

RELIGION, SOCIETY AND STATE IN INDIA

A Legal Perspective

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“A Union of Government and Religion tends to destroy Government and degrade Religion.” Justice Hugo Black¹

1. Introduction

The question of Secularism is one of the most challenging doctrinal issues facing any scholar interested in socio-legal issues. Jurists have debated on the secular character of the Indian state.² There are various positions ranging from the espousal of an anti-secularist manifesto to invocation of a ‘Western’ style of secularism which advocates a strict separation of religion and state. Hence one is called upon to make an ‘ethico-legal’ assessment.³ Indian society has in the recent years witnessed a sharp increase in communal violence and the disturbing fact for any concerned citizen is the fact that the conduct of the Indian State has in many cases been suspect, to say the least. The widespread communal riots that shook the nation after the demolition of the Babari Mosque and the Gujarat riots of 2002 are instances which substantiate the preceding observation.

The role played by the judiciary in cases related to secularism is also suspect to say the least. The Hindutva judgement came as a shock to many as it seemed to suggest that the Supreme Court had clearly sided with the

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¹Hugo Black was a famous American jurist and an exceptional judge of the U.S Supreme Court. His worldview of Jurisprudence was informed with a strong sense of democratic virtues and judicial restraint in cases where the judiciary was at loggerheads with the legislature. He was also a strong proponent of the theory of ‘Originalism’, which held that the judiciary is not supposed to create or amend laws but only to uphold them

²Upendra Baxi, “The Struggle for the Redefinition of Secularism in India,” *Social Action* 44, 1994, 16.

³The term ethico-legal is used in the sense that one would desire that law would emphasize as much on the ‘substantive’ aspects as it does on the ‘procedural.’

dominant religion and exhibited majoritarian tendencies. On December 11, 1995, a three judge Bench of the Supreme Court delivered judgments in a number of appeals which arose from decisions of the Bombay High Court relating to the validity of the elections of certain Shiv Sena-BJP candidates to the Maharashtra Legislative Assembly. The Bombay High Court had set aside the elections of these candidates mainly on the ground that they had committed a corrupt practice as defined by Section 123(3) of the Representation of the People Act, 1951. The corrupt practice defined in Section 123(3) consists of “the appeal by a candidate or his agent or by any other person with the consent of a candidate or his election agent to vote or refrain from voting for any person on the ground of his religion...” The Supreme Court in the course of deciding an appeal in an election petition, had interpreted the meaning of ‘Hindutva’ and ‘Hinduism’ as a synonym of ‘Indianisation.’ This was clearly an affront to the multitudes of minorities in the country and seemed to suggest that the judiciary was displaying a majoritarian mindset.⁴

What then are the ethically or, rather, ethico-legally incoherent or untenable models of state-religion relationship that are being advocated in and for India today? How do they compare with, or depart from, the constitutional vision? Is the latter altogether flawless or does it call for some contemporary revisions? If it does in fact need to be amended and if the ethico-legal incoherencies of the presently available reformulations are to be avoided, how may we proceed? One can begin with the differences between the Western and Indian notions of Secularism, as these have been the pre-dominant theoretical frameworks employed in the dissemination of the concept. In the West secularism has been predominantly understood as separation of Religion and State, while Indians⁵ have understood it as *sarva dharma samabhava* (equal respect for all religions). The need for clarity is an urgent one as civil society is becoming increasingly subject to communal forces which threaten our existence as a peace loving nation

⁴The appeal no. 2836/1989 was filed by Ramesh Yashwant Prabhoo, a Shiv Sena candidate, against a judgement of the Bombay High Court which had set aside his election under Section 123 (3 & 3a) of the Peoples Representation Act holding him guilty of use of religion in his election campaign.

⁵The term ‘Indian’ is used in a cultural and civilization sense.

wedded to Gandhian ideals.⁶ Ideas of pluralism and multiculturalism may become extinct very soon.⁷

The attempt of the author will be to posit the different theoretical positions and point out to various inconsistencies in the law. Efforts will be made not just to diagnosis the problems in the legal framework and state policy, but also to attempt a prescription which may be able to address the problem.

