SECULARISM AND JUSTICE

A CASE STUDY OF SUPREME COURT JUDGEMENTS (1980-1997)

Dissertation submitted to the Jawaharlal Nehru University in partial fulfilment of the requirement for the award of the Degree of

MASTER OF PHILOSOPHY

SANGHAMITRA PADHY

CENTRE FOR POLITICAL STUDIES
SCHOOL OF SOCIAL SCIENCES
JAWAHARLAL NEHRU UNIVERSITY
NEW DELHI-110067
INDIA
1997

Jawaharlal Nehru University
New Delhi - 110067, India

CENTRE FOR POLITICAL STUDIES
SCHOOL OF SOCIAL SCIENCES

July 18, 1997

Certificate

Certified that the dissertation entitled "SECULARISM AND JUSTICE - A CASE STUDY OF SUPREME COURT JUDGEMENTS (1980-97)" submitted by Ms. SANGHAMITRA PADHY in partial fulfilment of the requirements for the award of MASTER OF PHILOSOPHY has not been previously submitted for any other degree of this or any other university. This is her own work.

We recommend that this dissertation may be placed before the examiners for evaluation.

Prof. C.P. BHAMBHRI
(Supervisor)

Prof. BALVEER ARORA
(Chairperson)

CHAIRPERSON
CENTRE FOR POLITICAL STUDIES,
SCHOOL OF SOCIAL SCIENCES-II,
JAWAHARLAL NEHRU UNIVERSITY,
NEW DELHI-110067.

Ph. : 6107676, 6167557 / Ext. 257 Fax : 011-6165886 Gram : JAYENU

ACKNOWLEDGEMENT

I am deeply indebted to my Supervisor, Prof. C.P. Bhambhri, for his guidance. He has always extended his help, advice and the necessary stimulation for academic pursuit. He has been a constant source of inspiration. I also take this opportunity to thank my teachers at Centre for Political Studies for their help and encouragement. In this venture, I have benefitted immensely by discussions with my teachers.

I shall extend my gratitude to the library and librarians of J.N.U, Teen Murti, and Indian Law Institute. I also want to acknowledge the support of Mr. Narender Sharma, my typist.

Finally, as always, the love of my family and friends has been an important sustaining force. My most special thanks to them and to all those who helped me at various stages of my work.

Sanghamitra Padhy

Sanghamitra Padhy

J.N.U. New Delhi
July, 1997

CONTENTS

		Page No.
Introduction		**1-3**
Chapter-I	**A conceptual reading of secularism**	**4-31**
	a) Genesis of secularism b) Indian interpretation of secularism c) Some theoretical considerations in Indian secularism	
Chapter-II	**Judicial perceptions on Secularism - Essential vs non essential debate**	**32-57**
	a) nature of Indian judiciary b) Judicial interpretations	
Chapter-III	**Uniform Civil Code : its relevance to Secularism**	**58-72**
	a) Debate for Uniform Civil Code b) Judicial position	
Chapter-IV	**Politics and Religion - the Judiciary's stand**	**73-89**
CONCLUDING INFERENCES		**90-104**
CONSOLIDATED BIBLOGRAPHY		**105-118**

INTRODUCTION

INTRODUCTION

"Long years ago we made a tryst with destiny and now the time comes when we shall redeem our pledge ...... At the stroke of midnight hour, when the world sleeps, India will awake to life and freedom. A moment comes, which comes but rarely in history, when we step out from the old to the new, when an age ends, and when the soul of a nation long suppressed finds utterance"

Jawaharlal Nehru
August 14th, 1947

15th August, 1947 marked a great event in Indian history with the termination of two hundred year old British colonialism and the transfer of power to Indians. Achievement of independence heralded a period of change and reconstruction. It provided our national leadership a choice with regard to the nature of institutional strategy it would like to adopt for the new state. Ancient systems which had been persisting were not conductive to the needs and values of a modern society and so efforts were made for transforming our social and political order. India made many modern political and social choices, based on the principles of rationality and universality. This process of change embarked a vision of secular democracy based on principles of justice and equality. Modernization process however, did not entail a shattering of the traditional patterns of society, but rather took it along a new path.

India has been an ancient civilization, with rich traditions and having a differentiated social structure based on primordial loyalties. With the coming of modern political and social institutions, its social infrastructure consisted of primitive, traditional and a brand of modern elements. In conditions of such social diversities, marked by an inequitous social order contradictions were inherent and therefore, conflicts and cleavages appeared.

Our political development in the last fifty years has undergone a zig zag process. Confrontations have appeared and the consensus based approach that marked the beginning of our democracy have been replaced by contest. Social contradictions have reflected in our political process also. Modern ideals that shaped our polity and society have become susceptible to the traditional social structure, which is increasingly being identified by the political process to mobilize support and consolidate its base. The nature of our political and social setting, thus, has made confrontation an inevitability. Crises have manifested in many areas of Indian politics. Secularism has been one such issue, which has been increasingly strained with the rise of religious fundamentalism. Numerous conflicts have appeared in society, requiring an institutional basis for solving the problem. Hence, the judiciary.

Judiciary as the custodian of our Constitution and as an adjudicating body has an intrinsically valuable role in determining the principles of secularism, Judiciary however is not an isolated institution but is in continuous interaction with other political and social institutions. Herein, lies the purpose of this research, to probe into the Judicial discourse on secularism, in the Indian Context. But first a study of the theoretical perspective of secularism, as it has developed in our social and political mileu.

CHAPTER-I

A CONCEPTUAL READING OF SECULARISM

- genesis of secularism

- Indian interpretation of secularism

- theoretical considerations in Indian Secularism

A Conceptual Reading of Secularism

In our post colonial world, secularism has been considered inherent to our nation building process. However, failure of our national development process to meet the rising expectations of our people, has mired secularism in controversy[1]. With the recrudescence of religious fervour the validity of this concept for our society is being questioned and its practical usefulness challenged. The modernisation process entailed the destabilization and uprooting of many primordial institutions but religion continued to maintain its stronghold over political, social and individual action. Characterised by plural identities (religious, moral and philosophical) the question of building a just and stable society is of prime importance, whose basis can be laid in a secular state. Though secularism is acknowledged as a fundamental principle of social and political life the upsurge of fundamentalism, spurts of communal violence are symptoms of a deepseated social malaise posing a great challenge to our secular ideals. These issues of ethnic and communal conflict have made the state

---

[1] Rudolf C. Heredia - "Secularism and secularization : nation building in a multireligious society" in Rudolf C. Heredia and Edward Mathias (Ed.) - Secularism and liberation, Indian social institute publication, 1995, pp 12.

vulnerable with respect to the crisis, necessiating an indepth analysis of secularism and its role in society. Infact, the understanding of the phenomenon of secularism has emerged as a major intellectual challenge before the new Asian nations. These nations as late comers to the modernisation process can benefit not only from our own historical experience regarding the factors promoting or retarding secularism but also from the experience of western countries[2]. The phenomenon of tradition linked with religion and modernisation and secularization, the understanding of this process has emerged in a big way. Here, lies the purport of this chapter i.e. to study Indian interpretations of secularism, its genesis in our freedom struggle and incorporation in our Constitution and the various interpretations. But first, its proper historical perspective, which conditioned its evolution as a concept.

A. GENESIS OF SECULARISM

In simple words, secularism would mean indifference to or rejection or exclusion of religion and religious considerations. It was a reaction against the

---

[2] P.C. Joshi, "Secularism and religiosity of the oppressed: some reflections, "Man and Development", Chandigarh, vol.9, no. 4, Dec. 1987, pp 201.

hegemony of religion which prevailed in medieval Europe. Secularism has been defined as an attempt to establish a body of principles concerning human behaviour based on rational knowledge and experience rather than theology or supernaturalism, presuppositions of medieval Europe[3].

Secularism as it arose in the west was a newly emerging social construction and a power struggle over the two swords of temporal and spiritual authority. The failure of Greek city states and downfall of Roman Empire marked a new era in the dawn of politics as religious institutions gained in importance a tendency which culminated in the appearance of Christianity and the formation of Christian Church, as a source of authority. Relation of state to religious institutions and of political philosophy to theology had scarcely been a problem for the Greeks, but they remained a problem throughout the medieval age and well down into modern times.

Roman society had become victim of corruption and despotism and so provided a fertile ground for spiritual absolutism to grow. Loyalty to Church

---

[3] William Outh Waite and Tom Bottomore (Ed.) : The Blackwell Dictionary of 20th Centuary Social Thought, U.K., Blackwell Publishers, pp. 573-574.

held sway over loyalty to the state. Christianity was established as a state religion at the time of Constantine. In the 5th century, Pope GelasiumI provided the doctrine of Swords, implying the dual organization of human society - the Church to conserve spiritual interests and the state in charge of temporal affairs "The characteristic position developed by Christian thinkers in the age of Fathers implied a dual organization and control of human society in the interest of two great classes of values which needed to be conserved. Spiritual interest and eternal salvation are in the keeping of the Church ..... temporal or secular interests and the maintenance of peace, order and justice are in the keeping of Civil Government.... Between the two orders .... a spirit of mutual helpfulness ought to prevail"[4] . Thus, two powers ruled the earth the sacred power of the popes and the royal power of the kings, of which priestly power was more important as it rendered account for king of men themselves at the divine tribunal. St. Augustine's philosophy of history was a contest between two societies - the Earthly city and the city of God, former being the actual political system in which a person lives and latter being the metaphysical unity of all christians. The ultimate victory would be of the city of God. This is how he explained the fall

---

[4] Sabine - A history of Political Theory, Revised by Thomas L. Thomson, New Delhi, Oxford & IBH Publising Co. Pvt. Ltd., 4th Edition, 1973. p 188.

of Rome - all earthly kingdoms must pass away. The papalist believed that the Church originally possessed both spiritual and temporal power, the temporal it handed over to the state.

In 800 A.D., Charlemagne was crowned by the Pope as king. Later Pope Gregory VIII, defeated kind Henry IV to become Emperor. The view accepted in the eleventh century was the Gelasian theory of two swords - "human society is divinely ordained to be governed by two authorities, the spiritual and the temporal, the one wielded by priests and the other by secular rulers both in accordance with divine and natural law"[5]. This separation of Church and state was never literally carried out as there was one single Christian society as St. Augustine mentioned in the city of God. Coronation of Charlemagne was interpreted as a translation of the Empire to the Frankish kings by an authority vested in the Church. Pope Gregory VIII's ascendancy to the throne further reinforced it.

End of the 13th century, saw a new turn in the struggle between the Church and the state with the victory of Philip over Pope Boniface VIII. The

---

[5] Op. cit, Sabine, 1976, p-216.

papacy was now confronted not by a theoretically universal emperor but by an independent king. New enlightenment in later years of 12th century had made recovery of ancient works on science especially that of Aristotle, which made the rift between science and faith more pronounced. Thomas Acquinas merged Aristotelian faith into Christian political and philosophical heritage. His philosophy, however, was relevant only for living as a Christian. The works of Marsiglio of Padua and Machiavelli, however, made a shift from the Church state nation of state and laid the foundation of modern nation state Marsiglio conceived state as a self sufficient community with the power to regulate the temporal concerns of the Church. He believed that rights of citizens are independent of the faith they profess and no man may be punished for his religion. Meanwhile, the Church had also fallen into corruption and became a subject of bitter criticism. Renaissance philosophy developed a new concept of man, without recourse to a concept of God. Machiavelli further separated state from religion and infact blamed the Church for the deteriorating state of affairs of Italy.

It was only in the 17th century that secularism was consolidated. The rational philosophy of Descarte, Spinozoa and Leibniz was infact the first sustained effort towards a universal purged of supernaturalism. The most radical

protagonist of such philosophy have been Hobbies and Locke, who perceived religion as outside Civil Government. Science replaced religion.

By this time, Christianity had also become divided and catholic faith fractured into numerous schisms. With the age of Capitalism, which sought its logic in Protestantism, the church though viewed as guardian of the only revealed truth, the centre of authority was transferred from the Pope to the bible, as interpreted by each reformer. The idea of the essential separateness of the church based on voluntary faith, from the state based on coercive power came up. "The problem of freedom of conscience in a multireligious society took centrestage .... where the state was unable to impose a single faith"[6] on the plurality of belief structures which resulted with protestantism.

"In all this confusion as the 'age of faith' yielded to the 'age of reason', the Enlightenment began a radical nationalist critique of religion with the undisguised goal of displacing all religions from public life and all faith from private life as well, and replacing both with a new secular consensus as the bias

[6] Rudolf C. Heredia - "Secularism & Secularization : nation building in a multireligious society" in : Rudolf C. Heredia & Edward Mathias (Ed.) - Secularism and liberation, Indian Social Institute Publication, 1995, p. 13.

of national community"[7]. The rationale of modernity thus provided the structural opposition to social situation in medieval Europe, creating new structures of society based on reason.

Secularism, therefore, implies, a separation of temporal from spiritual and subordination of latter to former. Though it does not reject religion altogether, its sphere of action is limited by reason's dominance. People now look upto reason and science for explanation than faith in the supernatural. Man is accepted as centre of activity and he is not an alienated form of God and his place in the universe is recognized. Universalism spread the meaning that all religions invoke equal respect and there is no difference between them. Secularism was a product of changing circumstances in the west, in its path towards modernity and provided an ethic corresponding to economic, political and social development of society.

B. INDIAN INTERPRETATIONS OF SECULARISM:

The evolution of Indian secularism has a different political context. It has been said that Indian secularism is a case of sui generesis[8]. "The framers of the

---

[7] op. cit. Heredia, 1995, p-13.

[8] P.K. Tripathi - "Secularism : Constitutional Provisions and Judicial Review" in G.S. Sharma (Ed) Secularism : its implications for law and life in India, Bombay N.M. Tripathi Pvt. Ltd. 1966, pp-170-174.

constitution contemplated a secularism which was the product of India's own social experience and genius"[9] Secularism has been used in our pluralist setting and not on the basis of compartmentalisation of religion and state[10].

"The question is not of horizontal separation between church and the state but of vertical segregation of state and primordial loyalties"[11].

Partha Chatterjee argues that the Indian meaning of secularism did not emerge in ignorance of the European or American meaning of the word. The reason why newer interpretations have arose is because of the "serious difficulties in applying the standard meaning of the word to the Indian circumstances"[12]. The term continues to be used in our political terminology and this according to Chatterjee is an expression of the desire of the modernizing elite to see the original meaning of the concept actualised in India, resort to new meanings is

---

[9] op. cit. P.K. Tripathi, 1966, p - 193.

[10] Ashgar Ali Engineer - "Practice of Secularism in India" in Iqbal Narain (Ed.) - Secularism in India, Jaipur, Classic Publishing House, 1995, p - 85.

[11] Rasheeuddin Khan - Bewildered India : Identity Pluralism Discord, N. Delhi, Har Anand Publications, 1994, p-278.

