SECULARISM AND THE LAW

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My reason for choosing this particular topic is because of the increasing importance of secularism in the context of the present surge of violent communalism in almost every state across the country. India has five main faiths, namely Hinduism (which legally includes Sikhs, Jains and Buddhists), Islam, Christianity, Zoroastrianism and Judaism. Historically, and even after Independence, communal conflict has, to a greater or lesser degree, existed between some of these faiths. In fact, there has often been conflict between sub-divisions of these faiths (for example, the disputes between different sects of the Syrian Christian Church, between Sunnis and Shias , communal violence against the Sikhs by Hindus in 1994) as also between sects within the same faith. The violent confrontations between the Nirankaris, Akalis or the Dera Sacha Sauda are illustrative of this.

With every riot, every bombing, indeed every act of communal violence, the cohesive fabric of this country undergoes a severe strain. Unfortunately, democracy inevitably brings in vote bank politics with political leaders taking advantage of such situations, fan fear and distrust which may strengthen their vote base but which eventually weakens the nation. It is doubly unfortunate because India

was meant to be a secular country. Although the word "secular" was incorporated to the Preamble only in 1976 by the 42nd Amendment, it was always an implicit part of our constitutional philosophy.

And yet sixty years after independence, according to the opinion poll conducted by a television channel, 82% of all Indians believe that India is at present more divided along communal lines than ever before. It has, therefore, become necessary to revisit and assess the Constitutional framework on the basis of which this country was founded and exists as one nation.

The subject of secularism is multifaceted, whether seen from the political, philosophical or legal points of view. I have limited myself to a legal appraisal of the concept in India with reference to two areas only, namely the issues of a uniform civil code and conversion.

The word 'secular' broadly defined means "worldly as distinguished from spiritual". It can also mean "no particular religious affiliation". However, in the political context, it can and has assumed different meanings in different countries, depending broadly on historical and social circumstances, the political philosophy and the felt needs of a particular country. In one country, the word may mean an actively negative

attitude of the State to all religions and religious institutions. For example, the First Amendment to the American Constitution prohibits the making of any law "respecting an establishment of religion, or prohibiting the free exercise thereof"; therefore, in other words, no law can be passed in the United States, with regard to anything which is even remotely religious. The clause against establishment of religion by law was intended to erect 'a wall of separation between Church and State'. The Australian Constitution, has adopted this approach. Under the Indian Constitution, there is no such 'wall of separation' between the States on one hand, and religious institutions, on the other. In India, the state is secular in that there is no official religion. India is not a theocratic State. In fact, Article 15(1) of the Constitution prohibits the State from discriminating against any citizen on grounds only of religion, race, caste, sex, place of birth. However, the Constitution does envisage the involvement of the State in matters associated with religion and religious institutions, and even indeed with the practice, profession and propagation of religion in its most limited and distilled meaning. For example, Article 16(5) recognizes the validity of laws relating to management of religious and denominational institutions by the state and Article 28(2) contemplates the State itself managing educational institutions in which religious instructions are to be imparted. Although like other secular Governments, the Indian Constitution provides for

freedom of conscience and the individual's right to freely profess, practise and propagate religion, nevertheless the right is expressly subjected to public order, morality and health and to other Fundamental Rights, guaranteed under the Constitution. In India, therefore, the word "secular" means an involvement of the State with religious matters but without discrimination. Nevertheless, the common and basic meaning given to the word "secular state" in all countries is "keeping religion away from politics".

The political philosophy of separation of church and state has been developed in the west in the historical context of the pre-eminence of the established church and the exercise of power by it over society and its institutions. The democratic State gradually replaced and marginalized the influence of the church. Although the word "secularism" may have been borrowed in the Indian Constitution from the west, the concept of a secular state in India is not new. Akbar laid the foundations of secularism and religious neutrality of the state which, he insisted, must ensure that 'no man should be interfered with, on account of religion, and anyone is to be allowed to go over to a religion that pleases him'. However, the unique brand of secularism provided in the Indian Constitution was developed in the historical background of the freedom struggle and the conflict between the one-nation as opposed to the two-nation doctrine, followed by "the fracture of

partition". The framers of the Constitution wanted to ensure the perpetuation of the "one-nation" doctrine to distinguish it from the theocratic state of Pakistan and to reassure the minorities i) that Parliament would not only **not** impose any religion but would also ensure freedom of religion amongst all Indian people and ii) that all religious communities would be treated equally.