2. Conceptualizing Secularism

Secularism, as understood as a separation of state and religion, has had its origins in Europe. The Treaty of Westphalia which ended the Thirty Years War in 1648 is a seminal event for the discourse on secularism. This treaty imposed the principle of sovereignty as a non-negotiable principle for the existence of the nation-state and also marked the beginning of the separation of Church and State by the clear demarcation of their respective powers. This breach would be further widened by the events of the French Revolution and the Enlightenment. In its pursuit of the project of Enlightenment and Progress through the replacement of the mythical and religious view of the world with the scientific and technological-industrial approach, Europe brought about a differentiation or separation of the political sphere from the religious sphere. This process by which “sectors of society and culture are removed from the domination of religious institutions and symbols” came to be variously referred to as the “secularization” or desacralization of the world.⁸ In addition to this idea of (1) the separation of religion and politics, “secularism-secularization” also means (2) the diminution of the role of religion; (3) this-worldly orientation rather than orientation towards the supernatural; (4) the replacement of the “sacred” or “mysterious” conception of the world with the view that the world or society is something that can be rationally manipulated or socially engineered; and (5) a view of religious beliefs and institutions as human constructions and responsibilities rather than as divinely ordained mysteries.⁹

⁶Amartya Sen, “The Threats to Secular India,” *Social Scientist* 21, 1993, 5-23.

⁷Rajni Kothari, “Pluralism and Secularism: Lessons of Ayodhya,” *Economic and Political Weekly*, December, 1992, 19-26

⁸P. L. Berger, *The Social Reality of Religion*, London: Allen Lane, 1973

⁹Upendra Baxi, “The Struggle for the Redefinition of Secularism in India,” *Social Action* 44, 1994, 17

While these are the meanings of “secularism” in the West, its use in India is accompanied by significant differences. In fact, because of the variant or *sui generis* nature of Indian secularism,¹⁰ the Preamble of the Indian Constitution did not contain the word secular as a signification of the state until it was done so by a 1976 amendment.¹¹ It must, however, be noted that the original constitution did contain several provisions, which left no one in doubt about the secular (in the sense of *sarva dharma samabhava*) character of the Indian state and which, in 1973, made the full bench of the Supreme Court to rule that “secularism” is a constitutive feature of the basic structure of the constitution. In the West, as noted above, secularism usually refers to the state’s separation from, or indifference toward, religion. Hence, the Western antonym of “secular” is “religious.” In India, by contrast, it is “communal” that is the antonym of “secular.” This is so because given the pervasive religiosity of the people and the pluralism of religions, an ethico-politically appropriate pattern of relationship between religion and state had to be one that stressed the equal respect of all religions, rather than the establishment of any insurmountable “wall of separation” between the state and religion.

India which proclaimed itself a Republic with a democratic constitution in 1950 chose a different trajectory. According to the great legal scholar Granville Austin, the framers had to keep in mind the unity of India in the light of many diverse religions that existed.¹² Many articles in

¹⁰*Sui generis* is a term used in law to identify a legal classification that exists independently of other categorizations because of its singularity or due to the specific creation of an entitlement or obligation. It is also used in philosophy to indicate an idea or an entity that cannot be included in a wider concept, which makes it its own genus/kind.

¹¹The 42nd Amendment of 1976 was introduced by the government of Prime Minister Indira Gandhi during the imposition of emergency. Amongst many other things the word ‘secular’ was added in the Preamble. It was a very controversial amendment and was an attempt by the government of the day to stay in power by suppressing basic liberties of the citizens. It almost amounted to rewriting the Constitution. It deprived citizens of direct access to the Supreme Court, except when violation of the fundamental rights resulted from Central law. The Supreme Court was given exclusive jurisdiction as regards determination of the constitutional validity of laws passed by the union government. It restricted the power of Courts to issue interim orders by way of injunction or stay. Almost all parts of the Constitution from the Preamble to the amending clause saw changes through this amendment.