[12] Partha Chatterjee - 'Secularism and Toleration', Economic and Policital Weekly, July 9th, 1994, p-1769.

a mark of failure of this attempt"[13].

The concept of secularism has its origins in western political developments but in our context, its not just the embodiment of an abstract idea, it is a product of a long and sustained struggle of the Indian nationalist against political forces which wanted to bring religion in the centre stage of anti colonial struggle[14]. In the west, the welfare secular states were the result of "four centuries of historical development with several shifts in ideological legitimation viz transition from God as legitimation of emperors to the modern ideologies of legitimacy in the west"[15]. Indian political development after British colonialism, has been that of an "ancient land slowly seeking to incorporate into its womb the best elements of the culture of the modern world, without at the same time destroying its age old traditions and diversities"[16]. The exigencies of time in the post colonial world would require the channelization of eroded traditional structures of society into

---

[13] op. cit., Partha Chatterjee, p-1769.

[14] C.P. Bhambhri - The Indian state 50 years, New Delhi, Shipra Publications, 1997, p-86.

[15] C.P. Bhambhri - Indian Politics since Independence, N. Delhi, Shipra Publication, 1994, p-15.

[16] Rajni Kothari - Politics in India, N. Delhi, Orient Longman, 1991, p-3.

"new patterns of institutional relations, sustained by a new structure of opportunities and legitimised through a new set of universals"[17]

Secularism used freely in public discourse in India implies a concept and a process, that seeks to change a traditional society into a modern polity, by emphasizing certain values and norms of civic life and political culture[18]. The decision for a secular state was a practical necessity and a political expediency in the Indian context. Britist colonial rule evolved complex arrangements of governance suited to their colonial interest by perpetuating the divisions already present in society. They founded a complex and heterogeneous society based on a dual strategy of promoting religious divisions through preferential and discriminatory treatment of different religious communities and a policy of neglect and non-interference in many areas[19]. They thus reinforced obscurantism, religiosity etc., which, post independent India inherited as a legacy. Our nationalist struggle asserted the separation of religion and politics - "there was no conflict between India's religious pluralism and the goal of independence with

---

[17] op cit. Kothari, 1991, p-3.

[18] op cit. Rasheuddin Khan, 1994, p-277.

[19] op cit. C.P Bhambhri, 1994, p-18.

political unity[20]. If India was to gain independence from colonial powers, it was important to assert that it was indeed a nation. The basic theory of Indian nationalism was committed to the ideals of secularism through which it sought to bind the multireligious and multiethnic society into a nation. The Indian national congress (INC) emphasized secularism to allay the apprehension of religious minorities particularly the muslims, that it was not a Hindu political formation. Thus, it was a religious community, rather than religious authority which mattered in the Indian context. Religious authority was not challenged, rather it drew upon it and its institutions to reinforce political processes[21].

Thus internally it was our cultural and religious diversities that necessiated a secular model, for the elites it was a necessity for gaining legitimacy. Externally, it was a preference over a tendency of countries neighbouring India to turn to majority religion as a symbol of national unity[22].

---

[20] D.E. Smith - India as a secular state, Princeton. Princeton University Press, 1963 p-141.

[21] op cit. Asghar Ali Engineer, p-86.

[22] op cit. D.E. Smith, p-vii.

In the Indian context, secularism meant tolerance and positive attitude of respect in a multireligious society. D.E. Smith Writes, secularism is commonly used in India to describe the relation between state and religion i.e. equal respect for all religions and not total separation as it exists in the west. It guarantees individual and corporate freedom of religion, is not constitutionally connected to a particular religion, nor does it seek to promote or interfere with religion. Guided by our immediate historical experience, our constitution expresses this spirit, though it was only the 42nd constitutional amendment, which provided the official recognition to secularism. K.T. Shah did try to incorporate the term "secular" in the constitution but it was firmly opposed by Ambedkar, who believed in restricting the domain of religious and for extending state's power to legislate in religious matters for social reform. It was believed that incorporating the term secularism would conflict with Article 25 which permitted state intervention in matters connected with religion in the interest of social reform and also would give rise to a state structure that would go against Indian cultural ethos. Ambedkar has argued that "Hinduism and Islam, the two major religions in India do not confine themselves to spiritual or other worldly matters, rather cover within their fold the entire social behaviour, and if any secularism has to exist it will not be possible until religion is demarcated from temporal[23].

[23] op cit. D.E. Smith, p-105.

The 42nd constitutional amendment, 1976, declared India to be a secular state - a state which would observe an attitude of neutrality and impartiality towards all religions. The spirit of the constitution that national unity and rights of citizen are inseparable led to the 1976 amendment[24]. However the term secularism has not been defined. In spirit, it means that state protects all religions equally and does not itself uphold any religion as state religion. State intervention in religious affairs has however been allowed to bring in social reform. The meaning sought to be given to secularism was '*Sarva Dharma Sambhava*' i.e. treating all religions alike instead of '*Dharma Nirpeksh*' i.e. state neutrality in matters of religion. Secularism in the literal western sense was never visualized as an essential feature of our constitution as religious symbols continued to be recognized by the state. A spirit of tolerance formed the philosophical background of secularism which recognises pluralism in society.

With time, secularism has gained varied interpretations, dealt in the following section.

---

[24] C.P. Bhambhri - Indian state - 50 yrs, Shipra Publications, New Delhi, 1997, p-87.

C. THEORETICAL CONSIDERATION

With changing social contexts, secularism carried several connotations. The political and social conditions present at the time of independence - marked by partition and communal holocaust - resulted in a national consensus for secularism. However, the political and social developments in the last fifty years, have shown many contradictions in our political journey. The superstructural institutions of governance have internally fractured as consensus is replaced by confrontation. Multiple social groups have emerged, based on primordial identities of religion, region, caste etc. In such political and social settings, secularism is increasingly strained. For a long time, Indian political and judicial discourse have taken for granted the meaning of a "semiotic field called secularism" but the present developments have made it a contestable concept. "Its a suspect conception among intellectuals and academicians, who now make a distinction between secular and pseudo secular"[25]. The general idea prevailing in academic and political circles is that secularism is an incoherent and unrealizable notion. This necessiates an opening up of the debate on secularism.

---

[25] Upendra Baxi - "Secularism " Real and Pseudo" in M.M. Sankdher (Ed.) Secularism in India, Deep and Deep Publication, 1992, p-88.

This section shall deal with the various interpretations on secularism, in the Indian context. The first theory of secular state discussed will be Indian nationalism.

Unity in diversity has been the pattern of Indian civilization. While the nationalist movement emphasized unity in areas of culture like language, religious differences remained. Religion was also not restricted to the private domain, the ruling cities used religious symbols to secure their legitimation over the masses. The British followed a policy of divide and rule which perpetuated religious divisions more strongly. Indian nationalism, therefore signified the freedom from colonialism as well as communal politics. Secularism formed the ideal of the main current of Indian nationalism - emphasizing the separation of religion from politics; there was no conflict between India's religions pluralism and the goal of independence with political unity[26]. The concept of Indian nationalism was that of a geographic entity, composed of all those who claimed India to be their homeland. Secularism provided the antithesis to communalism - a term used to denote the political functioning of individuals or groups for the selfish interests of particular religious communities[27] - the assertion being that India represented one nationality, despite the plurality of religions existing in society.

---

[26] op. cit. D.E. Smith, p-141.

[27] op. cit. D.E. Smith, p-140.

This idea of nationalism has however been opposed by the fundamentalists - Hindu Mahasabha, Muslim league. The religious fundamentalists posed the idea of a monolithic self in opposition to a monolithic cultural other to gain political and cultural legitmacy among the masses. V.D. Sarvarkar, through his concept of hindutva evolved a problematic of nationalism directly opposed to nonhindu communities. He referred to a combined history of religious communities which regard hindustan as their '*pitrubhoomi*' and '*punyabhoomi*'. Hence muslims, christians, parsies were not part of this hindutva, as their holy lands were outside the confines of hindustan. Savarkar's monolithic construct of hinduism was thus directly counterpoised to British imperialism as well as the muslim community.[28]

Muslim league propounded the two nation theory Jinnah declared Hinduism and Islam as two distinct social orders, two civilizations, based on conflicting ideas. These ideas of communal divide reinforced the congress's commitment to secularism. Nehru said nationalism was a consciousness of unity, while Maulana and others asserted that objective of nationalist movement was not a Hindu Raj but a secular state. The secular state referred to by the nationalist was a state

---

[28] Arun Patnaik and K.S.R.V.S. Chalan - "The Ideology and Politics of Hindutva", in T.V. Satyamurthy (Ed.) - Region, Religion, Caste, Gender, and Culture in Contemporary India, volume-3, Oxford University Press, 1996, Edition, p-266.

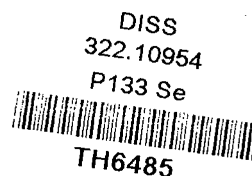
neutral to all religions, all citizens having equal rights, privilege and obligations irrespective of religion.

The next theory of secular state will be the concept of secularism derived from religions tolerance based on Hindu philosophy. Dr. S. Radhakrishnan wrote - "It may appear some what strange that the government should be a secular one, while our culture is rooted in spiritual values. Secularism here, does not mean irreligion or atheism or even stress on material comforts. It proclaims that it lays stress on the Universality of spiritual values which may be attained by a variety of ways. This is the meaning of a secular conception of state"[29]. Even Gandhi believed in a state based on religions tolerance based on a syncretic approach. He has emphasized the inseparability of religion from politics and the superiority of the former over the latter. "For me, every , the tiniest activity is governed by what I consider to be my religion"[30]. Religion for Gandhi was Sarva Dharma Sambhava i.e. equality of all religion and the essential tolerance and openness it implies is much closer to the multifaceted religiosity of the masses. Roots of

TH- 6485

[29] op. cit D.E. Smith, p-147.

[30] Gandhi quoted in T.N. Madan - "Secularism in its place" Journal of Asian studies, November 1987, p-752.



secular ideas based on religions tolerance have been traced to Bhakti, Din Ilahi, ancient Hindu and Buddhist texts. But, these are undefined ideas and cannot be linked to the modern concept of secularism,. The ideas of religions tolerance of hinduism has also been rejected by many. Savarkar's concept of hindutva explodes this myth of hindu religious tolerance.

Now, we deal with western secularism, as the theoretical perspective to be applied in the Indian case. K.M. Pannikar has argued that roots of Indian secularism were in the west and not in ancient hindu thought. The valid experience of any country becomes the common inheritance of civilized humanity and India has assimilated much of western thought"[31]. The western model of secularism is accepted among the liberal democrats - Nehru has been a strong protagonist of this model. Secularism for Nehru meant keeping the state, politics and education separate from religion, making it a private matter for the individual. He considered religion to be a hindrance to the tendency to change and progress inherent in human society[32]. Secularism for Nehru was both a gift

---

[31] K.M. Panikkar - The State and the Citizen, 1956, p-28, Quoted in D.E. Smith, 1966, Princeton University, p-152.

[32] S. Gopal - "Nehru and Minorities", E.P.W., Spl no. November 1988.

of freedom struggle and a heritage of India's ancient and medieval past[33]. His definition of secularism was four pronged a) Secularism meant separatism of religion from politics, economic, social and cultural aspects of life. Religion was purely a personal matter, b) Dissociation of state from religion, c) Full freedom to all religions and the tolerance of all religions, d) Equal opportunity for followers of all religions and no discrimination and partiality on grounds of religion. And, in the Indian context secularism meant above all, a firm opposition to communalism[34]. He said "Religious questions may arise and religious conflicts may take place, and they should be faced and settled. But the right way to deal with them is to limit their sphere of action and influences and to prevent them from encroaching on politics and economics[35]" Communal problem was entirely a political creation of upper class groups and had no relation to racial or cultural matters"[36]. He believed that Indian unity could be maintained only on the basis of secularism, which could be established through education and through

---

[33] Bipin Chandra - Ideology and Politics in Modern India, Delhi, Har-Anand Publication, 1994, Edition, p-63.

[34] Nehru: Selected Works, Volume III, p-126. Quoted in Bipin Chandra, 1994, p-63.

[35] Nehru selected works, volume III, p-180. Quoted in Bipin handra, 1994, p-71.

[36] Nehru: Selected works, volume IV, pp-175-176. Quoted in Bipin Chandra, p-72.

economic and social change, that disadvantaged masses could be rescued from vulnerability to the exploitation of religious sentiments by vested interests[37]. Nehru thus endeared a process of modernisation and secularization, on lines similar to the west, rooted in the ideals of liberty, nationalism, secular polity and democratic socialism. Indian Constitution also reflects this spirit of Nehruvian model of secularism - infact the official model of secularism is a consensus between Gandhian tolerance and Nehruvian rationalism.

The dynamic hinduism model of V.H.P. which subordinated all religions to hinduism and identifies hinduism with Bharatmata, has challenged the Nehruvian ideal and Gandhian tolerance which renders official support for all religious traditions. They have called secularism in India to be of the nature of pseudo secularism and have glorified the concept of one nation of hindus. The threat posed by this ideology makes it pertinent that we delve into issues of secularism in the context of the present political and social setting.

Modernistaion theorists have pointed out that in the newly coming nations of post war period, the growth of civic religion has not taken place as in the west.

---

[37] op. cit. Bipin Chandra, p-63.

Religion is very much a part of the pubic domain. Political parties have used religious symbols for legitimizing their rule against secular trends.[38] Bellah says "The new ruling elite engaged in modernizing their plural societies use religious sources, symbols and institutions in order to secure their legitimation amongst the civilian population[39]. As Rudolphs have pointed out modernity does not mark a break with tradition, but they continue to have a dialectal relationship[40]. Recent examples like Babri masjid demolition, Shah bano controversy are good illustrations of use of religion for political ends. In these societies, under state patronage new elites have emerged who seek to incorporate religion into the private domain, implying the formation of civic religion. But the inability of the elites to fulfill the aspirations of masses has led to these taking recourse to religious idioms for mobilizing masses. Massive institutionalization of religion takes place for eg. religious leaders get directly involved in the political process.

---

[38] See Arun Patnaik and K.S.R.V.S. Chalan "The Ideology and Politics of Hindutva" in T.V. Satyamurthy (Edited) - Region, Religion, Caste Gender in Contemporary India, Oxford University Press, 1996 Edition, p-254.

[39] Eva Hellman "Dynamic Hinduism: Towards a New Nation" in David Westerlund (Edited), Questioning the secular state, London, Hurst and Company, 1996, Ed., pp-237-257.

[40] Rudolph & Rudolph - The Modernity of Tradition Political Development in India, Delhi, Orient Longmans Ltd., 1969, p-8.

This dual process is a paradoxical outcome of the molecular transformation strategy or the strategy of compromise or change envisaged by the secular state[41]. Religion acts as a social control.

