ISSSC 2010 student essay competition for India

"Secularism in the world today: Challenges and prospects"

The judges awarded the first prize to a joint essay by Sehej Buttar and Vipul Jai of the Rajiv Gandhi School of Intellectual Property Law at IIT Kharagpur.

A Flexible Approach Theory to Understanding Indian Secularism

Secularism is a concept trapped in semantics like "separation of church and state", and is often considered a Christian-European concept.[1] Literally, "secular", is:

"Worldly, as distinguished from spiritual"[2]

This is not a succinct definition, as secularism is a socio-political construct, and who constructs it determines its definition.[3] These constructs of secularism are governed by legal and political policies and systems, envisaged in constitutions of nations. They are much needed both to check state power and majority tyranny and also to control the destabilizing swings generated by popular passion. However, constitutions also provide us with peaceful, democratic means with which to bring about profound social transformation. Thus, it is pertinent to study the definition of secularism in context of the various constitutions in the world.

Secularism in the U.S.A.

In the United States, concepts of 'non-establishment' and 'free exercise' of religion have molded secularism through a system of interrelationship of rights. The First Amendment provides, "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof" and is accompanied by the 'free exercise clause'. *Reynolds* v.

[1] Seval Yildirim, *Expanding Secularism's Scope: An Indian Case Study*, The American Journal of Comparative Law, Vol. 52, No. 4 (Autumn, 2004), pp. 901-918.
[2] Bryan A. Garner (Editor in Chief), *Black's Law Dictionary*, Eighth Edition, Thomson West.
[3] Ibid, no.1.

United States,[4] the first case interpreting the 'free exercise clause', held that religious duty was not a valid defense against criminal indictment.[5] It revived Thomas Jefferson's statement regarding the rigidity of a(?) wall of separation.[6] Later, the Warren Court introduced the doctrine of 'compelling interests'[7] in *Sherbert v. Verner*[8] and *Wisconsin v. Yoder*[9]. However, the Supreme Court in *Employment Division v. Smith*[10] again narrowed the interpretation of the 'free exercise clause'. As a response, the Religious Freedom Restoration Act of 1993 (RFRA) was passed by Congress (hailed as an imperative legislation for protecting the rights of free exercise of religion as promised by the First Amendment of the U.S. Constitution). The Act reaffirmed the 'compelling interest test'.[11] The Court, however, declared RFRA unconstitutional on June 25, 1997.[12] Justice Kennedy declared, "(RFRA) alters the meaning of the Free Exercise Clause... (Legislation) has been given the power 'to enforce', not to determine…" 'Enforce' has been defined by the Court[13] as Congress' power as remedial rather than substantive. Considering the remarks by Senator Orrin Hatch[14] and Justice O'Connor[15] Congress' intention is evidently a remedial one. Furthermore, courts' interpretations of the First Amendment, have lead to wide disagreements regarding religious acts and beliefs encompassed by it. Though RFRA no longer remains in force, America

[4] *Reynolds* v. *United States,* 98 U.S. 145(1878).
[5] The court said, *"Laws are made for the government of action, and while they cannot interfere with mere religious beliefs and opinions, they may with practices"*.
[6] The phrase "separation of church and state" is generally traced to an 1802 letter by Thomas Jefferson to the Danbury Baptists. His purpose in this letter was to assuage the fears of the Danbury, Connecticut Baptists, and so he told them that this wall had been erected to protect them.
[7] Doctrine was provided as an interpretation of Free Exercise Clause by the Warren Court, under Chief Justice Earl Warren in 1960s.
[8] 374 U.S. 398 (1963).
[9] 406 U.S. 205 (1972).
[10] 494 U.S. 872 (1990).
[11] Section 2(b), RFRA: The governments cannot substantially burden the religious exercise without compelling justification, rather than simply stated.
[12] *City of Bourne, Texas v. Flores,* 117 S.Ct. 2157 (1997).
[13] *South Carolina* v. *Katzenbach*. 383 U.S. 301 (1966).
[14] The leading proponent of the bill, stated "This decision shows the Court's blindness to a pervasive trend in society, which does not just discriminate against, but is expunging religion".
[15] Agreed, "*Smith's case* was wrongly decided".

continues to profess itself as a secular state with a rigid wall of separation, though many vital considerations have been ignored to continue strictly as a 'secular state."

