

# LEGALFOXES LAW TIMES

## INDIA'S SECULARISM – MYTH OR REALITY?

### ➤ SECULARISM'S ENTRY INTO THE INDIAN CONSTITUTION

Secularism has been an age-old concept dating back to the 1600's, where "secularization" was used for the first time to refer to the properties that belonged to Church to the prices after the end of the thirty years of war for the balance of powers. Later, it was used in many other occasions as well including the French Revolution. "The term 'secularism' was first time formally introduced by George Jack Holyoaked<sup>1</sup> in the West, although it has been practiced in India since time immemorial - it's just that the term "secular" or "secularism" was never used.

The Vedas and Upanishads have supported secularism in many stanzas, but the former eventually lost their value because of other significant movements and also they could not reach the common masses as since they were written in Sanskrit. Ashoka was the first emperor to have ever supported secularism. "In his 12th Rock Edict, Ashoka made an appeal not only for the toleration of all religion sects but also to develop a spirit of great respect toward them<sup>2</sup>." One of the most secular emperors in India was Akbar, who formed a religion known as Din-i-Ilahi, comprising of essential features of both Hinduism and Islam. The main reason for the creation of this religion was to fill up the gap between two religions and its followers, i.e. the Hindu and the Muslims. Akbar also abolished Jizya, a tax that was levied on the non-Muslims. So, all of these examples suggest that India has always had the quintessence of secularism in its culture.

Later when the drafting of our constitution began, our forefathers took diverse elements and concepts from the greatest constitutions of the world. There were certain examples that were put up in front of the Constituent Assembly, which, for a matter of fact knew how religion in a country like India shapes the lives of people. When the example of United States of America

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<sup>1</sup> Ranbir Singh and Karamvir Singh *SECULARISM IN INDIA : CHALLENGES AND ITS FUTURE* The Indian Journal of Political Science Vol. 69, No. 3 (JULY - SEPT., 2008), pp. 597-607. As retrieved from: ([https://www.jstor.org/stable/41855808?seq=1#metadata\\_info\\_tab\\_contents](https://www.jstor.org/stable/41855808?seq=1#metadata_info_tab_contents))

<sup>2</sup>Secularism 15 May 2019. As retrieved from: (<https://www.drishtiiias.com/to-the-points/paper1/secularism-1>)

came up in the Constituent Assembly, though secularism is followed but it is based on two main principles – the “free-exercise clause” and the “non-establishment clause”. Now, the question was whether or not there should be an acceptance of the non-establishment clause. In the case of establishment clause, America had witnessed from the other colonies that if there is an establishment of one religion it would lead to suppression of other religions, which would lead to nothing but disaster, and United States of America wanted to be free, free of all religion complexity, hence the “non-establishment clause” came into picture. In the case of *Everson V. Board of Education*<sup>3</sup>, the court explained the extent of the clause. The Court stated that the government cannot help any religion or all the religions and also cannot establish any Church. This case clearly states that for any reason the state shall not interfere and Church and State will be kept separately. But the members of the constituent assembly knew that if a non-establishment clause is enforced in India, it will destroy its unity as a country. Because India is a country that runs by and through religion and if government does not show some positive interference, then any social evils for example child marriage or sati that is prevalent or acceptable in a religion will continue to grow and destroy a country’s development both on social and all the other aspects of the society. Hence, the government’s positive interference in religious activities of the country was necessary and is why it accepted America’s free exercise clause (according to which the state won’t interfere and create any laws to prohibit following any religion) but did not fully follow the non-establishment clause.

#### ➤ PREAMBLE AND THE TERM “SECULAR”

The term secular did not appear in the Preamble since the very beginning and in order to understand the underlying reason for the same, one has to focus on the debates that took place in the Constituent Assembly during the time of the drafting of our constitution. Though everyone was in a favour of India being a secular country but our constitution-makers were a little skeptical about specifically mentioning the word “secular” in the Preamble. Secularism meant keeping the state and the religion totally apart and India recently had a partition based on communalism, which was one of the bloodiest partitions that had ever taken place in the history. So, declaring our country as a secular state might have created a problem. In 1948, Loknath Mishra, in one of the debates in the Constituent Assembly said that religion cannot be separated