Secularism is a recognized Constitutional goal and is a part of the basic structure of the Constitution which cannot be amended in exercise of the powers of the amendment granted to Parliament under Article 368 of the Constitution. It is a facet of the right to equality which is the cement which holds the citizens of this country together. Part III of the constitution deals with 'Fundamental Rights'. Amongst the rights which are treated as fundamental are Articles 14 to 18 which deal expressly with the 'Right to Equality' and Articles 25 to 28 which guarantee 'Right to Freedom of Religion', which right is a facet of the right to equality but is subject to public order, morality and health. The State is also empowered to make any law *"regulating or restricting any economic, financial, political or other secular activity which may be associated with religious practice"* with the object of bringing about a uniformity, an equalization of the rights and obligations of the people thereby minimizing differences in areas which do not interfere with any religion.

As a result, the courts have upheld laws which may regulate or restrict matters associated with religious practice if such practice does not form an integral part of a particular religion. The decision of the question as to whether a certain practice is a religious practice or not, may present difficulties because sometimes practices, religious and secular, are inextricably mixed up, and 'what is religion to one, is superstition to another' . But the Courts have decided the issues raised, irrespective of the religion in question. A few recent examples will suffice.

The appointment of a non-Brahmin to perform pujas in a Temple in Kerala was challenged on the ground that the appointment offended and not only violated a long-followed mandatory custom and usage of having only Malayala Brahmins for such jobs but that it denied the right of the worshippers to practise and profess their religion in accordance with its tenets and manage their religious affairs as secured under Articles 25 and 26 of the Constitution of India. The Supreme Court rejected the claim and upheld the appointment saying:

"Any custom or usage, irrespective of even any proof of their existence in pre-constitutional days, cannot be countenanced as a source of law to claim any rights when it is found to violate human rights, dignity, social equality and the specific mandate of the Constitution and law made by Parliament".

In *State of W.B. v. Ashutosh Lahiri*, the Supreme Court held that it is not a part of religious requirement for a Muslim that a cow must be necessarily sacrificed for earning religious merit on BakrI'd.

Similarly it has been held that performance of Tandava dance in public is not an essential practice of the Ananda Margi order; that no community or sect of that community can claim a right to add to noise pollution on the ground of religion whether by beating of drums or reciting of prayers by use of microphones and loudspeakers so as to disturb the peace or tranquility in the neighbourhood .

So are personal laws a part of religion or does the State have the power to regulate them through legislation? Without making any value judgment and going strictly by the law as it stands today, the answer to this is in the affirmative or in other words, the state does have the power to regulate personal laws. The Constitution envisages homogeneity to be

brought about in respect of all aspects of Civil Law applicable to all Indians and Article 44 says that "the State shall endeavour to secure for the citizens a uniform civil code throughout the territory of India". In fact, except for marriage, divorce, adoption and succession, all other aspects of personal Civil Law are covered by statutes, which apply to all Indians irrespective of their faith. For example, contract, transfer of property, tenancy relationships, service rules etc., apply to all citizens, irrespective of their faiths. Laws relating to marriage, inheritance and adoption cannot be said to be part of religion, however sacred, the source may be believed to be. It has been suggested with some force that the issue is really one of gender. Whatever the reason, exclusion of personal laws limited to only these three aspects of personal law--- is not a question of constitutional power but political expediency.

At present, the laws relating to these three subjects are governed by the personal laws of the different faiths. For example, we have the Hindu Marriage Act, 1955, The Muslim Law (Shariat) Application Act, 1937, the Parsi Marriage and Divorce Act, 1936, the Christian Marriage Act, 1872 and the Indian Divorce Act, 1869. Article 25, itself, does not speak of the personal laws of any religious denomination. On the other hand, it contains a clause giving power to the State to regulate and restrict economic, financial, political, or other secular activities that may be associated with religious practice. To a

large extent, uniformity has already been brought about **within** the different faiths. Hindus in different regions and belonging to different sects had different personal laws and practices. These were brought under one umbrella by the Hindu Code Bill, which made the various personal laws uniformly applicable all Hindus. The Shariat Act removed the differences between the different sects of Muslims such as the Khojas and Cutchi Memons of Gujarat and the Malsan Muslims with regard, inter alia, to inheritance. Under strict Hanafi Law, there was no provision enabling a Muslim woman to obtain a decree dissolving her marriage on the failure of the husband to maintain her or on his deserting her or maltreating her and it was the absence of such a provision entailing (according to the Legislature) "unspeakable misery in innumerable Muslim women" that was responsible for the Dissolution of the Muslims Marriages Act, 1939. The Christian Marriage Act similarly applies equally to the various sects of all Christians. Therefore, the process of uniformity had long since started.