Critics have pointed out that modernisation theorists have neglected the role of state, economy and class structure in the shaping of political cultures and institutions. Marx believed that religion is an idealized form of reality, has its social basis in the social relation and therefore depended on its articulation in the material interest of classes and communities. Moreover, since social forces are in antagonistic relations, so is religion. Gramsci's argued that "the ideological terrain (of religion) is the site of struggle in which religion provides the language of positive world view for the exploited as well as a means by which exploiting seek to establish and reproduce hegemony"[42]. Randhir Singh[43] argues that the dynamics of religion can be determined by the basic economic structure. It is the

---

[41] op cit. Arun Patnaik and K.S.R.V. Chalan, 1996, p-255. Molecular transformation strategy means. Civic religions's growth takes place in a molecular fashion, as long as industrialization and modernisation are gradually undertaken by the new states and new elites.

[42] op cit Arun Patnaik and K.S.R.V. Chalan, p-254.

[43] Randhir Singh - Of Marxism and Indian Politics, Delhi, Ajanta Publications, 1990, pp 44-70.

logic of contemporary social formation in India. Religious identity becomes important from the perspective of giving a sense of belongingness but should not be violative of the elementary principles of reason. Secularism as practiced in India is not the solution as Sarva Dharma Sambhava is rather a celebration of all kinds of religion and religiosity. Any criticism of religion should however look into the social circumstances - religion first began as a powerful social movement but gradually became a tool of the ruling elites. Rulers of the state have resorted to a range of cultural practices in the name of secularism, which merely reinforces their control of power. Those advocating freedom for all religious have robbed secularism of its essential element of reason[44]. Secularism is subverted by hegemony and so what is called for is a democratic secularism which would take into account specificities of the social situation and would be self propelling[45].

[44] Manoranjan Mohanty "Secularism : Hegeneonic and Democratic" in Bidyut Chakravarty (Ed.). Secularism and Indian Polity, New Delhi. Segment Book Distributors, 1990.

[45] op. cit. Manoranjan Mohanty.

S. Khan[46] says secularism is not simply a state of affairs i.e. separation of state and church or merely an ideology but is a many sided process involving the progressive decline of religious influence in the economic, political and social life of man and even over their private habits and motivations. Religion is thus seen as a anachronism in society, belonging to the superstructure that shall wither away with economic development.

With the upsurge of pan - Indian Hindu consciousness in society, it is felt that secularism is in crisis. While in the political discourse, a distinction has been made between secularism and pseudo secularism, in academic circles, secularism has been called an unrealizable and in-coherent concept by those arguing from within the post modern tradition. These new critics of secularism have rejected the secular model of state stating it as an alien cultural ideology, which lacks the strong support of the state. T.N. Madan has argued that "in the prevailing conditions in South Asia (secularism) as a shared Credo of life is impossible, as a basis of state action impractical and as a blueprint for the forseasable future

[46] S. Khan "Towards a marxist understanding of Secularism", Economic and Political Weekly, 7th March, 1987.

impossible"[47]. Infact, in the Indian case, where religion has an all pervasive, all encompassing character, secularism is an impossible concept. "It is the dream of a (modernist) minority which wants to shape the majority in its own image, which wants to impose its will on history but lacks power to do so under a democratically organized polity"[48]. Secularism therefore, according to Madan, is a vacuous word and a phantom concept.

Ashis Nandy argues that secularism has exhausted its possibilities and is rather a crisis than a solution. Secularism which is a product of modernity and age of reason, is an ideology of the modern state. Its the state and the elite with its instrumental rationality and amoral and manipulative technocratic managerial ethos i.e. responsible for the atrocities. "While the modern state builds up pressures on citizens to give up their faith in public, it guarantees no protection to them against sufferings inflicted by the state itself in the name of its ideology"[49]. He says that 'within' the contours of the existing ideology of

---

[47] T.N. Madan "Secularism in its place", Journal of Asian studies, November 1987, pp. 748-749.

[48] op cit. T.N. Madan, pp 746-749.

[49] Ashis Nandy "Politics of Secularism" and Recovery of Religions Tolerance in Veena Das (Ed.) - Mirrors of Violence : Communities, Riots and Survivors in South India, New Delhi, Oxford University Press, 1990, p 80.

secularism, instead of resisting violence, secularism endorses the world view within which such violence flows"[50]. Nandy thus says Indian secularism should learn from the religious traditions and these should be freed from the imperialism of western category of secularism.

Ashis Nandy and T.N. Madan's approach of the problem is of a different nature. They are arguing from the post-modern tradition and so have rejected modernity with science and technology which is a killer. They are traditionalists and conservatists. Such an approach is a fallacy, as the alternative provided of going back to tradition is a dangerous option. Their view is a distrust of the state.

Though secularism developed as a western political concept and is linked to the enlightenment philosophy, Indian secularism is not as in the west a compartmentalisation of Church and state. The Constitution of India and the legal framework of India is based on a model of secularism in a specific socio-cultural context. Two hundred years of colonialism, national liberation movement and the Constitutional developments that followed cannot be neglected. Indian interpretation of secularism has a specificity of its own conditioned by the political and social developments. Imposition of secularism from above on principles of

---

[50] Ashis Nandy-An Anti Secular Manifesto, Seminar, October, 1985, p. 24.

Hindu rashtra or rejection of secularism by giving credence to tradition cannot be the solution to the crisis. Secularism has to be deepened and extended because only secular democratic principles can keep India united. In this chapter, we dealt with the various theoretical perspectives on secularism which have given the term varied connotations.

The next chapter shall look into the principles of Indian secularism as interpreted by the Judiciary. The effort of the Judiciary in promoting secularism shall be analysed, an area very often neglected by social scientists. Constitution not having defined secularism, it has been left to the Judiciary to resolve the contentions present in our polity.

CHAPTER-II

JUDICIAL PERCEPTIONS ON SECULARISM - THE ESSENTIAL VS THE NON ESSENTIAL DEBATE

- Nature of Indian Judiciary
- Judicial interpretation of Secularism

Judicial Perceptions on Secularism

Discourses on secularism, in their quest for a secular model of state, have given it varied connotations which has kept the debate on secularism ongoing. Unlike the west, where secularism meant separation of Church and state, in Indian political terminology its use has been in context of our social mileu Academicians have provided varied interpretations of the term, as seen in the Indian context i.e. through its various phases of development - social structure, national liberation movement, constitutional history and the present political situation. In this debate centering on relation between state and religion, judiciary's perceptions cannot be eclipsed from vision. In the span of 50 years of Indian state the judiciary has emerged as an "institution of state engaged in extended public conversation with the holders or claimers of centralized unity of state power"[1]. Judiciary being the custodian of our constitution is recognized as an important institution to protect and promote the secularist vision for India. Therein lies the purpose of this chapter i.e. to explore the judicial perception of secularism in India, its role in the evolution of the concept of secularism. This

---

[1] Upendra Baxi - "Secularism : Real & Pseudo", in M.M. Sankhader (Ed.). Secularism in India, Deep & Deep Publcation, 1992, New Delhi, pp 93.

chapter shall analyse the post-80 phenomenon only, in the backdrop of precedents set by the supreme court, keeping in mind the increasing number of cases that are coming to the courts.

Our constitution though reflects liberal spirit of protecting individual's rights, guaranteeing all equal liberties and opportunities vis-a-vis their cultural rights, such freedom is however subject to limitations based on common good for all. The spirit reflects a secular political order consistent with principle of social justice. Religious affairs though outside the purview of politics could however be reformed for the maintenance of public order, morality and health and for social welfare. Given a society beset by social and economic inequalities, predominance of traditional features, social reform is important in view of a common good of all. The state therefore can bring about changes in religious affairs but should not override its terrain. Here, the judiciary's role becomes important, providing a link between the secular political order and religion. Before going on to the debate, we shall first take a brief look into the judiciary in the 80's.

A. NATURE OF INDIAN JUDICIARY

In our democratic set up, legislature, executive and the judiciary form three institutions of governance, each of them working under a system of checks & balance. Law making is essentially in the hands of the legislature, subject to ordinance making power of the executive. The judiciary protects citizens from any infringement of their rights, by excesses of executive and legislative power. Justice H.R. Khanna says "an independent judiciary can well be described to be the very matrix of the system, the one indispensable condition for the continued existence and survival of democratic institutions and the rule of law"[2]. As democracy necessarily implied popular control of the institutions of government, complete independence of judiciary is not feasible. The very nature of judicial function, however, entails independence of Judiciary as it seeks to secure justice for all and of creating a just democratic order, through the armory of law, provided by the constitution. This power of judiciary can be used misused or abused.

---

[2] Justice H.R. Khanna - Judiciary in India and the Judicial Process, 1985, Publication, pp 20.

The Judiciary in India, especially in the post emergency period, saw the dawn of an activist phase. "The extraordinary complexity of modern litigation required (not merely the declaration of) the rights of citizen but also to mould the relief warranted under given facts and circumstances and often command the executive and other agencies to enforce and give effect to the order, writ or directive or prohibit them to do unconstitutional order"[3]. Prof. Upendra Baxi relates activism in judicial policy making to that which further the cause of social change or articulates concepts such as liberty, equality or justice. In a changing society like India, the constitution visualises a new social order the articulation of such order is activism[4].

Judicial activism is "an assertion of judicial power in cases where the judiciary comes face to face with legislative arbitrariness, executive abuses ar interference in the due course of legal proceedings"[5].

---

[3] Dr. Veer Singh and Dr. P.S. Jaswal - Judicial Activism and Democratic process in India, page 2, unpublished, MIMEOGRAPHED.

[4] Prof. Upendra Baxi - The Indian Supreme Court in the eighties: Courage, Craft and Contention (1985), N.M. Tripathi Pvt. Ltd., Bombay.

[5] K.P. Krishna Shetty - Judicial Activism is Essential in Democracy, Hindu, Tuesday, December 10th 1996.

Baxi further argues that judicial interpretation is not a mechanical process but envisages the use of judicial discretion. Judicial activism camot grow in vaccum and very much depends on the constituency of lawyers and judges. It is precisely this reason which explains why does the court of Justice Krishna Iyer on Justice Bhagwati cater to the needs to poor ?[6]. Judicial Activism has been a judge based phenomenon. Failure of executive and legislature to discharge their function has led to the discontent of the masses thereby resulting in their looking upon the Judiciary for the fulfillment of their aspirations. It has led to a process of Judicialisation of politics.

Chief Justice A.M. Ahmadi's argued that the lack of initiative of the institutions of governance, have left the Supreme Court with little choice, but to act in deterrence to its constitutionally prescribed obligations. This shall be a temporary phenomena, not because of Judicial tyranny but because judges are cut off from the ground realities in society[7]. With the Keshavanand Bharti case, a new beginning was made. Justice Chandrachud argued that the constitution is not intended to be the area of legal quibbling for men with long purses. It is made

---

[6] op. cit. Prof. Upendra Baxi, 1985.

[7] Chief Justice Ahmadi - Excerpts from Zakir Hussain Memorial lecture.

for the people. The court is not chosen by the people and is not responsible to them in the sense in which the house of people is. However, it will be able to get the support of the people if it can shift its attention to the welfare of all and not just a few"[8]. Judicial perceptions in activism is that such a role is not only beneficent, but imperative in a developing country like India, divided by various religions, caste, regional loyalties. Only under an activist judiciary responding to changing times can minorities have access to remedies.

To sum up, this has been only one perception of an activist judiciary, the other is beset by limitations of the judiciary. Its non-confrontational approach and its encroaching upon the terrains of the executive and legislature have become subjects of criticism. It has been argued that courts are breaching the boundaries of rule of separation of powers. Upendra Baxi argues that "supreme court (now) is the centre of political power. And such a recognition impels us to ask more relevant questions as to what kind of political role the court ought to play in changing India"[9]. Keeping this in view, we shall now move to the judicial

---

[8] Keshavanand Bharati vs State of Kerala, A.I.R., 1973.

[9] Upendra Baxi - The Indian Supreme Court & Politics, Lucknow, Eastern Books, 1985 Edition, N.M. Tripathi, Pvt. Ltd.

narratives on secularism - judiciary providing the link between state and religion, in pace with the needs of changing times. The study of judicial discourse shall focus on the eighties and 90's when there has been a revival of religious conflicts, threatening our secular political order. This period coincides with the activist phase of judiciary.

JUDICIAL INTERPRETATION OF SECULARISM

This section deals with the judicial discourse on secularism, to be specific, the Supreme Court. Through the potent weapon of law, the judiciary has sought to uphold the values of secularism. Though in a final sense the term was included in the constitution only in 1976 through the 42nd constitutional amendment, it has been freely used by the judges, judicially as well as extrajudicially, while explaining the nature and character of our constitution even before 1976. In 1974, the Supreme Court said "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 state and ensures that no one shall be discriminated against on the ground of religion[10]". Justice Beg had said - our constitution makers certainly intended to set up a secular Democratic Republic, the building spirit of which is summed up by the objectives setforth in the preamble to the constitution[11].

---

[10] Ahmedabad St. Xavier's College vs State of Gujrat A.I.R. 1974, SC 1389.

[11] Jiyamddin Bukhari vs Mehra case, A.I.R. 1975.

Keshavanand Bharati[12] case, however, made a beginning by recognizing secularism as a basic feature of our constitution which cannot be altered or amended under Article 368. In the recent historic judgement in the S.R. Bommai vs union of India, the Supreme Court has further clarified that secularism is a fundamental law and basic structure of Indian political system, essential for "man's excellence with material and moral prosperity and political justice"[13]. Indian secularism as understood establishes a rational synthesis between the legitimate functions of religion and the legitimate and expanding functions of the state. It has, therefore, permitted the state to regulate the secular affairs of the temples, mosques for bringing in a welfare state. The interpretation of secularism is rooted in religious tolerance and equal respect for all religions than a total wall of separation between state and religion. It means freedom of religions and conscience including freedom for those who have no religion, subject only to public order, health and morality.

The secular model of state as given in our constitution is based on the realities of our present existence, efforts to govern a religiously plural society

---

[12] Keshavanand Bharati vs State of Kerala, A.I.R. 1973.

[13] S.R. Bommai vs Union of India, A.I.R. Dec 1994.

undergoing social change. Major functions of the state would be to bring in socio-economic change through modernization and secularization of polity. This model of state is based on the need to circumscribe the role of religion. However, in a society where religion pervades all aspects of life, conflict may arise between the traditional religious practices and the secular law. For this purpose, state has been given extensive powers to reform religion. Indian constitution does not envisage a compartmentalisation of life into conventional religions and secular spheres but rather allows reasonable restrictions in the granting of freedom of religion. Religion and 'secular' form part of the religions conflict, moreso, because the two categories are indistinguishable in Indian society. Baird says that restrictions on the otherwise free exercise of religion constitute an admission that there may be a conflict between the constitutional system and the traditional religious practice[14]. The Supreme Court in Shri Govindalji vs state of Rajasthan has also emphasized on the intermixing of 'religion' and 'secular' - sometimes practices, religious and secular are inextricably mixed up. This is more particularly so in regard to Hindu religion because as is well known under the provisions of ancient smritis, all human

[14] R.D. Baird "Religion and the secular : categories of religious conflict and religions change in independent India" in B.L. Smith (Ed.) Religion and Social Conflicts in South Asia, Leiden, E.J. Brill, 1976, p-50.

actions from birth to death and most of human actions from day to day are regarded as religious in character"[15].