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<sup>37</sup> C.A.D. 839 (1948)

from life, and if it is supposed to be separated then the state should not make laws at all, with respect to religion<sup>4</sup>; to which to H.C. Mukherjee replied saying that, if a country wishes to be a secular state by keeping the two institutions, i.e. the state and the religion separate, then that should also deem to mean that state should not make laws with respect to protection of minority and protect minority because that would mean the involvement of State with religion, which would go against the rules of secularism<sup>5</sup>. Nehru and Ambedkar, who were truly fond of the idea of the existence of secularism, were skeptical for specifying it in the preamble. According to them if secularism is to be accepted in its purest form then that would require no state intervention in relation to uplifting of minorities, providing any policies with relation to quota, or uplifting the women or getting rid of any social evils present in the society. Hence, according to them, it was better not put the word “secular” if one cannot implement it in its true meaning and sense.

With the change in the position and scenario of the country, by the time the era of Indira Gandhi, our country had started to come out of the trauma of partition. According to the then Prime Minister, Indira Gandhi, thought of secularism to be an integral part of the Constitution, and hence mentioning the term “secular” was felt as a necessity. During her reign, a two-year long Emergency was proclaimed, which further led to number of amendments. Subsequently, the forty-second amendment came into force which modified number of important aspects in the constitution but the most important one was the addition of the word ‘secular’ in the Preamble to the Constitution.

### ➤ **ARTICLE 25 TO 28 – THE ESSENCE OF SECULARISM**

#### ARTICLE – 25

According to Article 25, any person has freedom to practice profess and propagate any religion. But, this Article not just focuses on giving right but putting certain restrictions for the same. In *Ratilal Panachand Gandhi V. State of Bombay*<sup>6</sup>, in this case the court stated that every person has a right to freely profess, practice and propagate any religion, with respect to certain restrictions imposed by the State. Hence, one can understand that more than the right, restrictions

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<sup>4</sup>Id

<sup>5</sup>Harshita Vatsayan *India's Quest for Secular Identity and Feasibility of a Uniform Civil Code*

<sup>6</sup>1954 AIR 388

are emphasized upon. But first one has to understand what does profess, propagate and practice refer to in this Article. In the case of Commissioner *Hindu Religious Endowments Madras V. Shirur Matt*<sup>7</sup>, in this case the court explains the meaning with respect to “profess” which is specified in Article 25, the Court says that the term “profess” means the right of a person to declare their particular religion. “Propagate” means to explain others what one’s religion consists of, but the person telling about his religion cannot force anyone to convert their religion, and practice means to practice their religion either indoors or outdoors (in their personal or private capacity).

“One thing people do feel is that though the duty of the court is to protect all the religious activities, but the real duty of the court is to protect the activities that are important in a religion<sup>8</sup>.”

There are certain religious practices that are essential in any religion. Some of these practices are: -

Worshipping of the holy book Guru Granth Sahib, in case of Sikhism is an integral part of the religion. In the case of Hindus, worshipping of idols is another integral part of their religion. Wearing a turban to a religious ceremony is another integral part of Sikhism.

Restrictions imposed upon the Article 25:-

- 1.) Any reforms related to social welfare with the religious practices, for example – abolishing of Sati or child marriage.
- 2.) If the religion interferes with public morality, health and other provisions of the Constitution.
- 3.) If there are any laws related to secular activities in relations to economic laws, political putting any restriction on religious activities<sup>9</sup>.

#### ARTICLE – 26

This Article gives rights to the religious institutions. Unlike Article 25, which focuses on individual rights, this Article focuses on religious based institutions. Three major rights are given

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<sup>7</sup>1954 AIR 282

<sup>8</sup>Ruling on rituals : Court of laws and Religious Practices in Contemporary Hinduism – Gilles Tarabout.

<sup>9</sup>The said restrictions were mentioned in Article 25 of the Indian Constitution.

to these institutions. One of the first rights given to these religious institutions are that they can manage their own affairs, they can own movable and immovable properties and it is up to them the use of these properties. And last but not the least the formulation of any institution for religious or charitable institutions. But to understand Article 26 fully it is important to know the meaning of “religious denomination”. Though, our constitution does not define the meaning of religious denomination, but there are number judgments which define the same. One of the major judgments defining the meaning of religious denominations is in the case of *S.P. Mittal V. Union of India*<sup>10</sup>, which defines the meaning of religious denomination, any group having a common faith, a common organization and have a distinctive name<sup>11</sup>, for example Shias and Sunnis, Catholics and Protestants and so on.

