

Secularism in Indian Constitution and the Experience

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“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.”

I. Introduction:

A nation like ours, having many religions, cultures and languages can only be united when not only the polity of the nation is secular but also it has secular minds. If we are still a country united, it has to be presumed that we are secular not only in polity but in our minds also. It has been our tradition since our civilization came into existence, ‘to lead the word and show the world the real path of humanity’. Gautama Buddha and lord Mahavir propagated tolerance and nonviolence and equal respect to all on this land and this land has been birth place of many religions. We are still following our tradition and giving the world true ‘secularism’, secularism distinct from the western concept.

The secularism does not have universally agreed definition. The word secular is derived from the Latin word *sacularis* which taken to mean, among other things, ‘that which belongs to this world, non-spiritual, temporal as opposed to spiritual or ecclesiastical thing’. It is a form applied in general to the separation of state politics or administration from religious matters. The dictionary meaning of secularism is ‘the belief that religion should not be involved in the organization of society, education etc.’² this dictionary meaning denotes that a secular state must be irreligious. Similar is the western concept of secularism. In the United States secularism means that the state and the church co-exist in the same human society without having to do anything with each other. In Europe, secularism is the negation of all things religious, particularly in political functioning. In states having such concept of secularism there is a complete separation of religion from state to the extent that there is an ‘impassable wall’ between religion and state. There is no state intervention of religious matters and vice versa.

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² Oxford Advance Learner’s Dictionary A S Hornby (editor) Oxford University Press 8th Edition 2010 at p 1382.

The Indian concept of secularism is different; it is binary opposite to communalism. It is '*Sarva Dharma Sambhava*'. According to Indian concept of secularism the state must treat all religions equally and with equal respect. In this concept state does not uphold any religion as the state religion thus there is no hegemony of one religion. Indian concept of secularism is not just a passive tolerance but an active encouragement to religious pluralism. This active encouragement emphasises that a free and open state is so sovereign that it does not have to live in fear of ideas and faiths, nor does it fear that it could be subverted by such beliefs.³

As Dr. S. Radhakrishnan in his book '*Secularism in India*' has said that: 'secularism in India does not mean irreligion. It means respect for all faiths and religion. India being a secular state, there is no state preferred religion as such and all religious groups enjoy the same constitutional protection without any discrimination.'

The Constitution of India which embodies the concept of secularism since its enforcement provides us the polity with features of secularism discussed above. Although the word secular was not expressly mentioned in the Constitution at the time of its enforcement but overall reading of the various articles of the Constitution would amply demonstrate that 'Secularism' is an integral part of the Indian Constitution. Though it was incorporated in to the preamble of the Constitution by the 42nd Amendment Act of 1976, it does not mean that before that inclusion India was a religious state. Nobody had ever doubted that the republic was conceived and made secular from the very beginning.

The secularism in this country had faced several challenges to reach at this juncture of democracy and still those challenges continue. The challenges of castism, communalism and religious fundamentalism, involving separatism and violence in India, are the major threats to our secular polity. They weaken the working and stability of our secular federal system and militate against the basic principles governing our national life and providing meaning to our new identity. 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. In recent past we have witnessed several incidents of communal violence and still it 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 to

³ Akhtar majid "Secularism and National Integration in the Indian Multi-Ethnic Society" *Multi-Ethnicity and National Integration*, Edited by A D Pant & Shiva K Gupta, Vohra Publishers and Distributors Allahabad 1985 pp 90-99, at p 92.

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 in this country. There have been reports that some state governments were in partisan and were instrumental in aggravating communal violence. Such shocking incidents would undoubtedly affect the secular credentials of our country.

II. Constitution and Secularism:

As discussed above the word 'Secular' was only incorporated in the preamble in 1976 by the 42nd amendment of the Constitution but prior to that amendment secularism in the Constitution was beyond doubt. Apart from removing doubts over secular nature of the Constitution the formal inclusion of the adjectival term 'secular' was mainly the result of meeting out the exigencies of the prevailing circumstances, requirement of party politics and ideological window-dressing. As the word 'Secular' was used after the word 'Socialist' it can be pointed out that such inclusion was not required as a socialist democratic state has necessarily to be secular.⁴ In light of the various articles in the Constitution to protect secular nature of our polity including article 14, 15, 16, 25-28, 29-30, 44, 51-A (e) & (f), 123 etc. this view is strengthened. These various constitutional provisions promote the idea of secularism and by implication prohibit the establishment of a theocratic 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 framers of the Constitution were so satisfied with the secular character of the Constitution that they did not find it necessary to include the word and define it. Nehru viewed secularism as a functional and not an institutional concept. He did not, therefore bother to define or incorporate it in the Constitution.⁵

Dr. B R Ambedkar, in the Constituent Assembly said: "A secular state does not mean that we shall not take into consideration the religious sentiments of the people. All that a secular state

⁴ See M Moshir Alam, "Secularism: The Basic Feature of Indian Constitution" *Kashmir University Law Review* (1994) Vol. 1 at p 107.