Baird writes that although the categories of religion and secular are integral parts of the secular model, what he calls the constitutional religious[16] model, and although the two categories are axiomatic they are not constitutionally defined. This interpretation of religion and secular have been left to the judiciary. The Constitution of India does not explicitly define secularism, but a contextual understanding of the judicial implications will help understand its meaning. The judiciary not only differentiates the religious from the secular, but also acts as a bulwark against the encroachment of the state on the freedom of religion through its power of judicial review. In its interpretation the judiciary has evolved the doctrine of essentiality of religious practices to be the basis of protection of the freedom of conscience and free profession, practice and propagation of religion, freedom to manage religious affairs. The foremost task however is to differentiate religion from secular and when the state should or should not intervene.

---

15 A.I.R., 1963, SC 1368.

16 Robert D. Baird "Religion vs Secular" in India - a religion historical analysis of the constitutional tests and their judicial interpretations", Civil and Military law journal, April-June, 1992.

Dr. Ambedkar says "we ought to strive to limit the definition of religion ...... to .... beliefs and such rituals as may be connected with ceremonial which are essentially religious[17]. The Supreme Court says. The question is where is the line to be drawn between what are matters of religion and what are not.............. The word religion is not defined in the constitution and it is a term which is hardly susceptible of any rigid definition[18]. The U.S. Supreme Court defined religion as the relation of an individual to the creator and the obligation they impose of reverence for HIS BEING and character and of obedience to HIS WILL. The Indian Supreme Court however does not comply to such a definition, as certain religions like Buddhism, Jainism etc. do not believe in any Supreme Being. The Supreme Court says religion not only lays down a code of ethical rules for its followers to accept, it might prescribe rituals and observances, ceremonies and modes of worship, regarded as integral parts of religion. In S.P. Mittal vs Union of India[19], the supreme court recognized that religion is a matter of faith but belief in God is not essential to constitute religion.

[17] Ambedkar, Constituent Assembly Debates, Vol. 7, p-781, See Iqbal Narain Practice of Secularism in India, p.97.

[18] Commissioner, Hindu religions Endowments, Madra vs Sirur Math, 26 SC J (1954) 348.

[19] A.I.R. 1983, S.C. I.

Doctrine of each religion decides what forms an essential component of religion, and the court is competent to examine them. In A.S. Narayana Deekshitulu vs state of Andhra Pradesh[20] it was held that religion in the Consitution was personal to the person having faith and belief in religion. Religion, therefore, had its basis in a system of beliefs and doctrines, regarded by practioners of the religion to be conducive to their spiritual well being. Religion as interpreted was restricted to that which was essential to the religion and the non essential features were not protected, the rationale of such distinction was to be decided by the courts. Courts being custodians of constitutional interpretations decide what constitutes religion and restrictions to religion. The Supreme Court has, in the last 50 years, adjudicated on a large number of issues raised on secular matters. Especially in the post 80 phase, there has been an increase in the number of cases, due to rise in religious fundamentalisms and also because of the need for social change, which seems to restrict religious freedom.

Religion therefore lies in the belief practice dichotomy. the supreme court has interpreted belief as essential to a secular state but not practice, which is subject to limitations imposed by state for social welfare, public order, morality

[20] A.I.R. 1996, Aug.

and health and any other provision of Part III. Though, rituals and practices are as much a part of religion, as faith or belief in particular doctrines, that by itself does not make them conclusive. They can function only within the parameters of "essentially of religion" as decided by the courts.

The debate, therefore, centers around what forms an essential religious practice and also the question of distinguishing religion from the secular based on the principle of essentiality. "The Supreme Court's Constitutional oversight of these measure, of statutory control has gone through three distinct phases[21]. The three phases as has evolved will be studied now.

The first phase was marked by the Sirur Math Jaganath temple and Bombay trust cases of Justice B.K. Mukherjea. In this case the court assured all faiths that not only their beliefs but also practices and management of religious institutions would be protected. The Supreme Court rejected the Attorney Geveral's argument that non essential practices would be amenable to regulation. It nevertheless expressed that essentiality of a religion would be determined with reference to the doctrines of the religion itself. "In the first three decades it was

[21] Rajeev Dhavan "The temple at Vaisnuodevi" HINDU - Jan 18th, 1997.

primarily adjudicatory power of the state which established a view of secular state as one which propounds a charter for its religions"[22] (Galanter).

The second phase was marked by the Nathdwara temple cases, Durgah committee case, propounded that only the essential practices of a faith would be Constitutionally protected. With this began the phase of recognition of essential features of religion only. Its been argued that this phase has led to over assimilationist stand yielding to overt state control, making judges the custodians of the faith and not the Constitution. In the S.P. Mittal vs Union of India[23] case. The followers of Aurobindo were denied the status of religion. Teachings of Aurobindo were recognized to be philosophy based rather than religion based. It subscribed to a narrow definition of religion which kept the society out of it. The court therefore did not recognize it as religion, and the management of its property was to be under state control.

[22] See Upendra Baxi "Redefinition of Secularism in India, some preliminary observations in Iqbalnanain (Ed.), Jaipur, Classic Publishing House, 1995 Published, p 58.

[23] S.P. Mittal vs Union of India, A.I.R., 1983.

In another case, the Anand Margis[24] were recognized as a religious denomination within the ambit of Article 26. But performance of tandava dance by the Anand margis in procession or at public place was not protected under Article 25 and Article 26. The court believed tandava dance to be a non essential feature of the religion. While the earlier phase, protected not only religious faith but also their practices, in this phase, we see the courts rejection of a statement made by the religions denomination about the nature of its religion. Supreme Court, allowed after reviewing its judgement, a fresh appeal before the Calcutta high court, which accepted the contention that Tandava Dance is essential to Anand margis. However, they can still be restricted to maintain public order.

In Abdul Jalil vs state of U.P.[25] the court held that burial ground for muslims coming up unauthorisedly and illegally on other's land could be shifted in the larger interest of society for the maintenance of public order and was not unIslamic. It was stated in the court that Fatwa Alamgiri states Sunni law as - when a body has been buried in the ground for a long or short time, it cannot be

[24] Jagdishwaranand vs Police Commissioner, A.I.R. 1984 SC 51.

[25] AIR 1984 SC 883.

exhumed without lawful excuse. In Gulam Abbas vs state of U.P.[26] the court held that it could be in larger public interest to shift the burial grounds and this does not deprive the sunni's of their faith. The court stated that no bar to such shifting could be spelt out legally, constitutionally or in the name of religion.

The Supreme Court added a new dimension to Article 25 in the Bijoe Emanuel vs state of Kerala case[27], also known as the national anthem case. It was contended by the respondents that a person can be compelled to sing national anthem against his religious beliefs as they were duty bound under Article 51 A. The Indian Supreme Court considering a U.S. Supreme Court verdict on a similar case allowed the appellants who believed in the Jehovah faith, not to sing the national anthem, if an individual has genuine conscientious religious objection. JUSTICE Chinappa Reddy observed that there was no provision of the law which obliged anyone to sing the national anthem and it was not disrespectful to the national anthem if a person stood up respectfully when it was sung and not join singing. Jehovah faith did not allow their singing a belief expressed all over the world and this was recognized by courts.

---

[26] A.I.R 1986 SC 1017.

[27] A.I.R. 1986 SC 615.

The ban on cow slaugher issue further extends this debate on essentiality and non essentiality of religion. Operating under a "reified concept (treating an historical process characterized by diversity and change as a single objective entity) of Islam the Supreme Court judgement in State of West Bengal vs Ashutosh Lahiri[28] and in the M.H Quereshi vs State of Bihar[29] reaffirmed the established legal position that the muslims of India cannot be given the freedom to kill cows by way of qurbani as part of Id-ul-Adha (Baqr-id) celebrations. Following the precedent set by Hanif Quraishi dictum, the court reaffirmed itself that killing of cow cannot be regarded as essential religious practice of muslims. The petitioners claimed that this was enjoined in the Holy Quran, but the court contended that the verses referred to merely stipulated that people should pray and offer sacrifice. Court made a scriptural search for statement making cow sacrifice obligatory. It was found that it was optional for a Muslim to sacrifice a cow or Camel for every 7 persons or a goat for each person. (Hamilton's translation of Hidaya, Book XLIII at pg 592). It was apparent that muslims had an option. During the Mughal period cow slaughter had been prohibited taking the cognizance that majority were against it. British rule, however, lifted the ban.

---

[28] A I R 1995 SC 464.

[29] A I R 1995 Feb.

With the constitution, Article 48 directed the states to take steps for prohibiting slaughter of cows, providing an "unacknowledged recognition of hinduism belief in the sanctity of cow[30] Administrative regulations has been passed, which have been challenged in the Supreme court stating that it deprived muslims of their freedom of religion. The court observed that cow slaughter being optional there is nothing wrong in state legislations banning cow slaughter. Though explicitly the ban gave primacy to Article 48, implicit was the demand of a majority community whose religion bans cow slaughter. Some others have argued that acceptance of ban, deprived the poor employed in the slaughter houses a right to profession.

In Bengal, the slaughter control act permitted slaughter on religious lines. The Supreme court declared the act to be illegal it was believed that it was only optional for muslim and not an essential religious practice.

The judgements of the Supreme court thus reiterate that in matters of religion, one must limit oneself to the essential or integral parts of religion. This

[30] Tahir Mahmood - Pg 122, Cow, Constitution and Courts - Reflections on Indian Secularism in a Supreme Court Ruling of 1995. Religion and Low Review, vol IV: no.1, Summer 1995.

is decided on the basis whether it is considered integral by the community itself. The question that has been raised is "what if the community does not speak with a united voice[31]" a fact over looked by the courts. The court seems to endorse the view that all non-essential features of religion were amenable to state control. By its protection of certain religious and social practices, there has been a continual state interference in matters of religion. The most important part of the judgement is not the verdict but the context viz that its motive being that of protecting the religious interests of a majority community.

In the All India Imam Organization vs Union of India[32], Imams in charge of religious activities of mosques approached the court by way of writ petition under Article 32 for the enforcement of their fundamental right against exploitation by the wakf board. It was contended that under Islamic religious practice, Imams were not entitled to any emoluments as Islamic law ordains Imams to offer voluntary service. The Supreme court dictum was that the wakf boards created under the wakf Act 1954, had the duty to pay remuneration to the Imams who performed the duty of offering prayers. It was stated in the

---

[31] op cit Baird. Civil & Military Law Journal, 1992, p - 95.

[32] A.I.R. 1993, SC 2086.

judgement that in muslim countries. Imams are paid by the state. The question is can such reason be fixed in a secular state and can the court attend to all such cases of exploitation under Article 32.

This verdict also seems to restrict the right of religious communities to manage their religious affairs. It also reflects inconsistency with secularism. Political overtones of the case seems to have clouded the legal issues, where interests of protecting vested groups have overriden all other considerations.

In the third phase, identified with Justice Hansaria and Ramaswamy, the tentacles of state control were expanded further and also the reification of hindu faith. In the Sri Lakshamana Yatendrulu vs state of Andhra Pradesh[33], the validity of Andhra Pradesh Charitable and Hindu religious institutions and Endowments ACt was established whereby accounts of the math were to be maintained in the manner prescribed therein which is a secular activity. It also permitted the intervention of the legislature in the so called secular affairs of the math. The commissioner could also remove the mathadhipati. In the A.S.

[33] A.I.R. S.C., July 96.

Narayana Deekshitulu vs state of Andhra Pradesh[34] it was established that law seeking to separate essential from non essential was not unlawful but visionary. What is essential practice of religion is essentially a question or fact to be considered in the context in which the question has arisen and the evidence - factual legislative or historic - that is required in the context is to be considered and decision reached. The judgement: demarcated certain areas in which state could make laws and hence allowed the state to take over the property of Devaswom trust and manage its secular affairs.

The Supreme court verdict in the special leave petition of the Baridaran association[35], challenging the Shri Mata Vaishno Devi Act, found that the state of Jammu & Kashmir had acted within its jurisdictions in taking over the management of the temple. The judgement emphasized secularizing the matters of religion that fell outside the rituals and other practices that formed an integral part of its belief system. It recognized that services of priest formed a secular activity which could be regulated by the state. Differentiating religious service and the person who performs the service, the court said that performance of

---

[34] A.I.R. Aug. 96.

[35] State and Religion - Hindustan Times Editorial, Jan 16th 1997.

religious service according to the tents, customs, usages prevalent in place of worship is integral to religions faith and belief and it cannot be regulated by the state securing the service of the priest, who performs the ritual was not essential to the religion and, however, could be regulated by the state. Government could also abolish his customary share in the offerings to the deity. The verdict clarified the courts position on state control of religious institution. Vaishnodevi verdict closely followed the precedents set by Badrinath, Nathdwara, Jagannath temple cases.

These cases seem to breach the doctrine of separation of state and religion as endowments would now be run by government appointed Hindus irrespective of whether they belong to the denominaton or have expertise in the discourses of the endowment. Adherents of the faith whose profession is to run these endowments are denied the right to manage their own affairs. State control seems to be much more restrictive now than under the British rule, even though our constitution guarantees religious freedom[36], Rajeev Dhavan[37] has argued that

---

[36] Badar Ahmed - Religions freedom under Article 25 of constitution of India - A critical study - Civil and military law journal, April, June 1991.

[37] Rajeev Dhavan - The temple at Vaishno Devi, Hindu, January 18th, 1997.

these acts are a kind of juristic activism (which entails judicial legislation of ideas) which has resulted in the transformation in the laws regarding religious freedom into an over assimilationist mould to pave the way for an extensive control of religion and religions affairs by the state.

The debate centers around whether the state should be allowed to control religions institutions even if the religious denominations agree. On the ground of mismanagement of property etc. it has been argued that the secular state should keep itself out of interfering with religions denominations, and the maximum interference that could be allowed is supervision only[38]. Degree of state interference that can be permitted remains a debatable issue. Legislative acts have moved expeditously under the garb of Article 25(2) to reform religious traditious and practices, though not without conflict and contention. The Judiciary needs to maintain a balance between the constitutional provisions, legislative acts necessitating state intervention to bring in social reforms and concern of individuals and groups to defend his religious freedom. In a society, where traditional institutions continue to have a hold over society, social reforms to

---

[38] V. Francis - "Concept of Secular State and Administration of Religions Institutions. The Academy Law Review, Trivandrum, June-December, 1978.

bring in social change become a necessity. But the question remains as to what extent can state interference in religious affairs in a secular polity. The judiciary has evolved the doctrine of "essentiality principle i.e. it restricts religion to what is essential to the religion and attempts to secularize all other aspects. However, the debate continues as state control increases and separation of secular and religious is not maintained. Religion continues to have a stronghold over society.