¹²Granville Austin, *Working a Democratic Constitution: A History of the Indian Experience*, New Delhi: Oxford University Press, 2009.

the constitution tried to ensure this. Some of the significant provisions were as follows:¹³

(a) Article 25 provides that all persons have equal freedom of conscience and religion;

(b) Article 15 ensures that there is no discrimination by the state against any citizen on grounds of religion;

(c) No communal electorates;¹⁴

(d) Article 25(2) (a) states that the state has the power to regulate through law any “economic, financial or other secular activity” which may be associated with religious practice;

(e) Article 25(2) (b) ensures that the state has the power to provide for “social welfare and reform or the throwing open of Hindu religious institutions of a public character to all classes and sections of Hindus;”

(f) Article 17 outlaws untouchability;

(g) Article 25(1) states that subject to public order, morality and health, every religious denomination has the right to establish and operate institutions for religious and charitable purposes;

(h) Article 30 states that all religious minorities have the right to establish and administer educational institutions of their choice and they cannot be discriminated against by the state in its granting of aid to educational institutions;

(i) Article 16 states that no citizen can be discriminated against on grounds of religion for employment or office under the state as well as for admission into educational institutions maintained or aided by state funds;

(j) Article 28(1) states that no religious instruction is to be provided in educational institutions which are wholly maintained out of state funds, with the exception of those state-run educational institutions, whose

¹³I have referred to Granville Austin’s works on the Indian Constitution and also commentaries of the constitution by M. P. Jain, *Indian Constitutional Law*, 5th edition, New Delhi: Wardha Law Publishers, 2006.

¹⁴There has been a lot of controversy over the proposed ‘Caste’ based census. The last time this was done was in 1931 by a colonial regime. It is very difficult to decide on policy matters like reservations if data on caste is unavailable. A good example is the policy of Tamil Nadu to grant 69% reservation, which clearly violates the Supreme Court ruling in *S. R. Balaji v. State of Mysore* (1963) which fixed the upper limit of reservation at 50%. Tamil Nadu circumvented judicial review by introducing reservations under the 9th Schedule of the Constitution. Until a Supreme Court ruling in 2007, the 9th Schedule was exempt from judicial review. Hence a caste census will provide more clarity for policy makers and the judiciary.

founding endowments or trusts require such instruction to be provided in them. Moreover, no person attending any educational institution “recognized” or “aided” by the state can be required to take part in any religious instruction or worship that may be conducted in it unless she/he or her/his guardian has given consent to it.

(k) By a Constitutional amendment in 1976, all citizens are enjoined to consider it their fundamental duty to “preserve the rich heritage of our composite culture.”¹⁵

3. Legal Discriminations

While these provisions exist in the legal framework, there are certain ‘discriminations’ that exist within the Constitution. Article 25(2) of the constitution calls for providing “social welfare and reform and throwing open of Hindu religious institutions of public character to all classes and sections of Hindus.” India’s constitution does not define who or what is a Hindu, but it defines followers of Buddhism, Jainism and Sikhism as Hindus for purposes of Hindu temple entry. Article 25(2)(b) (Explanation II) states: “the reference to Hindus shall be construed as including a reference to persons professing the Sikh, Jaina or Buddhist religion...”

Why should a secular state be concerned with the social welfare of only one religion? The motive of the constitution writers was obvious: to prevent the conversion of Dalits to Christianity or Islam, to “reform” Hinduism to make it palatable to the former untouchables.

The Hindu Marriage Act of 1955 applies to

(a) any person who is a Hindu by religion in any of its forms and developments, including a Virashaiva, a Lingayat or follower of the Brahmo, Prarthana or Arya Samaj;

(b) to any person who is a Buddhist, Jain or Sikh by religion, and

(c) to any person domiciled in the territories who is *not* a Muslim, Christian, Parsi or Jew by religion.

In other words, legally there is no such thing as a Buddhist, Jain, or Sikh marriage, which is another attempt to deny these religions a distinctive identity and absorb them into the Hindu fold. The Office of the Registrar General that conducts the decennial census enumerates anyone

¹⁵The idea here was to stress more on the ‘duties’ and political obligations of citizens than on ‘rights.’ This was a brazen attempt to weaken the fundamental rights enshrined in the constitution.

who is not a Christian, Muslim or Parsi as Hindu, most particularly in tribal areas, in order to inflate the religious majority.¹⁶

Article 290A of the Constitution, which was added in 1956, provides for Kerala state funds to be paid for the upkeep of Hindu temples and shrines in the territories of former princely state of Travancore. What state but a denominational one would spend government funds to promote a particular religion? This is a clear example of State promoting a particular religion. The most important thing to note is that this is a constitutional provision which means that it cannot be removed easily.¹⁷

Although freedom of religion is granted under the constitution's Article 25 (1), a Congress government of Madhya Pradesh pioneered anti-conversion legislation during the heyday of Nehru in 1954. Since then as many as 7 state legislatures (Arunachal, Chhattisgarh, Gujarat, Himachal, Orissa, Rajasthan and Tripura) have passed laws severely restricting conversion from Hinduism to other religions while facilitating conversion to Hinduism.