The British sought to introduce uniformity in civil laws, and succeeded to a large extent, as a measure of administrative convenience. For the framers of the Constitution, a uniform civil code meant a shared identity and a deletion of differences leading to national integration. Civil Rights activists support the uniform civil code because they

expect a more equal society where the vulnerable, oppressed and marginalized members are given their rightful place. However, the controversy has unfortunately taken on a communal hue. A uniform civil code is resisted by the Muslim community as it is seen as an attempt by Hindu fundamentalists to take away their cultural identity and survival. The distrust is heightened by the insistence of the Hindu fundamentalists on a uniform code to eliminate the so called "special privileges" to "pampered minorities". As I see it, uniformity in personal laws does not mean the imposition of any particular personal law of a particular faith but the adoption of best practices, so to speak of the different personal laws. "The purpose of law in plural societies is not the progressive assimilation of the minorities in the majoritarian milieu . This would not solve the problem; but would vainly seek to dissolve it".

Courts have on various occasions, urged the adoption of a uniform civil code not out of any political or religious bias, but because the constitution mandates that the freedom of conscience and the right to freely profess, practise and propagate religion is subject to the fundamental rights, including the all important right to equality. I will conclude this part of the talk with three illustrations of how the Courts have been able to achieve this in some measure.

We are familiar with the case of Saha Bano. Saha Bano was married to an advocate. She married him in 1932. There were five children born of this marriage . Forty three years after she was married, in 1975 her husband drove her out of her home. She applied for maintenance under Section 125 of the Code of Criminal Procedure. Section 125 provides that if any person having sufficient means neglects or refuses to maintain his wife, and if the wife is unable to maintain herself, a Magistrate of the First Class may, upon proof of such neglect or refusal, order such person to make a monthly allowance for the maintenance or his wife ……., at such monthly rate not exceeding five hundred rupees in the whole, as such Magistrate thinks fit. The husband then divorced Saha Bano by pronouncing talaq thrice. The Magistrate directed payment of Rs. 25 per month. Sequel to appeal, the High Court increased the sum to Rs. 179. The husband appealed. The Supreme Court dismissed the appeal and held that the right conferred by Section 125 can be exercised, irrespective of the personal law of the parties and that, in fact, there was no conflict between the provisions of Section 125 and those of the Muslim Personal Law on the question of the Muslim husband's obligation to provide maintenance for a divorced wife who is unable to maintain herself.

The decision led to an uproar. Although human rights groups hailed the judgment as giving justice to women, some leaders of the Muslim Community saw it as an encroachment on their identity . The last led to the enactment of the Muslim Women (Protection of Rights on Divorce) Act, 1986 which ostensibly sought to negate the opinion of the Supreme Court in Shah Bano. The Constitutional validity of the Act was challenged before the Supreme Court by Daniel Latifi, one of the very liberal intellectual thinkers of our times. By interpreting the provisions of the Act keeping in mind that "solutions to such societal problems of universal magnitude pertaining to horizons of **basic human rights,** cultural, dignity and decency of life and dictates of necessity in the pursuit of **social justice** should be invariably left to be decided on considerations other than religion or religious faith or beliefs or national, sectarian, racial or communal constraints", the court reaffirmed the decision in Shah Bano by concluding that what could be earlier granted by a Magistrate under Section 125 CrPC would now be granted under the very Act itself .

The second example related to an application by a Christian lady for divorce. The Court found that the marriage had irretrievably broken down. The Indian Divorce Act, which applies to all Christians did not allow for divorce either on the

ground of irretrievable breakdown of marriage or by mutual consent, The Court said :

"*Surely the time has now come for a complete reform of the law of marriage and make a uniform law applicable to all people irrespective of religion or caste. It appears to be necessary to introduce irretrievable breakdown of marriage and mutual consent as grounds of divorce in all cases".*

and directed that a copy of the order be forwarded to the Ministry of Law and Justice for action.