In, the 2018 Sabarimala judgment, the Court decided that the women ages (10-50) should be allowed in the sanctorum, and not allowing women in the temple is not the integral part of the religion<sup>12</sup>.

#### ARTICLE 27

This Article focuses on tax payers that are the normal public. For example, during the Mughal era the Non-Muslims had to pay a tax known as Jizya, for their protection, which was later abolished by Akbar but reinforced by Aurangzeb. In the same way this Article states that no person shall be forced to pay taxes for promotion of any particular religion.

#### ARTICLE 28

This Article states if there is any educational institution, which is maintained or carried on by the State funds, then the protection can be given for attendance of religious instruction or any kind of worship. It depends upon the person who wants, to attend the religious activities. And if a institute is partially funded by the State, then in that case Article 28 shall apply. Notably, an individual can invoke the right present in this Article presented in the fundamental rights.

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<sup>10</sup>1983 AIR 1

<sup>11</sup>Divya Rai *Freedom of Religion under the Indian Constitution* May 20, 2019 As retrieved from: (<https://blog.ipleaders.in/freedom-of-religion-under-the-indian-constitution-2/>)

<sup>12</sup>Samanwaya Rautray *Women of all ages can enter Sabarimala Temple, rules Supreme Court* Sep 29, 2018, 07.01 AM IST As retrieved from: (<https://economictimes.indiatimes.com/news/politics-and-nation/supreme-court-allows-women-to-enter-sabarimala-temple/Articleshow/65989807.cms?from=mdr>)

### ➤ **INDIA'S TEST FOR SECULARISM - THE AYODHYA JUDGEMENT**

It has always been a question of confusion, whether India is actually a secular state or a Hindu state. The Ayodhya judgment which was a dispute between two communities – Hindu and Muslims, two of the most most-conflicting communities, throws ample light upon the answer to this question.

The facts of the case are as follows:

In the fourteenth century, Babur's commander Mir Baqi established a mosque, known as the "Babri Masjid". The legalities began in 1885 when Raghubar Das filed a suit in the district court of Faizabad for the ownership of the land on which the mosque was built, but the suit was dismissed by the court. For the next sixty years, there were no legal proceedings per se. In the year of 1934, riots took place and Hindus destroyed a part of the structure, which was later rebuilt by the Britishers. In December, 1949, idols were found in the central dome of mosque and it was found that Hindus had entered the site and placed the said idols, which led to the shutdown of the disputed site by the authorities. In the same year, a receiver was also appointed by the court. After a number of suits were filed, in 2002, the case went to the Allahabad High Court, wherein the Court ordered the Archeological Survey of India, to carefully examine the disputed site and submit the findings and the report to the Court. The High Court, decided to divide the

disputed land, amongst the three parties, that is the Muslims, the Nirmohi Akhara and the Rama Lalla.

But the decision was not favorable to any of the three parties; hence the case went to the Supreme Court. The Supreme Court referred to the reports of the Archeological Survey of India, according to which it was found that Babri Masjid was established on a Non-Muslim ground and there was presence of some other structure before the Babri Masjid was built. The court referred the case for mediation, which had no outcome and resulted in a failure. The case came back to the court, wherein, after consideration of all the evidences it decided to allot the disputed land, that is, the 2.77 acres of land to Ram Lalla. the Sunni Waqf Board, was granted a 5 acres of land and which will be a prominent land. According to the Court, the Board could not establish “adverse possession” that is the “continuous, uninterrupted and peaceful possession of the land<sup>13</sup>”.