Context has determined the nature of adjudicatory discourse. The context being that of a religiously plural society, where religion continues to be used for political mobilization. Taking the eg. of the judicial discourse on ban of cow slaughter explicitly is the need to promote animal husbandry (Article 48), but judgement is to be seen in context of a majority hindu community whose religion forbids the slaughter of cows, implicitly it means protecting the religious interest of a majority community. The Imam wages Act also has political overtones - protecting the vested interests.

In the post 80 phenomenon one sees an increasing tendency of state interference in religious affairs. in a period marked by increasing religions fervour. Such tendencies raises questions on the nature of secular state.

Secularization a prerequisite for social change has not taken place and religious symbols and religion are very much an aspect of our public life. Contradictions are therefore inherent in our political and legal process. Reality is of a secular order, restricting religion, only to its essentiality, but state interventionism controlled by vested interest negates the former goal.

This chapter seeks to analyse one aspect of judicial discourse on secularism i.e. basically what religion and secular mean and the line of distinction between the two realms. The next chapter shall analyse another aspect of this genre of discourses - ie religious personal laws and its implications for a secular state. This subject has increasingly become a subject of debate especially after the judicial discourse in Shah Bano controversy and its political after math, which in the 80's has made secularism a problematic category.

CHAPTER-III

UNIFORM CIVIL CODE : ITS RELEVANCE TO SECULARISM

a) Debate for Uniform Civil Code

b) Judicial Position

UNIFORM CIVIL CODE : ITS RELEVANCE TO SECULARISM

Uniform civil code constitutes an important area of focus of debate on secularism. The Judicial intervention in the Shah Bano case and the Sarla Mudgal case and the recent Ahmedabad women and allied cases have revived the debate on personal laws. The question that has assumed salience is, can a secular democracy recognise and enforce religious personal laws. In India the secular state has maintained the religious personal laws of minority communities and has thus left the whole realm of family, marriage, divorce, adoption and property rights within the fold of religious legislation. The motive being not to "offend the members of minority communities", "relying on the argument that minorities need special consideration"[1]. The recognition of community rights over that of individual rights, differential attitude to communities with respect to their personal laws and recognition of these personal laws have mired Indian secularism in controversy, naming it as pseudo secularism. However, such categorisation cannot be acceptable as Indian secularism has a specificity of its own depending on its social development and is not an indifference to religion, as in the west.

---

1 Archana Parashar - "Women & family law reform in India : U.C.C. and Gender Equality, Sage Publication, Delhi, 1997, pp. 144.

Secularism has not been defined in the Constitution and "boundaries have not been set in terms of what a secular state should do or not do"[2]. The Judiciary's role in this context, needs to be analysed. Judicial dictum have defined what secularism means in the Indian context, the principles that should form the line of demarcation between 'religious' and 'secular' already discussed in the previous chapter. The focus here shall be to extend the debate to the question of personal laws. Secularism would imply the secularisation of our laws and society, but existence of personal laws negate these very ideals. The question that has been raised is whether religious personal laws are conducive to our secular ideology. Before taking on the judicial stand we shall first very briefly look into the nature of debate that has arisen in context of the need to have a U.C.C. (Uniform Civil Code).

DEBATE FOR A UNIFORM CIVIL CODE (UCC):

Pre-independent India was marked by a diversity and multiplicity in religious personal laws, which were the result of historical accumulation of the

[2] Baird (Ed.) - Religion and law in independent India, Manohar Publications, New Delhi, 1993, pp.395-396.

practices, usages, customs, scriptural dictums, regional variations through the ancient, medieval and modern historical process[3]. It was only in the framing of our Constitution that the desirability of having a common civil code for all, irrespective of religion was expressed. Though prior to this, in 1941 the Govt. of India by a resolution appointed a Committee under Sir B.N. Rau, it was to examine the various bills to amend the Hindu Women's right to property act. In the Constituent assembly debates, the goal of a uniform civil code was seen as a step towards defining India as a nation. K.M. Munshi, Alladi Krishan Iyer exalted this idea of Indian nation, while the opposition was apprehensive of being assimilated into the majority culture and therefore, wanted protection of their minority rights. Dr. Ambedkar[4] argued to the objections raised in the assembly that in seeking to change personal law the state was encroaching upon an area protected by the right to religious freedom - "The religious conception in this country are so vast that they cover every aspect of life from birth to death. There is nothing which is not religion and if personal law is to be saved I am sure about it that in social matters we will come to a stand still .... There is nothing extraordinary in saying that we ought to strive hereafter to limit the definition of

---

[3] Vasudha Dhamgar - Towards U.C.C., Bombay, N.M. Tripathi, Pvt. Ltd. 1989.

[4] Partha Chatterjee - "Secularism & Toleration", E.P.W., July 9th, 1994.

religion in such a manner that we shall not extend it beyond beliefs and such rituals as may be connected with ceremonials which are essentially religious. It is not necessary that the sort of laws, for instance, laws relating to tenancy or laws relating to succession should be governed by religion I personally do not understand why religion should be given this vast expansive jurisdiction so as to cover the whole of life and to prevent the legislature from encroaching upon that field"[5]. In the event of opposition, uniform civil code was put in directive Principles, to act as a directive in the governance of the country, than be a fundamental right. The aim was to secularize matters of marriage, succession to property, adoption and maintenance, with equality and justice to all. Article 44 of the Directive Principles of state policy says, the state shall endeavour to secure for the citizen a Uniform Civil Code throughout the territory of India. Common law for all was thought of to develop a constitutive national culture. Its implementation would however depend on the legislative enactments than courts of law. The original motion for uniform civil code was a fundamental right, but was deliberately changed to Directive Principles by the Constituent Assembly, thus excluding the automatic enforcement by the Judiciary.

---

[5] Dr. Ambedkar - Constituent Assembly Debate, Vol. pp. 781, in Partha Chatterjee - "Secularism and Toleration", E.P.W., July 9th, 1994.

The dominance of religion in society and the strong sense of community identity present, were constrictions present in building a uniform system of law. The diversity of religions necessitated recognition of religious personal laws. The concept of religious personal law was created by colonial administration and has been maintained by independent India, since in a religiously plural society, it seems to help the ends of governance. Religion instead of being relegated to the private realm, the idioms of religion have been appropriated by the hegemonic apparatus of the state in the name of protecting cultural rights of minorities. The goal of social reforms to bring in equality in societies has been ignored, moreso, in bringing changes in personal laws. The state has assumed a non-interventionist position with respect to minority personal laws, because leaders of these communities claim their religious laws are inviolate. Moreso, since there is no demand for change from within these communities, which in itself expresses how vested interests play a dominant role in society.

Constitution seems ambiguous on the nature of religious personal laws, as arguments in favour of and against the reform are both based on provisions laid in the Constitution. Opposition to reform of personal laws is based on the freedom of conscience. It does not resolve whether the religious nature of these

laws prevents the secular state from interfering with them and whether these laws could be seen as distinct from territorial laws of the state. While support to reforms can be derived from the guarantee of citizens equality before law and equal protection of law, the Constitution also prohibits the state from discriminating against anyone on grounds interalia of religion only. Though Legislative acts can only bring in a Uniform Civil Code, judicial pronouncements needs to be looked into as the courts are the upholders of secular principles. Moreso, law is an instrument of social engineering and as society keeps changing according to needs of time, law should also be changed in practice. This requires an interpretation by the courts according to changing contexts.

JUDICIAL POSITION:

The foremost question concerning personal law is whether the right to be governed by religious personal laws is a component part of the right to freedom of conscience, and if it is, can this right have a precedence over the right to equality[6]. Judicial pronouncements have however put personal laws out of the ambit of the 'law' provided in Article 13, thus validating the social practices in

---

[6] op cit Archana Parashar, 1992, pp. 202.

the field of personal laws. In the state of Bombay vs Narasu Appa Mali[7], it was held by the Bombay High Court that personal laws do not fall within the ambit of laws in force and therefore, are not void even if they conflict with Part-III. Chief Justice Chagla, further stated that the educational development of the two communities being different, one community might be prepared to accept and work for social reform, while the other might be unprepared. The legislation brought in by the state would be in stages, the stages may be territorial or community wise. Thus the beginning period recognized that personal laws are beyond the pale of the Constitution.

Towards the end of 1979, the Supreme Court was queried in the Krishna Singh vs Mathura Ahir[8] case whether the high court was right in upholding the strict rule enjoined by the smriti writers which did not permit the entry of sudras into the order of Yati or Sanyasi. In this case, the court again reaffirmed its position of keeping personal laws out of purview of Part-III of the Constitution. This case provided an important issue in our post constitutional context viz

[7] A.I.R. 1952, BOM 84.

[8] A.I.R. 1980, SC 707.

whether a shudra can become a sanyasi and be entitled to Matadhipati[9]. Supreme Courts observation was to abide by the usage or custom of a sect. It held that religious denomination had complete autonomy in laying down rites and ceremonies which are essential. Justice Sen said - it would be convenient at the outset to deal with the view expressed by the High Court that the strict rule enjoined by the smriti writers as a result of which shudras were considered to be incapable of entering the order of sanyasi has ceased to be valid because of fundamental rights guaranteed under Part-III. However, the High Court failed to appreciate that Part-III of the Constitution does not touch upon personal laws of the parties. In applying personal laws, one cannot introduce his own concepts of modern times but should have enforced the law as derived from recognized and authoritative sources of Hindu law. The supreme court verdict thus held custom or usage to be out of the comprehension of the expression "laws in force" in Article 13.

This judgement along with the Narasu Appa Mali judgement both established the fact that tested against equality and other fundamental rights[10].

---

[9] B. Sivarmaya - Hindu Law - Annual Survey of Indian Law, 1980.

[10] Rajeev Dhavan - The Apex Court & Personal Law, HINDU - March 14th 1997.

However, a reasoned judgement as to why personal laws that violate Part III should not be declared valid is promised only in the 1952 judgement in Narasu Appa Maili case[11]. Though judicial dicta has kept personal laws out of the purview of state, constitutional assembly debates did not accede exclusive control to religion, and envisage personal laws as extraconstitutional law[12]. Ambedkar had said - no community should be under the false impression that its religious laws could remain outside the reach of the state. The state could not exclude certain practices from its control on the ground that they are religious practices because in this country every activity is governed by religion". Hence protection to personal laws negates the basis of our just and equitable social order as envisaged in our fundamental rights.

However, the contexts have changed. The debate for Uniform Civil Code in the Constituent Assembly took place in the immediate aftermath of partition and so, efforts were to consolidate the nation[13]. But the present situation is that of a threat to our secular political order. Social reform still remains a goal, but

---

[11] Archana Parashar, pp. 208.

[12] op cit. pp. 202.

[13] K.G. Kannabrian - "Whose code is it anyway", Seminar, May, 1996, pp. 18.

in concurrence with secular principles. The court, before Shah Bano felt that abrogating personal laws did not fall within its jurisdiction, scriptures and religious texts were not subject to judicial review, thus protecting the rights of religious communities to regulate their personal matters.

The Shah Bano[14] case, however, made a reversal in 1985, when the court responded to the injustices suffered by muslim women. Inevitably the role of the reformer has to be assumed by the court because it is beyond the endurance of sensitive minds to allow injustice to be suffered when it is so palpable. The view that has been held has been that reforms would be brought from within the community by the members of the community. In this case, the Supreme court held that 'no community is likely to bell the cat by making concessions on this issue. It is state which is charged with the duty to do so and unquestionably, has the legislative competence also.[15]

The Supreme Court decision that the muslim husband is liable to provide maintenance to his divorced wife after iddadat under section 125 of the criminal

[14] Mohd. Ahmed Khan vs Shah Bano, A.I.R., 1985.

[15] op cit, A.I.R., 1985, pp. 778.

Procedures Code 1973 and its plea for Uniform Civil Code has been a triumph for secularism. Religion was kept out of the purview. However, the political after math of the judgement was a blow as the court had to bow down to a polity whose interests were not in tune with the court. The Muslim Women's Protection Act 1986 was enacted, which is now, under challenge before the Supreme Court.

The Courts role of reformer asserted itself again, a decade later, in the Sarala Mudgal case of July 1995 when three Hindu men deserted their wives and converted to Islam to legitimise their bigamous marriages. Justice Kuldip Singh mandated the Government to enact a Uniform Civil Code, however, this mandate was in the nature of a recommendation[16]. Its been argued that this was an inapposite case for embarking on a sermon for Uniform Civil Code. It appears as though, to restrict hindu husbands to monogamy its imperative to alter muslim personal laws[17]. However as S.P. Sathe argues its the nature of arguments put forth for U.C.C. which is faulty.[18] Justice Kuldip Singh had called for Uniform Civil Code on the ground of strengthening national integration. Minorities should

---

[16] op cit Sarala Mudgal case.

[17] op cit K.G. Kannabrian, pp. 18.

[18] S.P. Sathe. 'U.C.C.', E.P.W, Sept 2nd, 1995.

give up their commitment to the two nation theory and accept reforms in a similar manner as the hindu, and thus promote national unity. Sathe argues that an attempt to have a common law could be counterproductive. Religious groups having their distinctive identities are not against national integration and their personal laws which are part of their religion cannot be obliterated for the sake of uniformity. Different personal laws can coexist but they should be based on uniform principles of social justice[19]. The initiative for reform as well as the creation of institutional structures of building consensus over such reform have to come from within the different communities since the different cultural communities are at varying stages of social development, the possibility for emergence of such initiative is also varied.[20]

The religious fundamentalist forces have called for the imposition of a uniform civil code based on principle of equality by a strong legislation. Such imposition shall however curtail the rights of minority cultures and assimilate them into the majority mould.

---

[19] op cit. S.P. Sathe.

[20] Imtiaz Ahmed - "Uniform Civil Code : Reform from within", E.P.W., November 11th, 1995.

The question that needs to be addressed to is not whether personal laws of different communities be changed but on the nature of change. While the hindutva forces have called for the imposition of a common law for all, others hold that reform should come from the community themselves. And if change is accepted, should it come through the legislature or judiciary[21]. Legislative enactments being inaccessible for the time, can the judiciary look for solution.

In the Ahmedabad women and allied cases, it was argued that certain enacted statutory laws and some customary personal laws violated the Constitutional principles of equality before law. It included both the statutory and non statutory provisions of personal laws. Justice Ahmadi's verdict protected personal laws from judicial reforms, even the statutory provision. The significance of the case however should not be restricted to the text only, the significance of the case should be recognized with a pending challenge to the muslim maintenance legislation of 1986.