⁵ Mohammad Ghose, "Nehru and Secularism" *Journal of Indian Law Institute* (1978) Vol. 20 at p 105.

means is that this parliament shall not be competent to impose any particular religion upon the rest of the people.”

Pandit Lakshmi Kant Maitra said: “By secular state, as I understand it is not going to make any discrimination whatsoever on the ground of religion or community against any person professing any particular part of religious faith... At the same time we must be very careful to see that in this land of ours we do not deny anybody the right not only to profess or practice but also to propagate any particular religion.”

Sardar Vallabh Bhai Patel said: “Trust us and see what happens.”

As far as the question of conversion is concerned irrespective of opposition of conversion by P D Tandon, K T Shah, Surya Prasad Mukherji and Sardar Vallabh Bhai Patel a committee constituted for inclusion of right to freedom of religion found that there was no danger by conversion in India because without the practice of conversion secular nature of the Constitution would have adversely affected.

The preamble of the Constitution says that: ““WE THE PEOPLE OF INDIA, having solemnly resolved to constitute India into a SOVEREIGN SOCIALIST SECULAR DEMOCRATIC REPUBLIC...” Thus we have solemnly resolved to constitute India as a secular state.

Articles 14 of the constitution provides for equality before law for all people. Article 15 prohibits discrimination on the ground of religion, faith and belief and article 16 provides for equality of opportunity in matters of employment under the state, irrespective of their religious beliefs. They protect right to equal opportunity of the minorities. Other most important part of the Constitution directly dealing with its secular nature is part III and in this part articles 25-28.

Article 25 guarantees to every person, and not only to the citizens of India, the “freedom of conscience” and “the right freely to profess, practice and propagate religion”. This is however subjected to public order, health, morality and other provisions of part III of the Constitution. But state is not prevented by this article from making any law regulating or restricting any economic, financial, political or other secular activity which may be associated with religious practice or from making any law providing for social welfare and reform, or for throwing

open of Hindu religious institution of a public character to all classes and section of the Hindus.

Article 26 gives special protection to religious denominations and thus it guarantees collective freedom of religion. It gives to every religious denominations or a section thereof right to establish and maintain institutions for religious purposes and right to manage its own affairs in matter of religion. For realization of above mentioned rights this article also provides them right to own and acquire movable and immovable property and right to administer such property in accordance with the law.

To maintain the secular character of Indian polity, not only does the Constitution guarantee freedom of religion to individuals and groups, but it also prohibits payment of any money out of public fund for promoting and maintaining any religion. Article 27 of the Constitution says that “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.”

Article 28 prohibits educational institutions which are wholly maintained by state funds from providing any religious education. Restriction under this article is not applicable on educational institutions though administered by the state but established under any endowment or trust requiring that religious instructions should be imparted in such an institution. This article also provides that state recognised educational institutions may impart religious instruction on a voluntary basis.

Apart from these provisions article 29 and 30 also protect minority interest. Article 30 provides them right to establish and administer educational institutions of their choice.

Article 44 in part IV of the Constitution which deals with the Directive Principles for State Policy directs the state to enact a uniform civil code applicable to all irrespective of their religions, faith and beliefs. Further, article 48 of the directive principles contains a special provision-enunciating ban on cow-slaughter as a desirable policy.

Part IV-A entitled 'Fundamental Duties' was introduced which inter alia casts a duty on every citizen to cherish and follow the noble ideals which inspired our national struggle for freedom, to uphold and protect the sovereignty, unity and integrity of India, to promote harmony and the spirit of common brotherhood amongst all the people of India transcending

religious, linguistic and regional or sectional diversities, and to value and preserve the rich heritage of our composite culture.

III. Determination of Scope by Judiciary:

The Supreme Court as the guardian of the Constitution interpreted its provisions to protect and preserve the secular character of the Constitution. It has not only clarified secularism but also the scope of secularism by interpreting provisions related with religious freedom and other fundamental rights.