Incidentally, 'irretrievable breakdown of marriage' and 'mutual consent' as grounds of divorce are not available under the Hindu Marriage Act, either. It is only available under the Special Marriage Act, which is applicable to all Indians, irrespective of their faiths.

The Indian Divorce (Amendment) Act, 2001, was then passed by Parliament, introducing divorce by mutual consent into the Christian Law.

The third is a recent case relating to the Hindu Marriage Act, 1955. Irretrievable breakdown of marriage is not a ground for divorce under the Hindu Marriage Act., 1955. Nevertheless, in one of the significant decisions of the Supreme Court (2006), divorce was granted because 'the marriage has been

wrecked beyond the hope of salvage, **public interest** and interest of all concerned lies in the recognition of the fact and to declare defunct *de jure* what is already defunct *de facto.* To keep the sham is obviously conducive to immorality and potentially more **prejudicial to the public interest** than a dissolutuion of the marriage bond. Without expressly referring to a uniform civil code, the court has recommended to the Union of India to seriously consider bringing an amendment in the Hindu Marriage Act, 1955, to incorporate 'irretrievable breakdown of marriage' as a ground for the grant of divorce. A copy of the judgment was directed to be sent to the Secretary, Ministry of Law and Justice, Department of Legal Affairs, Government of India for taking appropriate steps.

But, as observed in Shah Bano's case , it is the State which is charged with the duty of securing a uniform civil code for the citizens of the country and , unquestionably, it has the legislative competence to do so. Piecemeal attempts of courts to bridge the gap between personal laws cannot take the place of a common Civil Code. Justice to all is a far more satisfactory way of dispensing justice than the same meted out from case to case. It is also doubtful that the goal of uniformity can be left to ideas and interpretations of individual judges, where varying attitudes may dictate the outcomes.

This brings me to the second aspect of secularism, and that is the topic of conversions. This year, we have seen, several incidents of communal clashes, whether in Maharashtra, Karnataka, Orissa or Andhra Pradesh. Communal clashes have taken place in the past for various reasons, but the communal clashes this year have been initiated by Hindu fundamentalists on the ground that Hindus were being converted forcibly to Christianity. Article 25 secures to every person, subject to public order, health and morality, a freedom not only to entertain such religious belief as may be approved of by his judgment and conscience but also to exhibit his belief in such outward acts as he thinks proper and to propagate or disseminate his ideas for the edification of others. What the article grants is not the right to convert another person to one's own religion, but to transmit or spread one's religion by an exposition of its tenets. Several States have enacted legislation to prevent conversion by force, fraud or allurement, making such conversion a punishable offence. Such statues were upheld as being constitutionally valid by the Supreme Court on the ground that forcible conversions would impinge on the "freedom of conscience", guaranteed to all the citizens of the country alike , and secondly that "if an attempt is made to raise communal passions, e.g. on the ground that someone has been "forcibly" converted to another religion, it

would, in all probability, give rise to an apprehension of a breach of the public order, affecting the community at large".

The judgment has been widely criticized because the Supreme Court did not consider the legislative history of Article 25 and because no distinction was drawn between conversion by force and conversion by persuasion.

The fact that neither Islam, nor Buddhism nor Christianity have a caste system, may be the reason why many dalits may prefer any one of those systems over Hinduism. Would this come within the prohibition as an allurement ? I would submit not. The Supreme Court glossed over the issue by treating the question of "conversion" as a law and order problem, irrespective of the circumstances in which the conversion takes place. It also appears to me that conversion would cover "re-conversion", an exercise which is being undertaken across the country, accompanied, very often, by violence.

The Supreme Court has recently upheld a ban on Dr. Praveen Togadia restraining him from entering a district in Karnataka and from participating in any function in the district for a period of 15 days as there were several instances where on account of the action of Dr. Togadia, and his speeches and acts of organisers of the function, there were

communal clashes and the district administration had to intervene to avoid disturbances of social tranquillity and communal harmony.

Secularism in the Indian context means an equal status for all religions and equality for all religions means that faith in one's own religion must not detract one from respecting other religions. If that be so, why should it matter if conversions do take place? It can only matter if religion is seen as a source of political power.