The recommendatory nature of Judiciary, for a uniform civil code seems to be suggesting a view that personal laws are immutable. By stating that both

---

[21] Rajeev Dhavan - The Apex Court & Personal law, HINDU, March 14th, 1997.

statutory and non statutory enactments of personal laws are out of purview of fundamental rights, the judiciary seems to be following the precedents already set up by the court in the Narasu Appa Maili case in Bombay. The Judicial position of including the statutory enactments shall reflect upon the case on muslim women's protection bill, 1986 pending in the court. Law however should change according to our social needs and level of social development. But by providing protection to personal laws, an in inequitious social order seems to be protected which protagonists of personal law have been campaigning. For the development of society and secularisation U.C.C. is a practical necessity and so a national consensus needs to be present. Institutions of state legislation and Judiciary by virtue of position can bring in a change. Response however has been in the negative as the vested interests in society are opposed to it. The argument that has been put forth is that since the religious communities have not gone through the same levels of social development reforms connot be brought about in personal laws. Implicitly, lies the fact that our political process depends upon the support of traditional social groups to maintain its legitimacy. The leaders of these vested interest being opposed to reforms, state has vaccilated from its role of bringing in reforms. This issue has been highly politicized, with parties competing for the support of this or that group. The B.J.P. and Hindutva forces

have been demanding for a common law for all, the secular parties have opposed any initiative which shall be detrimental to minority interest. The proposal for uniform civil code has therefore become a contentious issue. Judicial response has also reflected this vulnerability of our institutions of governance in bringing about change in personal laws. The delay in taking up the muslim women's Protection Bill and the recent Ahmedabad women and allied cases verdict, keeping even the statutory enactments of personal laws out of the purview of Article 13, reflects the contradictions in our polity and society.

The next chapter shall analyze another aspect of this genre of discourse - that concerning separation of religion from politics. Religious symbols and instruments are increasingly being used for political mobilisation. Judicial stand on issues of politicisation of religion shall form the crux of the next chapter.

CHAPTER-IV

POLITICS AND RELIGION : THE JUDICIARY'S STAND

POLITICS AND RELIGION : THE JUDICIARY'S STAND

The project of secularism envisaged a transition from tradition to modernity whereby religion would be relegated to the private realm. Religion, however, continues to shape our social consciousness and has become a tool for political mobilisation. A "multi-theocratic"[1] view of secularism based on principle of tolerance and freedom of choice, has made cultural rights symbolic to mobilization taking place within the political realm. The chapter aims to study the Judiciary's perceptions on the link between religion and politics.

Ram Janambhoomi - Babri Masjid issue and political mobilisation on religious lines, where religion provides the platform for political parties, have questioned the legitimacy of the secular state - political parties, parliament, Judiciary. Debates have centered around whether the state, with all its variants is a neutral arena of pluralist power politics, aspiring always to be the sommun bonnum[2].

---

1 Dr. Neerja Gopal Jayal, "The Problem" - Seminar, March 97, p-12.

2 Prof. Upendra Baxi - "Redefining Secularism" in Iqbal Narain (Ed.) Secularism in India, Jaipur, Classic Publishing House, 1995, p-61.

The question posed is whether the state is the site of hegemonic practices[3] of power by the dominant or ruling elite. Elites use religion as a tool to legitimize their rule. Though explicitly state is given the secular status, implicit is the growing relation between state and religion, necessitating a review of the complexity and contradictions in law, in mediating state and religion relationships Marx and Engels held that religion as a political factor and as a subject matter of politics is significant in making people accept and obey state authority.[4] Modernisation theorists also put forth on how religion continues to mould the character of political institutions. Its a tool used by the elites to secure their legitimation.

Though religion has been continually used as a tool for mobilization, the regent view in adjudicatory discourses has been to separate religion from politics. The Keshavanand Bharati case, Minerva Mills and now the S.R. Bommai case vs Union of India have established secularism to be fundamental to the law of the

---

[3] op cit Upendra Baxi, p. 60.

[4] See Moin Shakir - Religion, State and Politics in India, New Delhi, Ajanta Publications, 1989.

lend Justice B.P. Jeevan Reddy[5] held that in matters of state religion was irrelevant. Using religion for political ends was a threat to the unity and integrity of our country. In the aftermath of the Babri Masjid demolition on 6th December 1992, a threat to democratic institutions was posed by the political tribulations. There was outbreak of communal violence at an imprecedented level. As a consequence of such widespread communal carnage, President's rule was imposed in the B.J.P. ruling states of U.P. Rajasthan, M.P., Himachal Pradesh. The imposition of President's rule in these states was assailed before different high courts. The Madhya Pradesh High Court in the Sunder Lal Patwa vs Union of India, declared President's rule as unconstitutional. Appeals were made from the M.P. high court verdict and others on this dismissal of the B.J.P. governments which was challenged and the supreme court delivered its epoch making verdict on this issue. The nine judge bench of the Supreme Court justified the dismissal of these state government, upholding the secular foundations of the Indian state. Use of religion and caste to mobilise votes in elections by any recognised political party would amount to corrupt practice. According the section 123 (3) of the Representation of People's Act use of religion in politics in prohibited.

[5] S.R. Bommai vs Union of India, A.I.R., Dec. 94.

The Court clarified that any party as organisation seeking to fight elections on the basis of religious plank, with the effect of eroding our secular principles would be guilty of following an unconstitutional course of action. This verdict gave a practical shape to the concept of secularism[6] as had been reiterated by an earlier 13 judge bench judgement as being basic to our democracy. In matters of the state religion is irrelevant. The Court held that any state government which pursues unsecular course, contrary of the Constitutional mandate, renders itself amenable to action under Article 356 the Constitution. The judges held that political parties should not lose their functional relevance in their endeavour to capture or share state power. They being integral to the governance of our democratic society, should inhere in them the principles of secularism. The Constitutional scheme neither recognises nor permits mixing religion with politics.

The Supreme Court judgements also throw light on the nature of Indian secularism. Academic and political discourses on secularism have been probing into the various connotation of secularism in the Indian context. While some have argued that secularism is antireligious, some others see it as non religious,

---

[6] Bal Krishna - "Judgement Against Fundamentalism", Civil and Military Law Journal, January, March 1994, p. 27.

religion being relegated to the private realm. Yet another version derived its legitimacy from Sarva Dharma Sambhava. The supreme court verdict has held that religion is a matter of one's personal belief and mode of worship[7] and secularism operates on the temporal plane of the state activity in dealing with people professing different religious faiths[8]. Secularism is, therefore, not the opposite of religious devoutness State's tolerance of religion does not make it theocratic.

On the basis of the material laid before the court B.J.P. party manifesto, the court inferred that the intentions of the party seemed to be coloured on lines of religion. The party seemed to be committed to "build Sri Ram Mandir at Janamasthami by relocating the superimposed Babri Masjid structure"[9]. The chief ministers and ministers of some of the state belonged to the R.S.S. which was a banned organisation at the relevant time[10]. Moreso, the public sendoff to

---

[7] Ashgar Ali Engineer - Boost for Secularism, Hindu, April 5th, 1994.

[8] S.R. Bommai vs Union of India, A.I.R., December 1994.

[9] S.R. Bommai vs Union of India, A.I.R., Dec. 1994.

[10] Soli J. Sarabjee, An Active Judiciary, Verdict on Articles 356 and Secularism, T.O.I., March 23rd, 1994.

kar sevaks and their welcome on their return after the destruction and the atrocities against muslims. Reflecting on this, the supreme court criticised the use of religion for political mobilisation. The Supreme Court also observed that a communal majority is not a political majority, in politics it is majority which is made and unmade"[11]. While communal majority is unalterable in its ethics and attitude a political party which seeks to secure power through its religious policy disintegrates people and disrupts the social structure[12]. Such practices were anathema to the Constitutional culture of India and therefore the dismissals of govt. were legitimate but only if they have prior gubernatorial recommendations and agreement of both houses. This would however be finally subject to judicial review.

In another case of Dr. Ramesh Yeshwant Prabhoo vs Prabhakar K. Khuntes[13], the supreme court once again emphasised on the secular character of a democratic nation. In this case, the court held that where during the election campaign appeal was made by the political party on the ground of religion and the

[11] op cit S.R. Bommai case.

[12] op cit S.R. Bommai case.

[13] Ramesh Yeshwant Prabhoo vs Prabhakar K. Khunta, A.I.R., SC, 1995, December.

election speech could be construed as an appeal to promote for a candidate on the ground of his being a Hindu or to refrain from voting for a candidate on the grounds of his not being a Hindu amount to corrupt practices, under the Representation of People's Act, 1951. Thus the election based on such religious appeals was struck down. In this judgement court followed the precedent set in Ziyanddin Bukhari vs Mehra case, 1975. Here the court upheld the decision of the high court setting aside the election of Bukhari to the Maharastra state assembly on the ground that he had asked muslim voters to vote for him as he was a muslim.

The court spelt out that in the S.R. Bommai case, it was recognised that secularism reflected state neutrality to all religious and this would be violated if religion is used for political ends. Thus, appealing to electorate on grounds of religion negates secular democracy was a corrupt practice under section 123(3) and 123(3A) of the Representation of People's Act. 1951[14]. In the unseating of

[14] Section 123(3) declares as corrupt practice the appeal by a candidate or his agent, or by any other person with the consent of the candidate or election agent, to vote or refrain from voting for any person on the ground of his religion, race, caste, community or language, or the use of or appeal to religious symbols, or the use of or appeal to, national symbols such as the national flag or the national emblem for the furtherance of the prospects of the election of that candidate or for prejudicially affecting the election of any candidate.

Mr. Ramesh Yeshwant Prabhoo, the court rejected as unreasonable the appellant's contention that only a direct appeal on religious lines could attract prohibition contemplated under R.P.A. The substance of the speech and the manner in which it is understood by audience determined its nature.

The Supreme Court (three judge bench) held that - Mr. Bal Thackery's speech in the election campaign in 1990 asking hindu voter to vote for Ramesh Prabhu, a hindu also containing derogatory remarks against muslims amounted to corrupt practice. Secondly, Mr. Suryakant Mahadik's comment on the necessity to vote for Shiv Sena for the protection of 'Hindutva' was a corrupt practice because it was an appeal by a Hindu to a congregation of Hindu devotees in a Hindu temple during a hindu religious festival with the emphasis on Hindu religion for giving votes to Hindu candidate. Supreme Court believed 'Hindutva' to be understood as way of life or a state of mind and it is not to be equated with

---

Section 123(3A) declares as corrupt practice the promotion of feelings of enmity as hatred between different classes on the grounds of religion, race, caste, by the candidate or his agent or any other person with the consent of candidate or his election agent.

Section 8A disqualifies person found guilty of corrupt practice from exercising his electoral right upto 6 years section 29A requires political parties to swear allegiance to the principles of secularism and democracy which is necessary for registration and allotment of symbols.

or understood as religious hindu fundamentalism. Quoting Maulana Wahiduddin Khan, the court observed 'Hindutva is used and understood as a synonym of Indianisation that is development of uniform culture by obliterating the difference between all cultures coexisting in the country.

Its argued[15] that by giving such a broad meaning to hindutava the court has overlooked the special meaning it connotes in the philosophy of Savarkar and Golwalkar. Hindutva as construed by Sarvarkar refers to a combined history of religious communities, which regard hindustan as their pitrubhoomi and punyabhoomi. He argues that Muslims, Christians and Parsis are not part of Hindutva, as their respective holylands are outside its confines. Common rashtra common jati, common sanskriti are the three principles of hindutva. Savarkar's monolithic construct of hindutva was directly counterpoed not only to British imperialism but also to muslim community as a whole. It explodes the myth of hindu tolerance of other religious institutions[16].

---

[15] Anil Nauriya - The Hindutva Judgement, E.P.W., Jan. 6th, 1996.

[16] Arun Patnaik and K.S.R.V. Chalan - "The Ideology and Politics of Hindutva" in T.V. Satyamurthy (Ed.) - Region, Religion, Caste, Gender and Culture in Contemporary India, Vol. 3, Oxford University Press, 1996, Edition, p. 266.

Moreso, seeing hindutva as development of uniform culture by obliterating the differences between all the cultures coexisting, negates the Constitutional principle of giving each culture its own dignity. The court also seems oblivious of the context in which the term hindutva was used (Article 29).

In Manohar Joshi's case the supreme court ruled that his promise to establish the first hindu state in Maharashtra did not amount to appealing for votes in the name of religion. "In our opinion, a mere statement that the first hindu state will be established in Maharashtra is by itself not an appeal for votes on the ground of his religion but the expression at best of such a hope"[17]. Its been argued that Mr. Joshi's promise to establish a Hindu state went against the secular parameters of state neutrality. This statement is ultravires of the Constitution because no Hindu state can fulfill the requirement of state neutrality on religion. Though the court rightly said it is a despicable statement and hence expressed disdain, it did not hold it to be a corrupt practice. The court failed to see the impact such statement would have in the audience - especially when the statement was made in context of election campaign. Similar trend can also be visualised

---

[17] op cit. Anil Nauriya, E.P.W, January 6th, 1996.

in the Ram Kapse vs H.R. singh case[18], where the three judge bench dismissed the high court's contention that B.J.P. M.P. Ram Kapse was liable to loose his seat because he was present at a meeting where Sadhavi Rithambara made an inflammatory speech on his behalf. The Supreme Court, however, reinstated Mr. Kapse on the ground that he was opposed to the rhetorical appeal made in the public meeting and was not a part of it. The judgement seems to leave many unanswered question - is it possible for Mr. Kapse to be unaware and opposed to an election meeting held in his constituency - especially a meeting widely publicized ?

These judgements - Manohar Joshi's & Ram Kapse's - militates against the Representation of People's Act "Politicisation of religion" is infact getting promoted by such oblivious observations which do not correspond with our social reality.

What has been overlooked is the gap between theory and practice, the gap relates to what these parties promote and practice[19]. Anil Nauriya[20] has argued

---

[18] Ram Kapse vs H.R. Singh Case, A.I.R., SC, December 1995.

[19] O Vidya Subramaniam - Redefining Secularism, Times of India, December 22nd, 1995.

that Supreme Court's interpretations of Hindutva as Indianisation of culture and upholding Manohar Joshi's claim reflects a growing tendency towards appropriation of the B.J.P. - R.S.S. conceptual framework by state institution. Though such arguments may not be true as the other judgements of Judiciary shows its efforts in promoting a secular ideals, it seems to reflect a non confrontational attitude. The 80's phase of Judiciary being a Judge centered phase of activism - a question seems to arise, whose vested interests are they oriented to? Are Judicial observations consistent with redistributive justice championed by secularist and socialist ideals. One trend that seems to emerge is its contradictory nature in checking politicisation of religion. In principle that it inheres the basis is profound, but such profundity gets lost in interpreting the applicability of principles. State appropriation of religious symbols continues and judicial efforts have not paid much. Mohd. Aslam vs Bhurye's[21] case reaffirmed supreme court's judgements in Manohar Joshi case.

Another issue which has seen much political tribulations has been the Babri Masjid issue - an event which has questioned the very premise of our secular

---

[20] op cit. Anil Nauriya, 1996.