In *Ahmadabad St. Xavier's College vs. State of Gujarat & Anr.* Hon'ble Supreme Court observed that: "There is no mysticism in the secular character of the state. Secularism is neither anti-God nor pro-God; it treats alike the devout, the agnostic and the atheist. It eliminates God from the matters of the state and ensures that no one shall, be discriminated against on the ground of religion. The idea of giving some special rights to the minorities is not to have a kind of a privileged or pampered section of the population but to give to the minorities a sense of security and a feeling of confidence."⁶

In *Mohd. Hanif Qureshi vs. State of Bihar*⁷, the Court held that the slaughter of cows is not an integral part of Islam religion.

In case of *Jagdishwara vs. Police Commissioner Calcutta*⁸, the Supreme Court held that tandav dance was not the integral part of Anand Marg.

Similarly in case of *Ismail Faruqui vs. Union of India*⁹, the Court held that a mosque is not an essential part of the practice of Islam and Namaz may be offered anywhere. State Government can acquire a mosque in exercise of its sovereign power for public safety.

In *E R J Swami vs. State of Tamil Nadu*¹⁰, the Court held that the mode of appointment of Acharyas in temple was a secular and not a religious practice.

Hon'ble Supreme Court has also held that right to freedom under article 25 and 26 does not give any one right to spread noise pollution and to disorder the public tranquillity. It further

⁶ AIR 1974 SC 1389; 1975 SCR (1) 173, at p 178.

⁷ AIR 1958 SC 731.

⁸ AIR 1984 SC 51.

⁹ (1994) 6 SCC 360.

¹⁰ AIR 1972 SC 1586.

held that in a civilized society no right is absolute. Right to freedom of religion is subject to public health, morality and public order.¹¹

The Supreme Court has also held that a properly trained and qualified person may be appointed as *pujari* of a temple regardless of his cast.¹²

The Supreme Court in case of *Bijoe Emmanuel vs. State of Kerala* where three students belonging to a sect Jehova's Witnesses were expelled from school on the ground that they did not sing the National Anthem invalidated the expulsion because it did not fall within any of the exceptions mentioned in article 25 of the Constitution. The exceptions in the article can only be enforced on the authority of the law and not otherwise.¹³

This judgement was criticised by Prof. M. P. Jain he observed that this pronouncement has raised a controversy. Fears were expressed that other religious groups would take advantage of the ruling and may refuse to participate in the singing of the National Anthem and this would ultimately affect national integrity.

Though one of the purposes of inserting word 'secular' in the constitution was to remove doubts but it continued. In year 1994 the Supreme Court ended this debate by declaring secularism as a basic feature of the constitution which cannot be amended. The Supreme Court held that: "Religious tolerance and fraternity are basic feature and postulates of the Constitution as a scheme for national integration and sectional and religious unity, programmes and principal based on religion amounts to recognising religion as a part of the political governance which the Constitution expressly prohibited. It violates the basic feature of the constitution."¹⁴ Thereafter it was reiterated in coming years.¹⁵

In case of *Santosh Kumar vs. Secretary of Ministry of HRD*¹⁶ the Supreme Court held that state tolerance of religion, does not make it either a religious or a theoretical state. Secularism represents faith born out of the rational faculties and it enables to see the imperative requirements for human progress in all aspect. Secularism is neither anti-god nor pro-god, as it treats alike the devout, agnostic and the atheist.

¹¹ Church of God in India vs. K K R M C Welfare Association AIR 2000 SC 2773.

¹² N Aditya vs. Travancore Devaswam Board (2002) 8 SCC.

¹³ AIR 1987 SC 748.

¹⁴ S R Bommai vs. Union of India, AIR 1994 SC 1918.

¹⁵ See M Ismail Faruqui vs. Union of India AIR 1995 SC 605; Valsamma Paul vs. Cochin University AIR 1996 SC1011.

¹⁶ AIR 1995 SC 293.

In *Aruna Roy vs. Union of India*¹⁷ the Court said that secularism is susceptible to the positive meaning that is developing, understanding and respect towards different religions. Secularism can be practiced by adopting complete neutral approach towards religion or by positive approach by making one section of religious people to understand and respect religion and faith of another section of people. Quoting Gandhi ji the Supreme Court further said that secularism is '*Sarva Dharma Sambhava*' meaning equal treatment and respect for all religions. But we have misunderstood its meaning as *Sarva Dharma Abhav* meaning negation of all religions. It was further held that the concept of secularism is not endangered if the basic tenets of all religions all over the world are studied and learnt. Value-based education will help the nation to fight against fanaticism, ill-will, violence, dishonesty and corruption.