As early as 1994, it was noted by the Supreme Court that rise of fundamentalism and communalisation of politics are anti secularism. They encourage separatist and divisive forces and become breeding grounds for national disintegration and fail the parliamentary democratic system and the Constitution.

Who then is responsible for keeping secularism and national integration alive ?

In the context of a free play of social forces where it is not possible to bring about a voluntary harmony, it is the State which has to step in to set right the imbalance between competing interests. It is India's misfortune that although it was founded and meant to continue as a "secular" state, religion is seen as a source of political power and therefore

colours governmental action. How can an Indian hope for neutrality in governance if the government is religiously prejudiced ?

Fortunately, the Constitution is neutral. Although Article 14 says that the State shall not deny to any person, equality before the law or the equal protection of the laws within the territory of India, equal protection of the laws does not mean that all persons must be dealt with identically, irrespective of the circumstances. That would be formal equality. True or substantive equality requires that a distinction must be made, having some relevance to the purpose for which the classification is made. The Constitution, therefore, has special provisions for vulnerable sections of society, including minorities. This is not "appeasement" but it means that it has provided for substantive equality as opposed to mere formal equality by creating a level playing field for the weaker sections so that they can live at par with all other Indians.

Fundamental to the concept of equality before the law is that the task of superintending the operation of law rests with an impartial and independent judiciary. The fact is that the framers of the constitution did not define such concepts like "equality", "liberty" or "freedom". They did not lay down the standards of "reasonableness" of the restrictions which the Constitution allows on the freedom of speech, the rights of

peaceable assembly, to form associations, to move freely or to reside and settle anywhere in the country, nor what constitutes "public order, morality and health", subject to which a person is entitled to freedom of conscience and the right to profess, practise and propagate any religion. None of the rights have a fixed content. Most of them are empty vessels into which each generation pours its content by judicial interpretation in the light of its experience. The concepts of communal harmony and secularism have, by and large, been well protected by the courts. The death penalty was awarded to a person who had killed a woman in a communal clash saying :

"In our country where the Constitution guarantees to all individuals freedom of religious faith, thought, belief and expression and where no particular religion is accorded a superior status and none subjected to hostile discrimination, the commission of offences motivated only by the fact that the victim professes a different religious faith cannot be treated with leniency". Judges need great wisdom and restraint in wielding this great judicial power; otherwise judges can and sometimes, though rarely, have erected their own predilections into principles.

According to Justice H.R. Khanna, "the major responsibility for ensuring communal amity in every country

lies upon the majority community. It can indeed be said that the index of the level of civilization, culture and catholicity of a nation can be gauged from the fact as to how far its minorities feel secure and are not subjected to any discrimination or suppression".

The same view has been expressed by the noted economist Mr. Arjun Sengupta who said that Communalism is a group phenomenon in the sense that it reflects the attitude of one group towards another. When it is adopted by the majority community, it can lead to fascism.

Just as hatred of the Jews was the cementing factor in the ideology which justified ethnic cleansing and genocide in several countries of Europe , in our country, too, the objects of hatred would become the staple of the ire of the minorities , viz., the Muslims, the Christians, if the public perception of the majority is swayed. One lesson that the history of these sordid years of Europe teaches us is that if the role of fascism is not resisted and fought at the very beginning, it inexorably engulfs the whole society in a few years.

In conclusion, let me emphasize that there is no such thing as 'The Indian Religion'. None of the major religions of India are, in that sense, truly indigenous. Historically, the earliest inhabitants of India were Pantheists. In other words,

they worshipped Nature, who believed in ancestral worship. Indeed, there are some tribal areas where this form of worship persists. The difference, therefore, between the five major faiths in India is one of their historical sequence of emergence and in their relative numerical strengths. The majority, merely because it enjoys such a status, cannot, exclusively appropriate Indianness to itself. Religion, therefore, must be separated from nationality. One's belief is and should be deemed as irrelevant for assessing one's patriotism. Religion can only be relevant if India claims to be a theocratic state. It is not. Nothing can be justified in the name of freedom without giving people an opportunity to exercise that freedom. The violation of the freedom can also come from the tyranny of conformism that may make it difficult for certain members of a community to opt for other styles of living.