[21] Mohd. Aslam vs Bhurye A.V.R. SC 1996.

state. Ashish Nandy and T.N. Madan, infact call the secular state - pseudo secular which models itself according to alien western culture. Though such formulations are fallacious, but it does necessitate us to look into the secular discourse. In societal level this issue has polarized religious and cultural identification of groups and communities.

Destruction of Babri Masjid and inability of forces of state & judiciary to prevent the destruction and the communal carnage that followed reflects the weakness of our secular state. The acquisition of the site of Babri Masjid and the contempt proceeding thereafter seeking to prevent the demolition by the hindutva parties, emanated as a P.I.L. The earliest of the reported proceeding of the court on the Babri Masjid demolition issue was the Acchan Rizvi vs State of U.P.[22]. The demolition of the masjid reflected the failure on the part of institutions to protect the religious rights of minority communities. The matter was taken up for hearing by a division bench comprising of Justices Venkatachaliah and G.N. Ray on 20th Nov. 1992. The matter was adjourned to 27th Nov. 1992.

---

[22] Acchan Rizvi vs State of U.P., A.I.R., 1994, S.C. 646.

U.P. Govt. filed an undertaking on 27th Nov. assuring the court that "No construction machinery or construction material will move into the acquired land and no construction activity will take place". The court was warned by counsels of P.I.L for placing undue reliance on assurance of state govt. But the court had its faith on assurances from the state govt. which of course did not keep its promise. Public interest litigation depends on social and political predilections and view of judges hearing and deciding the case. The court has however, learnt a lesson from this case as reflected in the other cases. B.J.P.'s party manifesto based on Ayodhya plank and its gaining of popularity as reflected in the elections further deepens the crisis which reflects the weak nature of our secular state. In the aftermath of Babri Masjid demolition on 6th Dec., 1992 a threat to democratic institutions was posed by the political ferment.

The Supreme Court stood by the position in Oct. 1994 that where Ram was born or where a temple existed, where a mosque stood until December 1992, it argued were not judicial questions. It said however, Judiciary would certainly inquire into the property issues involved in the Ismail Faruqui vs Union of India[23]. The Supreme Court pulled itself out of a question that could have

[23] Ismail Faruqui vs Union of India, A.I.R., S.C., October 1994.

compromised its jurisprudential integrity. But it affirmed that religious beliefs cannot take away the legal oversight over secular questions like ownership of religious property. Reflects a high watermark in judicial activism upholding secular values and through it has strengthened the foundation of democratic institution.

The Supreme Court tried to keep itself out from the political motivation of the ruling govt. eg. Ismail Faruqui vs Union of India, where the supreme court only decided the Constitutionality of the act in question and refused to give its advisory opinion under Article 143 sought by the President of India regarding the determination of the question whether there was a Ram temple or Masjid at the disputed site at Ayodhya. Supreme Court refused the advisory opinion on three grounds.

i) Reference favoured one religion community and disfavours another and the purpose of reference was opposed to secularism and thus unconstitutional.

ii) From the terms of the reference it was clear that the govt. wanted to use the court's opinion as a springboard for negotiation.

iii) Principal protagonists were not appearing before the court and the central govt. was not ready to lead any evidences.

Hence the Court found itself to be ill equipped.

Judiciary has intervened against communal politics but such cases have been an exception to the general practice of religious interpretations of law in India. The initiative of certain judges have been significant in this regard. However, the larger question of politicisation of religion continues. Supreme Court being a part of the political process is also influenced by the rising trend of religiosity in politics. Ostentatiously, the impression is that of a state based on principles of humanity and rationality, implicit is the vested interest of a polity holding power on religious lines. The ineffectiveness of the state and the judiciary to protect Babri Masjid, delay in any kind of Judicial verdict on this issue reflects the dynamics of our polity. The Hindutva judgement, interpreting Hindutva as a way of life has been a watershed judgement.

The judiciary though has tried to separate religion from the political realm, its stand has been contradictory. It has been reactive in nature than initiative and

has also shown contradictory trends. This chapter, along with the previous two chapters dealt with various issue on judicial perceptions on secularism. The next chapter, which shall be the concluding chapter, will delve into the broader implications of these judgements, dilating on the nature of judiciary, within a broader framework of Indian politics.

CONCLUDING INFERENCES

CONCLUDING INFERENCES

The resuscitation of religious fervour in the 80's and 90's have called for a broader introspection of our national ideals. The categories of 'religion' and 'secular' have become the arena of political conflict. National consensus which served as the underlying thread of our secular fabric has been replaced by a politics of confrontation. This is the politics of transition of a nation in the throes of a persisting and pervasive flux where social contradictions have emerged. Though the state embarked on a process of modernization, traditional forces have continued to hold their sway over politics. Religious idioms are being continually used and the state apparatus have failed to penetrate into the traditional structures of society. Our modernization and development goals have become entangled in resolving the growing conflict between religious cultural groups based on primordial loyalties. The legal institutions operate in a milieu of this growing crisis, deepened by the increasing violence and vulnerability of state showing in the inability to grapple with the contradictions. Religion vs the state seems to be the practical reality of Indian state, the institutional arrangement for resolving this conflict being the judiciary. The Judiciary being an integral component of the political system, is therefore, not above the practical realities present.

The focus of this concluding chapter which is of the nature of a conclusion is to analyse the nature of Judicial discourse prevailing at present. As a researcher, the task remains incomplete without an introspection of the questions raised in the context of societal needs. A mere study of empirical reality cannot accomplish the set goals - practical realities need to be seen with respect to theoretical considerations, which would provide the perspective. Therefore it is pertinent to contextualise the discourses on secularism within a broader perspective of Indian state.

NATURE OF INDIAN STATE:

India is a muticultural and multiethnic society marked by a plurality of identities. Diversities and heterogeneity are however, never the cause for social strain, although potential is always there. The inability to satisfy human needs can be a viable cause for growing crisis which has taken shape in the numerous social groups which have emerged in our political scenario, rooted in primordial identities (religion being one of them). Kothari[1] says its a crisis of legitimacy of the Indian state, having ceased to fulfill the roles assigned to it as an instrument

---

[1] Rajni Kothari - Politics in India, New Delhi, Orient Longman, 1991.

of social change. State autonomy is increasingly being eroded by communal interests. Paul Brass[2] terms the crisis as a systemic crisis produced by the centralising drives of a national leadership, in a culturally diverse and socially fragmented agrarian society. The crisis has manifested in the erosion of our political organization and heightened ethnic religious conflicts. Entry of new social groups into political processes have intensified the conflict, but this conflict is not a participation crisis, as Huntington[3] has theorized, but rather is perpetrated by the national leadership.

The interventionist nature of Indian state, has also led to a perpetration of the crisis. The very nature of our development process marked by the interventionist nature of state, has politicized all forms of social cleavages - traditional as well as modern ones. Through a policy of protecting minority interests in some cases, or in some, supporting the 'hindu mass base', the state has deepened the crisis further. Though secularism has been adopted as an ideal for national consolidation but religious institutions, actions and consciousness have

---

[2] Paul Brass - The Politics of India since Independence, New Delhi, Cambridge University Press, 1994.

[3] Huntington, Samuel P. - Political Order in Changing Societies, New Haven, Yale University Press, 1968.

not lost their social significance and religious idioms are very much a part of the hegemonic apparatuses of the state. Marxist perspectives have analysed the practical reality through a broader struggle for liberation of oppressed masses. Randhir Singh[4] argues that communalism is not an isolated problem but rather a part of the larger problem facing society today. The struggle against it must be a part of people's broader struggle against their developmental strategies, politics, ideology and culture. It is necessary to separate the elements of faith and truth from abetting legitimation of exploitation.

The struggle for secularism needs to be fought at various levels in society, inherent in the social contradictions. While the state in India seems to be an over arching reality, society has many rules, codes and traditions, determined by religion. Religion, is an all pervading all encompassing reality in India. Infact, in our social milieu. Religion has psychological functions and rejection of religion without satisfying the needs of men could lead to a crisis. Social contradictions have risen and the state has become weak in resolving the crisis, thus weakening the ideological and legitimation base of the state. Bhambhri

---

[4] Singh Randhir - Of Marxism and Indian Politics, Delhi, Ajanta Publication, 1990.

argues that both the exploited and exploiting class take resort in religion, exploited to escape from the growing misery and deprivation and exploited to legitimize the exploitation in society[5]. Within the ruling classes secularists and communalists are contending and contesting to push the Indian state towards an ideology legitimized by religion. Religion, thus makes people accept and obey state authorities - its symbols being used by the elites to perpetuate control over the political system. Though secularism has formally separated religion from politics, state continues its control, though in a subtle manner, allowing religious symbols to maintain their primacy in society. Neither our Constitution nor the conventions of our political process have clarified the principles of secularism. What appeared as a national consensus at the time of independence, in the aftermath of partition and communal holocaust, now seems to be a contestable concept. The adjudicatory realm, has over the years been responding to this growing conflict. The 80's and 90's, with its marked communal violence, have increased number of cases approaching the Judiciary.

---

[5] Bhambhri C.P. - Indian Politics since Independence, New Delhi, Shipra Publication, 1994.

ANALYSING THE JUDICIARY:

The importance of the Judiciary resolving the conflict is in the area of determining the principles and not policy. Principles reflect on the entrenched rights of individuals which must be maintained. Constitution has left this area of determining rights to the courts and policy making to the legislature. Moreover, the Constitution being an organic entity than a mechanical body, laws need to be consistent with social change. Discrepancies arise in society when laws do not comply to the social needs and hence a constant interpretation by the courts is necessary to keep pace with change. Conflicts have also emerged because of the incapacities of the other institutions of governance to respond to these felt needs of people. Judiciary operates within this mechanism of growing expectations of people and the crisis in society owing to weakness of state to grapple with the contradictions. In the last two decades especially, the Judiciary has been passing through an activist phase, entering more into the political realm and responding to grievances of the people. Large number of cases have come to the Judiciary on areas of conflict in society - on religious and other issues. Cases of state intervention have been challenged in the courts of law, on the principle of

violating the right to freedom to profess and practice religion. Separation of religion from the secular has been the focus of the debate that has arisen.

Judicial response to these larger issues have been in relation to the nature of social change that has been going on. Infact, in the judicial pronouncements more than the textual nature of the case, salience should be accorded to the context of the case. The initial phases of the Judiciary sees a phase when marked autonomy was given to religious beliefs and practices but the urge for social reform and equitable social order, necessitated restricting the religious beliefs and practices. The latter phase thus allows an interventionist role of state, to bring in reforms in religious practices. Judiciary evolved a doctrine of 'essentiality' of religion on the basis of which religious beliefs and practices would be protected, while the non essential practices would be secularized. This principle is, however, contradictory in its very nature. Judicial response to such conflicts have been determined by the nature of secular policies followed by the state. Context usually determined the nature of the case. While extensive reforms were carried out with respect to hindu religion, minority religious interests were protected. Inherent in this also is the contradiction of our religious nature. Taking for example the ban on cow slaughter act. Explicitly, the text of the judgement is for

promoting animal husbandry and thus protecting the milch cattle. It also looked into the essentiality of the religious doctrine of Islam stating that cow slaughter not being an essential religious practice can be curtailed. It shall not be restricted to the private realm of an individual's religious practice but rather banned to implement the directive principles (Article 48). Implicit, to this judgement is the social milieu in which a large majority of population worship the cow, considered sacred. Political overtones of this case cannot be neglected on the principle of essentiality. By supporting the ban on cow slaughter Judiciary seems to be upholding the religious symbols of Hinduism.

As a contradictory phenomenon can be seen the personal laws and reform of Hindu religious institutions. State embarked on the role of social reformer to bring in an equitable social order, thus necessitating changes in religions. However, change has been brought about only in Hindu religious institution and not with respect to minority institution on the pretext of protecting the cultural rights of minorities. But such an initiative seems to deny the members of this community the fundamental right to equality. The logic underlying the legislative and judicial policies have been that the minority communities have not attained the levels of social development requisite for change. Fifty years have passed

since independence, social needs have change, but legal institutions hesitate to adapt themselves more because of the politicisation of issues involved. Implicitly it is policy of protecting minority interest where the vested interests of the leaders of these religious communities are against reform. Reform has not been brought about with regard to personal laws, keeping it out of the purview of Article 13. The Judicial pronouncements have suggested the need to have a uniform civil code, but these have been only recommendatory in nature. The Judgements on personal laws reflects the highly politicized nature of the issue, which seems to prohibit any initiative to be taken in this regard. The Sarla Mudgal case and Ahmedabad women's and allied cases both raised the need for uniform civil code. While both recommended the need for a uniform civil code, nothing in the form of initiative was taken by the courts. Infact, it further clarified that both statutory and non statutory provisions of personal law would be out of the purview of Article 13. This judgement will definitely have implications for the Muslim women's protection bill to be taken up by the courts, a case which has been pending in the courts for the last ten years.

Personal laws have been an arena of contention in our polity where political parties are trying to protect their own interests. The Shah Bano

judgement and the events that followed leading to the Parliament enacting the Muslim Women's Protection Bill shows the nature of our political process which has been following a protectionist attitude towards religious issues. On one side, is the B.J.P. which has been calling for a common law for all implying the imposition of a majority culture on all on grounds of national integration, on the other, we have the Congress and the other secular parties who have been opposed to any change, primarily because of their vote bank politics and so do not want to antagonize the minority communities. Religious sentiments have become a contentious issue in politics and the judicial pronouncements also reflect this attitude. It will be interesting to compare these dynamics of our judicial pronouncements, with recent U.S. Supreme Court decision, striking down the Religious Freedom Restoration Act, 1993, which granted religious liberties to minorities. The U.S. Supreme Court declared unconstitutional a federal law that protects religious practices from Governmental interference. The Congress had passed a law allowing Sikhs to wear turbans and karpans and Muslim women to wear the hijab which the court declared unconstitutional as it was the court's prerogative to define the constitutional protection of religion. Comparing it with

---

the nature of our judicial perceptions, we can clearly see the lacunae of our system, where political under-currents determine the nature of our judgements. The Judicial pronouncements have rather provided the institutional support to our political process in this game of tight rope dancing. Precedents from the U.S. Court and other courts have been followed only where it suits the nature of our political bargaining.

The Imam Wages Act reflects this trend, where the Supreme Court brought in change in the provisions of the wakf board. The provision of the waqf board stipulate that the performance of the function of Imam is a religious duty and so no emoluments will be granted to the Imams. However, in most Islamic countries Imams are provided with certain emoluments - which formed the rationale behind Supreme Court judgement. The social and political context shows the control of religious leaders in our political process, and the Judiciary has gone beyond the scriptures and texts of religions to support the case of Imams. In most of the judgements the court has followed the precedents set by itself or precedents set elsewhere for eg. the U.S. Supreme Court's decision on singing of national anthem by the followers of Jehovah faith, courts decision to grant Imam wages on the basis of followings in Islamic countries. Though precedents formed an

important guiding principle, the calculus of political interest cannot be ignored.