In case of *State of Karnataka vs. Praveen Bhai Togadia (Dr)*¹⁸ the Supreme Court upheld an order of the Additional District Magistrate restraining Praveen Bhai Togadia from entering and participating in any function in the concerned district for 15 days. Arjit Pasayat Justice observed that:

1. "Whenever the authorities concerned in charge of law and order finds that a person's speeches or actions are likely to trigger communal antagonism and hatred resulting in fissiparous tendencies gaining foothold, undermining and affecting communal harmony, prohibitory orders need necessarily be passed, to effectively avert such untoward happening".

Thus the Supreme Court has protected, preserved and clarified the Indian concept of 'secularism'.

IV. Experience:

What common man has experienced is little bitter truth. Even after more than 60 years of independence we have not able to free ourselves from curse of communalism. In view of Mr. Asghar Ali Engineer 'there has not been a single year in post-independence period, which has been free of communal violence though number of incidents may vary.'¹⁹This may seem to be an exasperated fact but it is true. Still religious festivals, music before mosques, cow-slaughter and alleged desecration of temples provide occasions for the expression of

¹⁷ AIR 2002 SC 3176.

¹⁸ (2004) 4 SCC 684

¹⁹ Asghar Ali Engenier "Communal Riots- 2002" accessed at <http://www.sacw.net/2002/EngineerJan03.html> visited on 28th October 2011.

communalism. Since independence we are witnessing communal violence every year though we are not going to repeat Anti-Sikh riots of 1984 or Godhara ant aftermath of 2002 in near future but nothing can be said with certainty

After independence we have witnessed many communal riots in western U P in Firozabad (1972), Aligarh (1978), Moradabad and in Sambhal (1980). But Anti-Sikh riots of 1984 was of the kind, which India had never experienced except at the time of partition. In 1984 Anti-Sikh riots after the death of Indira Gandh as a result of the pogroms 10,000-17,000 were burned alive or otherwise killed, Sikh people suffered massive property damage, and "at least 50,000" Sikhs became displaced persons. To date, the Government of India has not prosecuted any of the assailants.

What happened in 1984 and thereafter is a history which can never be repeated all-over the world. We have seen commissions after commission, committees after committee but still justice is beyond our sight. Recently in Haryana a mass grave was discovered and it was doubted of victims of anti-Sikh riots of 1984. During riots mob was arbitrarily killing Sikh men and women but police and administrative authorities were either silent spectators or they were actively taking part in that carnage. Even children were not spared. For identifying Sikhs voter list, school registration forms and ration lists were used.²⁰

After the train burning incident of Godhara on 27th February, 2002, in state of Gujarat, whole state was engulfed by the flames of riots. According to the death toll given to the Parliament on 11 May 2005 by the government, 790 Muslims and 254 Hindus were killed, and another 2,548 injured. 223 people are missing. But according to other agencies up to 2000 people were killed. To investigate the incident of train burning, two commissions were established who gave two different reports out of which the Supreme Court upheld that the incident had been a planned conspiracy, explicitly citing the "scientific evidence, statement of witnesses, circumstantial and documentary evidence," upholding the Nanavati report, and discrediting the Banerjee commission.

There have been reports that two major riots in Indian history after our independence were at least abetted if not sponsored by the government authorities. Such alleged abetment was done

²⁰ 1984 anti-Sikh riots accessed at: http://en.wikipedia.org/wiki/1984_anti-Sikh_riots; visited on 2nd November 2011.

in tenure of two major political parties of this country. Still perpetrators of such organized mass killing are out of the reach of justice and victims are still suffering with the wounds given by communal riots. Their human rights are suspended forever without any hearing. If it would not have been true they would have got justice and perpetrators would have gone behind the bars of prison.

Most communal riots prior to 1947 were rooted in the 'divide and rule' policy of the British colonial rule. But after the partition of the country, sections of the Indian elite from both the communities are also to be blamed for the problem. Some people argue that even in independent India this 'divide and rule' is continuing and political parties are taking its advantage. Even if this is true, we cannot sideline our responsibility communal violence. It is us who are easily misled by such politicians. Even at the time of partition the real division was brought about on the question of share in power and not by differences in religious beliefs. The real question was not what Hindus believed in or what the nature of Muslim religious dogmas was. The real question was how political power on the one hand, and government jobs on the other, would be shared between the elite of the two communities.²¹ But the victim was common man and he is victimised in each and every riot and still without a lesson.