#### ANALYSIS OF THE JUDGEMENT

The Ayodhya judgment was the longest running property dispute in the history of India, but before coming to any analysis, it is important to know and understand certain points before concluding or talking about the judgment being fair or not. The major evidence in the said case was the report submitted by the Archeological Survey of India, and according to the Hon’ble Judge of the Allahabad High Court, Justice S.U. Khan, the reports presented by the Archeological Survey of India are not of much help as, first, a temple was constructed by King Vikramaditya in the first century and the mosque was constructed in the sixteenth century, which states that there were so many years between the first century and the sixteenth century wherein any construction could have taken place. And if there was a demolishing of a non-Muslim structure for a mosque then the remains would either have been removed or reused and but could not be instilled inside the ground. But what Justice S.U. Khan forgot to understand was that the question was to check if there was any existence of any remains before the Babri Masjid temple that suggested that there was any existence of symbol of Hinduism, another point that was brought up for the criticism of the report was that Archeology is not a definite science, it is that a person observe, and may come up with the conclusion which may seem similar hence

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<sup>13</sup>What Is The Result Of The Ayodhya Case? 10 Things To Know About The SC's Verdict November 9 2019 3:23 PM IST. As retrieved from: ([https://www.huffingtonpost.in/entry/ayodhya-verdict-babri-demolition-ram-temple-key-points\\_in\\_5dc64591e4b00927b2335eca](https://www.huffingtonpost.in/entry/ayodhya-verdict-babri-demolition-ram-temple-key-points_in_5dc64591e4b00927b2335eca))

relying fully on the report does not seem to be fair and also the report that the ASI had submitted were submitted within 15 days which is too short a time to determine and come to any conclusion with regards to any structure. But what critics and the opposite counsel missed the point that the work that was allotted to the Archeological survey of India was time bound and hence had to finish up the report in that particular time span. This judgment did not just consists of a land dispute, but about the religious sentiments involved, Hindus and Muslims are two religions who did not have a smooth past and coming up with a judgment that did not hurt the sentiments of any of the parties. The confusion was that the parties did not want the disputed land to be distributed amongst themselves and all the resorts that is mediation had gone to waste, but the judgment given by the Supreme Court was the fairest judgment that they could have given which led to both the communities to be content. But, there was one thing that actually was actually troublesome, that when the riots took place and destroyed the part of the Babri Masjid no action was taken against such act and court should have taken adequate actions with respect to the same.

#### ➤ **SURVIVAL OF SECULARISM IN FUTURE**

Though, the Ayodhya judgment is one of the recent judgments which proved that India is still traveling on the path of secularism, but for how long? This is a question that we need to ask ourselves. India is a land of multi-cultural diversity which is its strengths according to Nehru but it comes with a lot of challenges. Secularism seems to be a tough road for India in the future because of different religions and also because of vote banks. India is a country where communal based politics is something that is not new. But in a country like India, where religion is embedded in every human being and every substance, can religion be separated from politics? This is what is to be pondered upon. Many vote-banks are filled by religious based votes, the BJP and Shiv-Sena are those parties, whose policies are inclined towards Hindus or Hindutva, for example with reference to the Ayodhya dispute, BJP tried to fill up their vote banks by raising the slogan such as “mandirwahinbanega” referring to the Hindu temple. What is to be observed is that every political party is inclined towards some community or the other, for instance the Congress, since the time of Indira Gandhi filled up their vote banks with the votes of



minorities. “The Congress Party government in Andhra Pradesh tried to implement reservation on the basis of castes for Muslims.<sup>14</sup>”

India is a socialist country and still economically backward and people look up to their governments and once there seems to be economic growth in the country people will tend to think religion as their secondary tool and what political party suits their economic benefits and the country will be the primary concern. Being secular in a country like India, means achieving utopia in today’s scenario, because there can be no end to communal politics. Riots based on religion will continue to happen, because of poverty, people tend to take religion as their ray of hope and do not want to rise above the religion that they believe in. Politicians will continue to make policies that are made to abuse people’s religions and their feelings.

But with the due diligence of our judicial system, a case which consisted of the deeply embedded religious sentiments of both the religions, which could either divide or unite the country. But, court came up with the solution that did not affect the integrity of any of one religious class and led to India passing a secularity test with flying colors.

There was a time when everyone believed that elections can never be successful in India as most of the citizens residing in India are illiterate and India had to face a lot of backlash and had to face a lot of mockery because of the same, but India proved everyone wrong, and held one of the most fair elections that the world had ever seen. Hence the point being that India has the capacity to achieve the secularity that Nehru showed the path to, but if it follows the ideals and ways that Nehru put forward, it can definitely achieve the utopia that the Constitutional Assembly dreamt off.

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<sup>14</sup>Supra 1