose its will upon history but lacks the power to do so under a democratically organised polity. In an open society, the state will reflect the character of the society. Secularism, therefore, is a social myth that draws a cover over the failure of this minority to separate politics from religion in the society in which its members live. From the point of view of the majority, "secularism" is a vacuous word, a phantom concept, for such people do not know whether it is desirable to privatize religion, and if it is, how this may be done unless they are Protestant Christians but not if they are Buddhists, Hindus, Muslims, or Sikhs. For the secularist minority to stigmatise the majority as primordially oriented and to preach secularism to the latter as the law of human existence is moral arrogance, and worse-I say "worse" since in our times politics takes precedence over ethics-political folly. It is both these-moral arrogance and political folly-because it fails to recognize the immense importance of religion in the lives of the peoples of South Asia. I will not raise here the issue of the definition of religion: suffice it to say that for these peoples their religion establishes their place in society and bestows meaning on their life, more than any other social or cultural

factor”²⁶ Ashish Nandy, on the other hand, goes further, he identifies secularism as part of a larger scheme, which is used by the state to silence its non-conforming citizens.²⁷ According to him, secularism has been built on the principle of secularism. The ideology of secularism in India is thoroughly discredited by frequently recalling the idea of tolerance of Ashoka, Kabir, Gandhi and not going through the idea of secularism. He, therefore, calls instead for religious tolerance outside the bounds of secularism.²⁸

Different scholars have a different view on the subject of secularism in India. Some advocated the way secularism in India has been adopted. Some argue that it will doom as per the Indian society, which is so religious. Therefore, it can be concluded that for a multicultural, multi-religious society like India. A parameter has to be designed and decided so as to overcome the problems prevailing in society. The problem of compromising human rights in the name of religious freedom has to be done away with. However, how in 1986 in the Shah Bano case, the right of divorced women has been compromised in the name of personal law, which needs reforms from within the community and how several practices in Hinduism has been taken into account and have been prohibited, these two pictures need to look at. A need to look into different practices from the point of view of a just and secular state, where the individuals' life to be taken first into account, and the rights of the individuals to be safeguarded first. Overall, the set of ambiguous and ambivalent provisions in the Indian constitution concerning religion-state relations amounts to what Rajeev Bhargava termed "political secularism" or "contextual secularism." According to this model, the state is not separated from religion. Instead, it keeps a "principled distance" from all religions, by providing equal protection and support for all religions and by selectively interfering in religious practices that conflict with the states goals of promoting equality, liberty, and socioeconomic development. While supporters of this approach have emphasized the advantage of such ambiguous arrangements to maintain stability and democracy at the foundational stage of the state, its critics have pointed to the tendency of such arrangement to perpetuate rather than mitigate conflicts over issues of religion and secularism, which ultimately resulted in overburdening India's political and judicial institutions.

Religious Freedom has been guaranteed a fundamental right in the Indian constitution by our framers of the Indian constitution. Without inscribing secular word in the Indian constitution at the time of adoption, they have well equipped the India constitution with a reflection of secular character where there shall be no discrimination based on religion. In addition, the concept of Dharm Nirpekshita and Sarva Dharma Sambhava by Nehru and Gandhi respectively has been a path towards achieving and understanding the thoughts of the secularism in India. There are different theories has been given by several thinkers on what form of secularism is a fit in Indian context. Hence, this paper highlights and gives an overview of the secularism and religious freedom in Indian context.

REFERENCES

- [1]. Reaves, Dylan (2012) "Peter Berger and the Rise and Fall of the Theory of Secularization," Denison Journal of Religion: Vol. 11, Article 3.
- [2]. S.M.A.W. Chishti, "Secularism in India: An Overview," The Indian Journal of Political Science 65, no. 2 (March 26, 2004): 183– 98, <http://www.jstor.org/stable/41855808>.
- [3]. Donald Eugene Smith, India as a Secular State, First (New Jersey: Princeton University Press, 1963), .
- [4]. Chishti, "Secularism in India: An Overview", 184.
- [5]. Smith, India as a Secular State, 10-30.
- [6]. Smith, 11-15.
- [7]. Smith, 15-35.
- [8]. Kanan Gahrana, Right to Freedom of Religion, South Asian Publisher (New Delhi: South Asian Publisher, 1992).
- [9]. Hanna Lerner, "Permissive Constitutions, Democracy, And Religious Freedom In India, Indonesia, Israel, And Turkey," World Politics 65, no. 4 (2013): 609–55, <http://www.jstor.org/stable/42002225>.
- [10]. Sen, xiv-xxv.
- [11]. Sen,p.20.
- [12]. Rajeev Dhavan, "Religious Freedom in India," The American Journal of Comparative Law 35, no. 1 (February 17, 1987): 209–54, <https://doi.org/10.2307/840167>.

- [13]. Deepa Das Acevedo, "Secularism in the Indian Context," *Law & Social Inquiry* 38, no. 1 (2013): 138–67, <http://www.jstor.org/stable/23357741>.
- [14]. Gurpreet Mahajan And Surinder S Jodhka, "Religions, Democracy and Governance: Spaces for the Marginalised in Contemporary India," *Economic and Political Weekly* 47, no. 1 (February 17, 2012): 45–52, <http://www.jstor.org/stable/23065576>.
- [15]. Ranbir Singh and Karamvir Singh, "Secularism in India : Challenges And Its Future," *The Indian Journal of Political Science* 69, no. 3 (February 17, 2008): 597–607, <http://www.jstor.org/stable/41856448>.
- [16]. Das Acevedo, "Secularism in the Indian Context."
- [17]. Sen, *Articles of Faith: Religion, Secularism, and the Indian Supreme Court*, 21.
- [18]. Sen, 21.
- [19]. Singh and Singh, "Secularism in India : Challenges and Its Future."
- [20]. Singh and Singh, 601.
- [21]. Donald Eugene Smith, *India as a Secular State, First* (New Jersey: Princeton University Press, 1963), 3-6.
- [22]. Sen, *Articles of Faith: Religion, Secularism, and the Indian Supreme Court*, 21.
- [23]. Sen, xxi.
- [24]. Sen, xxii.
- [25]. T.N.Madan, "Secularism in Its Place," *The Journal of Asian Studies* 46, no. 4 (1987): 747–59, <http://www.jstor.org/stable/2057100>.
- [26]. T N Madan, "Secularism in Its Place," *The Journal of Asian Studies* 46, no. 4 (February 17, 1987): 747–59, <https://doi.org/10.2307/2057100>.
- [27]. Sen, *Articles of Faith: Religion, Secularism, and the Indian Supreme Court*, xxi-xxii . 28 Sen, 22.