Religious nationalism in south Asia has carved three countries namely, India, Pakistan and Bangladesh. These facts are still not enlightening us and we are still in impression of this religious nationalism. Indian society as conceived by James Mill and Thomas Macaulay has come to fruition in the politics of religious nationalisms.²² Sustained hate campaigns against the minorities and other vulnerable groups have eroded the secular space guaranteed by the Constitution, allowing for the rise of the religious right in India. Perpetrators of the violence against Muslims and Christians in the past decade have allegedly enjoyed the State support. But this situation has to be changed and minority religious groups have to be given adequate protection to strengthen their belief in our secularism.

For that purpose we have to identify that where lays the fault and what should be done to remove chances of such kind of communalism? This question requires intense study and analysis but there are some steps which must be taken to redress the grievances of minority

²¹ Asghar Ali Engenier "Gujarat riots in the Light of the History of Communal Violence" Economic and Political Weekly, Vol. 37, No. 50 (Dec. 14-20, 2002), pp. 5047-5054, at 5047.

²² Romila Thapar is the first holder of the Kluge Chair in Countries and Cultures of the South at the US Library of Congress. See R. Thapar, Preface, in K. N. Panikkar, *Before the Night Falls: Foreboding of Fascism in India* (India: Books for change, 2002).

community as urgency. Such serious and urgent steps include reparation of victims of such violence. And as other steps to strengthen their belief interaction between all groups and communities of the society has also to be organised more frequently.

V. Conclusion:

The Indian concept of secularism is the most practical concept of secularism for a multi religious country. It is a country where religion is very central to the life of people. Throughout our history India was a secular country and it is a secular country, irrespective of the religion of the ruler of its territories.

Gandhi ji in 1946 had written in Harijan that: "I swear by my religion. I will die for it. But it is my personal affair. The State has nothing to do with it. The State will look after your secular welfare, health, communication, foreign relations, currency and so on, but not my religion. That is everybody's personal concern."²³ His writing denotes that we are secular irrespective of our religious belief. Our constitution has assimilated the Gandhian concept of secularism and made several provisions for conservation, protection and propagation of minority community religions. 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.

Our judiciary has as guardian of the constitution enlightened and strengthened our concept of secularism when required. Whenever required it has restricted the scope of religious freedom and when it was required to be widened judiciary has widened its scope. The concepts of communal harmony and secularism have, by and large, been well protected by the courts. In a case dealing with communal clash court observed that: *"In our country where the Constitution guarantees to all individuals freedom of religious faith, thought, belief and expression and where no particular religion is accorded a superior status and none subjected to hostile discrimination, the commission of offences motivated only by the fact that the victim professes a different religious faith cannot be treated with leniency"*.

Communalism seems to have become more aggressive now than ever before. State after state is hit by organized communal violence not only in the urban metropolitan centres but also in rural areas. Such incidents are threatening the solidarity of the country and weakening the

²³ S R Bommai vs. Union of India, AIR 1994 SC 1918.

national integrity. In light of communal violence there is need for some legislative measures to strongly reiterate that our polity shall not avoid any damage done to its secular structure. Our legislatures and governments cannot silently watch the violation of human rights of vulnerable groups in this country. At least victims of communal violence must be given some help from state to retain its faith in democracy and rule of law in this country.

If we trace bits and pieces of Indian history it can be safely said that India, despite numerous adversaries has always been able to find a via media for survival by maintaining the same diverse socio-religious culture. As I have discussed earlier India still maintains its secular character, however, what is probably required is that India as a democratic and secular State must not allow itself to be identified with any religion, and also must ensure that while guaranteeing the freedom of religion for all, it should not legislate on the basis of any religion but for the protecting victims irrespective of their religion.

Recurrent occurrence of communal riots does not mean that our law is not secular, but it definitely means that we are not secular within, our mind is not secular. Whenever our mind goes out of the way communal riots take place. Challenges for our secularism were present since the inception of our civilization. What changes is the method of dealing with these challenges. This challenge to secularism gets stronger with the gap in our minds. This gap is required to be filled. Law is not the only mechanism to fill the gap mentioned. Since the gap is in our minds, out of which secularism is getting away so the brain needs some healing.

For this we need cultural interactions among children of every religion. This cultural interaction will give us healing fluid. The most important fact is that we are not getting much success in creating secular brains. Secular brains may only be created with secular education administered uniformly, but we have not succeeded in providing uniform education. Cultural interaction can only be possible with uniformity in syllabus. Until this fault is not removed we cannot become secular by heart completely and we are bound to see the results before us.