In 1982, when a few hundred Dalits embraced Islam in Meenakshipuram, the central government took measures to curb conversions. No less than Indira Gandhi characterized conversions as a threat to national security. Christian missions and churches have been under attack since decades, often with state complicity as demonstrated in August-September 2008 in Orissa and Karnataka.

Hundreds of mosques are in illegal possession nationwide including in New Delhi, where scores are occupied by the central government. It was a Congress government that first locked up the Babari Mosque in 1949 by court order effectively converting it into a Hindu temple. What began under Nehru was successfully completed by Narasimha Rao in 1992 through the Mosque's destruction under the very nose of army, paramilitary and police. It is ironic that the Indian state was ready to

¹⁶The need to increase the numbers of the dominant religion is clearly an expression of 'Majoritarianism.' Philosophers like Plato have opposed majoritarianism as being an expression of 'mob rule.'

¹⁷Article 290 A states, "A sum of forty-six lakhs and fifty thousand rupees shall be charged on, and paid out of the Consolidated Fund of the State of Kerala every year to the Travancore Devaswom Fund; and a sum of thirteen lakhs and fifty thousand rupees shall be charged on, and paid out of the Consolidated Fund of the State of Tamil Nadu, every year to the Devaswom Fund established in that State for the maintenance of Hindu temples and shrines in the territories transferred to that State on the 1st day of November, 1956, from the State of Travancore-Cochin."

deploy army to flush out Sikh insurgents from Golden Temple and Muslim rebels from Charar-i Sharif, but did not protect Babari Mosque from the Hindu mobs' jack hammers.

The states of Gujarat and Uttar Pradesh spent government funds to rebuild the Somanatha Temple around the same time when Babari Mosque was locked up. It was President Rajendra Prasad who inaugurated the rebuilt temple in 1951 amidst official fanfare. Article 16 (2) of the constitution prohibits discrimination in public employment on religious grounds. Yet there are numerous examples of outright discrimination. Per Presidential orders of 1950 and 1956 the beneficiaries of Scheduled Castes' reservation can only be Hindus, Sikhs and Buddhists but not Christians and Muslims. If an SC changes religion after obtaining employment or admission to school, he or she must forfeit job and withdraw from school as has happened in numerous instances. But if the SC reverts to Hinduism, he or she can resume his/her status as an SC.

These discriminations clearly indicate the state is not upholding the principle of secularism understood as *sarva dharma samabhava*. One must stress the fact that this is not confined to a Congress or BJP government. The constitution itself contains provisions that violate the principle of secularism.¹⁸

3. Discrimination in Army¹⁹

Right after 1947, Kashmir's predominantly Hindu army was absorbed in the national army; whereas Hyderabad's largely Muslim army was disbanded, rendering nearly 20,000 jobless. The Indian army's infantry regiments are still based on religion (Sikh regiments), or ethnicity (Gorkha) or caste (Rajput) or region (Garhwal) in which members of other faiths, ethnicities, and regions are barred.

While a bearded Sikh may become chief of the army staff as did Gen. J. J. Singh, a Muslim may not sport beard in any of the armed forces. Only Jhatka is served in army messes and *langers* forcing Muslims to

¹⁸The word 'epistemic violence' is used in the manner it was used by Gayathri Spivak in her seminal essay 'Can the subaltern speak?' (see Marxist Interpretations of Culture, Cary Nelson and Larry Grossberg (eds.), London: Macmillan, 1985)

¹⁹The Indian Army is one of the largest and oldest armies in the world. Established as early as 1776 by the East India Company, it had been organized strongly along caste and regional lines. This was done to suit the needs and interests of the colonial rulers. The newly formed Indian Republic also chose to retain its regiments along these lines.

become vegetarian. A Hanuman temple greets visitors upon entering virtually every cantonment in the nation, hinting non-Hindus that they don't belong there. In their public addresses to the soldiers and officers, at least two army chiefs, Generals B. C. Joshi and Shankar Roy Chowdhury, have used references to Hindu scriptures to the exclusion of other scriptures.