Indian Secularism

Religious freedom has been integral to the Indian political system since the 15th Century. National Emblem, the "Ashoka Lions", wherein Emperor Ashoka had erected the Sarnath lions atop the Ashoka pillar to mark the spot where Gautam Buddha first taught the 'Dharma'. The Ashoka Chakra depicts the Buddhist 'Dharma Chakra' thus representing 'wheel of law' or 'dharma'. All Indian religions[16] recognize Dharma as the path to self-righteousness.

On August 15, 1947, India gained independence after about five centuries, from under the Mughal rulers and then the British Empire. Secularization of law began with the British who established the judicial system[17] in pre-independence India. The Minorities Sub-Committee of the Constituent Assembly rephrased Freedom of Religion as "freedom of conscience and the right to freely profess, practice and propagate religion."[18] On April 23, 1947, the Constituent Assembly's Advisory Committee submitted a report stating that the 'right to religion' was a 'right to practice religion' and the proviso barred individuals from using religious reasons to exempt themselves from civic duties, as well as the article banning a state religion, were dropped.

The disagreements, discussions and acrimonious debates make this Constitution a successful document, bringing about order in a country with 28 States and 7 Union territories, further divided based on religious, cultural and ethnic groups, and upholding herself as a

[16] Hinduism, Buddhism, Jainism, Sikhism and Zoroastrianism are established around the same concept of Dharma.
[17] Caste Disabilities Removal Act, 1850, the Hindu Widow Remarriage Act, 1856, The Native Converts' Remarriage Act, 1866 and the Child Marriage Restraint Act, 1929 are exemplary how the secularization process percolated to various aspects affecting the religious and marriage laws.
[18] Proposed by Jaya Prakash Narayan. B Shiva Rao, *The Framing of India's Constitution- A study*, Government of India Press, Nasik, 1968, p. 208.

"*Sovereign Socialist Secular Democratic Republic.*"[19] The Indian Constitution is the first in the world after adoption of the 'Universal Declaration of Human Rights' and remains the oldest in the Developing World. Interestingly, though India's population largely consists of Hindus, the nation adopted the name "India" and "Bharat"[20] instead of "Hindustan."

The Indian Constitution ensures secularism through its provisions in Articles 25[21] to 30. Further, Article 25(2)(a) gives the State the right to regulate or restrict 'any economic, financial, political or other secular activity which may be associated with religious practice'. The Constitution awards the state-religion relationship a distinct character instead of confining itself to a mere non-establishment approach. Under Article 44, 'the States shall endeavor to secure for the citizens a uniform civil code throughout the territory of India', hence imposing no mandatory requirement for a Uniform Civil Code. Even on enactment all personal laws need not entirely be obliterated. The Constitution also imposes fundamental duties on its citizens.[22] Despite the express provisions of the Constitution ensuring freedom of religion, Courts have interpreted them comprehensively. In *Kesavananda Bharati v. State of Kerala*[23], the Court emphatically held secularism as part of the basic structure of the Constitution.

Broadly there are three judicial approaches in this regard. The *first approach* was initiated in *Lakshmindra Thirtha,*[24] wherein Mukherjee, J., observed "…an essential part of a religion is primarily to be ascertained with reference to the doctrines of the religion itself." Tenets laid down by the founders of religious denominations or sacred tenets of Buddha, Mahavira, Nanak, and sacred texts like The Bible, Quran and Book of Revelation, govern

[19] Preamble, Constitution of India, (42nd Amendment, 1976).
[20] Article 1(1): India, that is Bharat, shall be a Union of States.
[21] Article 25(1) ensures '…the right to freely profess practice and propagate religion'
[22] Article 51A(e): "to promote... amongst all the people of India transcending religious, linguistic and regional or sectional diversities..."
[23] (1973) 4 SCC 225.
[24] *Commr. H.R.E.* v. *Laxmindra Thirtha Swamiar*, AIR 1954 SC 282 at 290.