The rising communal fervour owing to the demolition of Babri Masjid, shows the weak secular character of our political process and the judicial set up. The destruction of Babri Masjid on December 6th 1992, marked a watershed in Indian politics where the protectors of legality and the Constitution remained mere spectators. Over the years, developments have facilitated the demolition of the mosque, starting from the opening of the disputed structure for worship to installation of idols. The judiciary has been a mute witness to this, its actions being of reactive nature than initiative. It has adopted a non confrontationist stand. This has been an issue highly politicized, where the two major religious communities are entangled in a bitter communal fight. The ramifications of this issue have penetrated to all levels of our society. Political parties are in a competition on religious lines. B.J.P.'s rise to power on lines of hindutva politics and Advani's repeated assertion of building a Ram temple at Ayodhya which has formed their party manifesto, and the weakness of our secular parties to confront it, shows the deep seated link which religion and politics share. Masjid-Mandir issue have been the bastion of our electoral politics.

The Indian state, which is in the process of formation faces crisis because of the failure of our institutions to bring in any solution. Religion has been constantly used for political ends and this aspect of our political process extends to all institutions of the state. Judiciary's avoidance of resolving the Ayodhya dispute, reflects the contentions of the case. In the Hindutva judgement, judicial interpretation of hindutva as a way of life ignoring the implications what the party in question implied in its usage of hindutva, reflects the contradiction present.

After looking into the various judgements, one can also see another strong phenomenon in the Indian judicial system i.e. a strong link between the individual judges, their social philosophy and the predilections. For examble Justice P. N. Bhagwati and Justice Krishna Iyer have always been associated with judicial activism, espousing the cause of the poor. Justice Ramaswamy and Justice Hansaria's dealing of judgements seem to reflect a support for interventionist state, as his judgements have allowed state control of religious institutions, and a reification of hindu faith. Justice Fazl Ali's judgement in Shah Bano case showed his concern for the muslim women, who have to suffer injustices because of the inequities present in personal laws. Justice Kuldip Nayar, though also associated with propagation of Uniform Civil Code, his approach to the problem

has been on a different platform - that of national integration.

Judiciary, thus, has vacillated in its response to questions on secularism. While the S.R. Bommai case came up with a broad definition of secularism, in practice it seems to have moved out from the principles it set. The response of judiciary - being indifference, concessions or repression - reflects that contradictions are present in the judicial dictums, which represent a mixed bag of responses.

These questions further raise doubts on the nature of Indian secularism. To attribute state neutrality, as the hindutva forces claim would not be a useful category as in the context of our social inequalities, uniformity is not a viable option nor can it be a reaffirmation of our traditional practices as the post modernists have claimed. Secularism should rather be a part of a movement against removal of all forms of social dominations in the context of our social specificities. The ideology should be compatible with the need for social reform, in our inequitous social order and also maintaining the plural social base. It shall be a wider struggle based on rationalism and humanity where religion would form a part of individual's private realm. Religious authority in India has not been

challenged rather our political process drew upon it and its institutions. Judicial perceptions are not mechanical instruments, but envisage use of judicial discretion which again is based on our socio-political setting. It is this whole perspective which influences our secular discourse.

CONSOLIDATED BIBLOGRAPHY

CONSOLIDATED BIBLOGRAPHY

Ahmadi A.M. - "The Problems and Prospects of Indian Democracy" in Dr. Zakir Husain Memorial Lecture, February 15th, 1996, Mimeographed.

Ahmed Badar - "Religious Freedom under Article 25 of Constitution of India", A Critical Study, Civil and Military Law Journal, April-June 1991.

Ahmed Imtiaz - "Personal Laws : Promoting Reform from Within", E.P.W., November 11, 1995.

Ahmed Badar - "Freedom of Religion and Judicial Trend in India", Civil and Military Law Journal, January-March 1993.

Bachal, V.M. - "Secularism and Law", Civil and Military Law Journal, January-March, 1987.

Baird Robert D. - "Reigion versus Secular in India", Civil and Military Law Journal, April-June, 1992.

Baird, Robert D. - "Religion and the Secular" in B.L. Smith (Ed.) Religion and Social conflicts in South Asia, Leiden, E.J. Brill, 1976.

Baird, Robert D. (Ed.) - Religion and Law in Independent India, New Delhi, Manohar, 1993.

Barlas Asma - Democracy, Nationalism and Communalism: The Colonial Legacy in South Asia, Westview Press, 1995.

Basu, Tapan et al. - Khaki Shorts and Saffron Flags, New Delhi, Orient Longman, 1993.

Baxi, Upendra - The Indian Supreme Court and Politics, Lucknow Eastern Book Co., 1985.

Baxi Upendra - Courage, Craft and Contention : The Indian Supreme Court in the 80's, Bombay, N.M. Tripathi Pvt. Ltd., 1985.

Bhambhri C.P. - Indian Politics since Independence, New Delhi, Shipra Publications, 1994.

Bhambhri C.P. - The Indian State : 50 Years, New Delhi, Shipra Publications, 1997.

Bhambri, C.P. - Political Process in India, New Delhi, Shipra Publication, 199.

Bhargava, Rajeev - "Giving Secularism its Due", E.P.W., 9th July, 1994.

Brass Paul - The Politics of India since Independence, New Delhi, Cambridge University Press, 1994.

Chakravarty Bidyut - Secularism and Indian Polity, New Delhi, Segment Book Distributors, 1990.

Chandra, Bipin - Ideology and Politics in Modern India, Delhi, Har Anand Publications, 1994.

Chatterjee, Partha - "Secularism and Toleration", Economic and Political Weekly, July 9th, 1994.

Chatterjee, P.C. - Civil Code, Uniform or Common, pp. 53-55.

Chaube, N.P. (Ed.) - Indian Society at the Turn of 20th Centuary, Indian Acadmey of Social Sciences, 1988.

Das Veena (Ed.) - Mirrors of Violence : Communities, Riots and Survivors in South India, New Delhi, Oxford University Press, 1990.

Das, A.N.H. - Is Judiciary Encroaching on Executive Territory - HINDU, January 30th, 1996.

Dhamgar Vasudha - Towards U.C.C., Bombay, N.M. Tripathi Pvt. Ltd., 1989.

Dhavan Rajeev - The Temple at Vaishno Devi, HINDU, January 18th, 1997.

Dhavan, Rajeev - The Apex Court and Personal Law, HINDU, March 14th, 1997.

Engineer Irfan - "Religion State and Secularism", E.P.W., October 28th, 1995.

Engineer, Ashgar Ali - Boost for Secularism, HINDU, April 1994.

Engineer, Ashgar Ali - Islam, Hindutva and Pluralism, HINDU, September 5th 1996.

Farooqui Mohiuddin Ahmad and Siddiqui Jaseem - "Delinking Religon from Politics", Civil and Military Law Journal, January - March 1994.

Francis V. - "Concept of Secular State and Administration of Religious Institutions", The Academy Law Review Centre for Advanced Legal Studies, Trivandrum, June-Dec 1978.

Gajendragadkar, P.B. - Secularism, its Implications for Law and Life in India, Indian Law Institute, 1966 (Ed.).

Gopal, S. - "Nehru & Minorities", E.P.W., Spl. no. Nov. 1988.

Gupta, Kanchan - Towards an Equal Social Order, pp.19-22, Seminar May, 1996

Haksar, Nandita - The Political Issues, pp.59-61. Seminar, May. 1996

Heredia C. Rudolf and Mathias Edward (Ed.) - Secularism and Liberation, Indian Social Institute Publication, 1995.

Huntington Samuel P. - Political Order in Changing Societies, New Havem, Yale University Press, 1968.

Jayal Neerja Gopal - The Problem, Seminar, March 1997.

Joshi, P.C. - "Secularism and Religiosity of the oppressed: Some Reflectons", Man and Development, Chandigarh, Volume 9, no. 4, December 1987.

Kannabiran, K.G. - Whose Code is it Anyway, pp. 15-18, Seminar. May 1996

Khan, Rasheeuddin - Bewildered India : Identity, Pluralism, Discord, New Delhi, Har Anand Publications, 1994.

Khan, S. - "Towards a Marxist Understanding of Secularism", E.P.W., 7th March, 1987.

Kohli, Atul - Democray & Discontent: India's Growing Crisis of Governability, Cambridge University Press, 1991,

Kothari Rajni - Politics in India, New Delhi, Orient Longman, 1991.

Krishna Bal - "Judgement Against Fundamentalism", Civil and Military Law Journal, January - March, 1994.

Krishna Bal - S.C. defines ambit of State's Role in Religion, Hindustan Times, 20th Jan. 1997.

Lateef, Shahida - The Communal Agenda, pp.23-28, Seminar. May. 1996

Latifi, Danial - "Muslim Law", Annual Survey of Indian Law, Vol. XXI, 1985.

Madan, T.N. - "Secularism in its Place", Journal of Asian Studies, November, 1987.

Mahmood Tahir - "Law, Constitution and Courts Reflections on Indian Secularism in a S.C. Ruling of 1995", Religion and Law Review Summer, 1995.

Martin and Scott - Fundamentalism and the State - III, Chicago and London, The University of Chicago Press, 1993.

Mendelsohn Oliver and Baxi Upendra - The Rights of Subordinated Peoples, Delhi, Oxford University Press, 1994.

Nandy, Ashis - "An Anti-Secular Manifesto", Seminar, October, 1985, p.24.

Narain, Iqbal (Ed.) - Secularism in India, Jaipur, Classic Publishing House, 1995.

Nauriya Anil - "The Hindutva Judgements : A Warning Signal", E.P.W., January 6th, 1996.

Nauriya, Anil - "Relation between State and Religion", E.P.W., February 25th 1989.

Outhwaite William and Bottomore Tom (Ed.) - Blackwell's Dictionary of 20th Century Social Thought, U.K., Blackwell Publishers.

Pannikar K.N. - Communalism in India - A Perspective for Intervention, People's Publishing House, 1994.

Parashar Archana - Women and Family Law Reforms in India Uniform Civil Code and Gender Equality, Sage Publications, Delhi, 1992.

Reddy, P. Ram - Hindutva Verdict Needs Reconsideration by Court, HINDU, February 20, 1996.

Rudolph and Rudolph - Modernity of Tradition : Political Development in India, Delhi, Orient Longmans Ltd., 1969, p-8.

Rupesinghe and Tishkov V.A. (Ed.) - Ethnicity and Power in Contemporary World, United Nations University Press, 1996.

Sabine - A History of Political Theory, Revised by Thomas L. Thomson, New Delhi, Oxford and IBH Publishing Co. Pvt. Ltd., 4th Edition, 1973.

Sankdher, M.M. (Ed.) - Secularism in India, Deep and Deep Publications, 1992.

Sathe S.P. - "Uniform Civil Code", E.P.W., September 2nd, 1995.

Sathe V.P. - "Secularism : Law and Constitution of India", New Quest, Novemeber-December, 1978.

Satyamurthy, T.V. (Ed.) - Region, Religion, Caste, Gender and Culture in Contemporary India, Volume-3, New Delhi, Oxford University Press, 1996.

Seminar, May 1996 - A Question of Rights.

Shakir Monin - Religion, State and Politics in India, New Delhi, Ajanta Publications, 1989.

Sharma, G.S. - *Secularism : its Implications for Law and Life in India*, Bombay, N.M. Tripathi Pvt. Ltd., 1966.

Shetty, K.P. Krishna - Judicial Activism is Necessary in a Democrary, *HINDU*, December 10th, 1996.

Shiva Vamaya - "*Hindu Law*", Annual Survey of Indian Law, 1980.

Singh, Randhir - *Of Marxism and Indian Politics*, Delhi, Ajanta Publications, 1990.

Singhveer and Jaswal P.S. - "*Judicial Activism in Aid of Democratic Process in India*", Unpublished, Mimeographed.

Smith D.E. - *India as a Secular State*, Princeton. Princeton Universtiy Press, 1963.

Sorabjee, Soli J. - An Active Judiciary : Verdict on Article 356 and Secularism, T.O.I, March 23rd, 1995.

State and Religion, Hindustan Times - January 16th, 1997.

Subramanian, Vidya - Redefining Secularism, Times of India, December, 22nd 1995.

Suresh V. and Nagasaila D. - "In Public Interest", Seminar, June 1995.

Tharamangalau Joseph - "Indian Social Scientists and Critique of Secularism", E.P.W., March 4th, 1995.

Vasudha Dhagamwar - The Problem. pp. 12-14. Seminar. May 1996

Westerlund, David (Ed.) - Questioning the Secular State, London, Hurst and Company, 1996.

Wilson R. - Contemporary transformation of Religion, (Oxford : Uarendron Press, 1976, pp.80.

PRIMARY SOURCES

A.S. Narayana Deekshitulu vs State of Andhra, A.I.R., Aug. 1996, S.C. 1765,

Abdul Jalil vs State of U.P. A.I.R. 1984 S.C. 882.

Acchan Rizvi vs State of U.P. 1994, S.C. 646.

Ahmedabad St. Xaiver's College vs State of Gujarat, A.I.R., 1974, S.C. 1389.

All India Imam Organisation vs Union of India, A.I.R. 1993 S.C. 2088.

Ashutosh Lahiri vs State of Bengal, A.I.R. 1995 S.C. 464.

Bijoe Emmanuel vs State of Kerala, A.I.R. 1986, S.C. 615.

Commissioner Hindu Religious Endowments vs K.J., A.I.R. 1985, S.C. 341.

Commissioner Hindu Religious Endowments, Madras vs Sirur Math, S.C. 1954, 348.

Gulam Abbas and others vs state of U.P., A.I.R. 1986 S.C. 1017.

Ismail Faruqi vs Union of India, A.I.R., S.C., October, 1994.

Jagdishwaranand vs Police Commissioner, A.I.R 1984, S.C. 51.

Keshavanand Bharti vs Union of India, A.I.R., 1973.

Krishna Singh vs Mathura Ahir, A.I.R. 1980 S.C. 707.

Mohammed Aslam vs Bhurye, A.I.R. 1996, S.C. 1611.

Narasu Appa Mali vs State of Bombay, A.I.R. 1952, Bombay, 1984.

Ram Kapse vs H.R. Singh case, A.I.R., S.C., December, 1995.

Ramesh Yeshwant Prabhoo vs Khuntia, A.I.R. S.C., December, 1995.

S.P. Mittal vs Union of India, A.I.R 1983 S.C. 1.

S.R. Bommai vs Union of India, S.C., A.I.R., December 1994.

Shah Bano vs Md. Ahmed Khan A.I.R. 1985, S.C. 945.

Sri Lakshamana Yatendrulu and others vs State of Andhra Pradesh, A.I.R., July, 1996.

Ziyauddin Bukhari vs Mehra Case, A.I.R., 1975.