4. Discrimination in the Cultural Sphere

There are numerous examples where Hindu culture is conflated with Indian culture. The ban on cow slaughter deprived thousands of butchers their livelihood even as it stole millions of poor their only source of inexpensive protein. Cow may be sacred to the upper castes, but not so to the rest of the Hindus, Tribals, Christians, Dalits, and Muslims. The Government of Karnataka has in fact passed an Anti-Cow slaughter Bill titled as Karnataka Prevention of Slaughter and Preservation of Cattle Bill, 2010. The bill stated that slaughter of a cow, calf, bull, bullock, buffalo was completely banned in the state. There was also prohibition of sale, usage and possession of beef and restriction on transport of cattle. It said a police official had the authority to search and seize cattle. The law provided for imprisonment from one year to seven years, with a fine of Rs 25,000 – 50,000. This is clearly an instance of the State trying to ‘police’ food habits and cultural lifestyles of its citizens.²⁰

Official functions of the government whether at the central or state levels often commence with Hindu ceremonies of lighting lamps, breaking coconuts, and recitation of *slokas*. The functions of central and state ministries of education begin with *Sarasvati vandana*, praising Hindu goddess of wisdom.

In September 1993, Air India took delivery of a Boeing 747 in Seattle, Washington where the Ramakrishna Mission performed a *puja* invoking Lord Ganesha. Ministers lay foundation stones of government buildings preceded by *bhoomi puja* (blessing of the land, according to Hindu faith and tradition) ceremony as if the state belongs only to Hindus. In a trip to the United States in 1984, Andhra Pradesh Chief Minister N. T. Ramarao found nothing objectionable in spending government funds for distributing medallions with Sri Venkateshwara's image among potential investors in the state.

²⁰It must be noted that this piece of legislation evoked widespread protests and criticism from civil society and citizens forums, including leading intellectuals from the state like U. R. Ananthamurthy and Girish Karnad.

A large stone image of a reclining Vishnu located at the entrance to the Inspector General of Police's headquarters in Bangalore is more fitting for a temple than a secular state's police building. Almost every police *thana* in West Bengal has a Kali temple, none has a mosque in a state with nearly 30 percent of the population are Muslims.

School children in Gujarat, Maharashtra and numerous other states have been forced to perform *Surya namaskar* against their will. Government school texts in Hindi and regional languages assume all pupils to be Hindus as the contents are soaked with idioms, phrases, signs, symbols, and icons of Hinduism to the exclusion of materials from other religions and cultures. Textbooks of history and social studies are replete with gross distortions of Indian history of all eras, ancient, medieval and modern, in which Muslims and Christians are invariably the villains, traitors and foreigners.

Until the advent of television in the 1980s, All India Radio (AIR) was the main source of information and entertainment to middle classes. The government-controlled AIR began its programs with *Vande Mataram*, *Mangala dhvani*, *Vandana*, and other Hindu lyrics. Rarely did AIR broadcast anything pertaining to Christian or Muslim cultures. Like the AIR, during its heyday, seldom does Door Darshan show any serials of Muslim or Christian character. When it broadcasted serials of historical or literary figures, Tipu Sultan, Ghalib, they were caricatured into modern stock characters stripped of their distinctive cultural identity.

5. The Future of Secularism in India

One often finds that countries like Pakistan and Saudi Arabia are termed as 'theocratic.' While one does not dispute the fact that living conditions in India are a lot more favourable, it would be pertinent to note the above mentioned discriminations. One is forced to ask the question: Is the Indian State Secular? The answer from a legal point of view is that it is not, be it whichever theoretical framework one employs, Western or Indian.

The most important contemporary challenge to Indian secularism has been mounted by the forces of Hindu nationalism. Since the mid-1980s, the Bharatiya Janata Party (BJP) and the "Sangh Parivar" have been insisting on a distinction between their own "positive secularism" and the "pseudo-secularism" of the Congress. According to them, "positive secularism," which would mean "justice for all and discriminations against none," should replace the prevailing "pseudo-secularism," whereby the word secularism is misused to denigrate the Hindu categories and symbols

of the majority community and to justify the pampering of the minority communities.²¹ According to Thomas Blom Hansen, the ideology of Hindutva and “positive” or “true” secularism amounts to the principle of rule by Hindu majoritarianism. He notes that it is a “peculiar co-articulation of brahminical ideologies of purity, romanticist notions of fullness and authenticity, and quasi-fascist organism and celebration of strength and masculinity which characterizes the Rashtriya Swayamesvak Sangh (RSS) and its affiliated organizations.”²²