practices of respective religions.[25] In *M. Ismail Faruqui*[26], the Court held that a "mosque is not an essential part of the practice of the religion of Islam." The *second approach* relies on communitarian conscience as outlined in the *Venkatramana Devaru case*[27], "the matters of religion in Article 26(b) include even practices which are regarded by the community as part of its religion."[28] The *third approach* is explicitly discussed in *Durga Committee case*, which cautioned the courts to rationally examine the beliefs and exclude superstitious ones from becoming essential part of the religion.[29] In *A.S. Narayana*[30], Hansaria, J. equated religious freedom under Article 25 to a broader concept of dharma where there should be no case for blind beliefs, narrow-mindedness, sectarianism and dogmas. This approach is advantageous in promoting a scientific spirit and upholding the values of humanism and would be possible by gathering support from various provisions of the Constitution.[31] The recent *Ayodhya judgment*[32] considered the essentials of a religion and deserves appreciation that although it was a Hindu-Muslim dispute, the Court was able to maintain peace, tranquility and public order contrary to the apprehensions of communal disturbance surrounding these two communities.

Flexible-Approach:

Various analysts[33] preface their discussions with the note that fundamental rights were drawn from the American Constitution. Nevertheless extensive Constituent Assembly Debates resulted in a document whose foundational principles and norms were quite

[25] *A.S. Narayana* v. *State of A.P*., AIR 1996 SC 1765.
[26] *Ismail Farooqui* v *Union of India*, (1994)6SCC360.
[27] *Venkatramana Devaru* v. *State of Mysore*, AIR 1958 SC 255 at 264.
[28] See, *Bijoe Emmanuel* v. *State of Kerala*, AIR 1987 SC 748.
[29] *The Durgah Committee, Ajmer and Anr*. v. *Syed Hussain Ali and Ors.*, AIR 1961 SC 1402.
[30] *A.S. Narayana Deekshitulu* v. *State of Andhra Pradesh and Others*, (1996) 9 SCC 548.
[31] Also see, *Pogakula Laxmireddy* v. *Principal Secretary to Govt. of A.P*., AIR 1977 A.P. 6.
[32] *Ram Janmbhoomi Babri Masjid Judgement*, available at: www.rjbm.nic.in. Last accessed on October 28, 2010 at 19:00 hrs.
[33] From Austin Granville to Durga Das Basu.

distinct.[34] Indian secularism, instead of creating a rigid wall of separation, prescribes the State's responsibility to ensure equal religious freedoms, social reforms and protection against undue domination of religious denominations over individuals.[35] As viewed by Chief Justice Berger:

> "The course of constitutional neutrality in these areas cannot be an absolutely straight line; rigidity could well defeat the basic purpose of these provisions."[36]

Contrarily, America's identification of essential aspects of a religion that are opposed to public values is handled by application of mutual relations between the non-establishment clause and the free exercise clause. As already discussed, such rigidity negates the provisions and the rights guaranteed there for.

India has adopted the '*Flexible Outlook Approach'*, characterized by embracing the existence of religions in society and also of individuals who constitute the State. Importantly, it does not advocate the violation of laws on the basis of a practice being a part of the religion, but mandates the determining whether the same forms an essential aspect of the religion or not. Awaiting strict demarcation in state-church relationship is hypothetical and impractical, rendering the rigidity approach obsolete. 'Flexible outlook' might well be the answer to religious acrimonies. Acceptance of the existence of religion allows the State to adjudicate on the basis of humanism while giving due respect to the religious sentiments. Disrespect of religious beliefs, even if for upholding of the state law, leads to ever growing discontent and disharmony amongst the very people who constitute a state. Such alienation takes the form of hatred against the state machinery, which fails to understand basic faith and beliefs of its own people, and thus sows the seeds of terrorism.

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[34] Gurpreet Mahajan, *Religion and the Indian Constitution: Questions of Separation and Equality,* as included in Rajeev Bhargava, *Politics and Ethics of the Indian Constitution,* Oxford University Press, 2009.
[35] Ibid at 11.
[36] *Walz* v. *Tax Commission of City of New York*, 397 US 664 (1970).

The evil of terrorism, having struck practically every nation across the globe, is to be fought not by waging wars and use of arms, but by the weapon of 'acceptance'. Such acceptance is propounded by 'flexible outlook approach' based on the Indian model of not trying to eliminate religion's existence in State Machinery but by embracing it as an integral part of the State's "*Sovereign Socialist Secular Democratic Republic*" character.