The ideology of “positive secularism” is subjected to serious criticism in the writings of Partha Chatterjee, T. N. Madan and Ashis Nandy, who are also critics of secularism. According to Nandy, Nehruvian secularism, which separates state and religion, and which has been imposed on the Indian people, is part of a larger, modern, Western package of scientific growth, nation-building, national security and development. Whereas secularism demands of the members of religious communities to dilute their faith so that they can be truly integrated into the nation-state, it “guarantees no protection to them against the sufferings inflicted by the state itself” in the name of its “secular, scientific, amoral” ideology of nation-building, security, development, etc. As a handy adjunct to these “legitimizing core concepts,” secularism helps the state-elites to legitimize themselves as the sole arbiters among traditional communities, to claim for themselves a monopoly on religious and ethnic tolerance and on political rationality. To accept the ideology of secularism is to accept the ideologies of progress and modernity as the new justifications of domination, and the use of violence to achieve and sustain the ideologies as the new opiates of the masses.²³ According to Nandy, this modern Western rational-scientific secularism, which Nehru sought to impose on the Indian society, has failed either to eliminate religion from politics or to promote greater religious tolerance. Hence, it can “no longer pretend to guide moral or political action.” Nandy therefore has no hesitation in calling himself an antiseccularist. By so criticizing secularism, Nandy does not mean to privilege the communalist ideology of either the majority or minority religious communities. To the contrary, these communalist ideologies are,

²¹Nana Deshmukh, *Our Secularism needs Rethinking*, New Delhi, Deen Dayal Research Institute, 1990.

²²Thomas Blom Hansen, “Globalization and Nationalist Imaginations,” *Economic and Political Weekly*, March, 1996, 608.

²³Ashis Nandy, “The Politics of Secularism and the Recovery of Religious Tolerance,” *Alternatives*, 1988, 192.

in his view, the pathological by-products of modernity; they are the dialectical “other” or counter-players of modernity’s secular state.

Like Nandy, T. N. Madan maintains that religious zealots, who contribute to fundamentalism or fanaticism by reducing religion to mere political bickering, are provoked to do so by the secularists who deny the very legitimacy of religion in social life. He sees secularism as a product of modernity and enlightenment rationality that is in blind denial of religion. According to him, because it denies the immense importance of religion in the lives of the peoples of South Asia, secularism is in this region an impossible credo, an impracticable basis for state action and an impotent remedy against fundamentalism or fanaticism. One has to concur with Madan on this as religion is an integral part of social life in India. The right wing and communal elements have always portrayed secularism as ‘denial’ of God and this seems to have gained currency amongst many sections of Indian society. Ruling out the establishment of a Hindu state as an utterly unworkable proposition, Madan concludes that “the only way secularism in South Asia, understood as interreligious understanding, may succeed would be for us to take both religion and secularism seriously and not reject the former as superstition and reduce the latter to a mask for communalism or mere expediency.”²⁴ He commends Gandhi not only for emphasizing the inseparability of religion and politics but also for opening up avenues of interreligious understanding and “of a spiritually justified limitation of the role of religious institutions and symbols in certain areas of contemporary life.”²⁵ Madan’s emphasis on interfaith dialogue should be taken very seriously indeed. This will certainly help build bridges between religious communities and reduce communal violence which has plagued the nation.

Like Nandy and Madan, Partha Chatterjee too finds that the ideology of secularism is not an adequate or appropriate political perspective for meeting the challenge of Hindu majoritarianism. In his view, the official model of Indian secularism and the present campaign of the Hindu right for setting up a “positively” secular state have brought India to a “potentially disastrous political impasse.” According to Chatterjee, since its birth, the project of the nation-state in India has been implicated “in a contradictory movement with regard to the modernist mission of secularization.” One part of this nationalist-modernist project

²⁴T. N. Madan, “Secularism in its Place,” *Journal of Asian Studies*, 1987, 758.

²⁵T. N. Madan, “Secularism in its Place,” 759.

was the secularization of the public-political sphere by separating it from religion, while another part was reformist intervention of the state in the socio-religious sphere mostly of the Hindus. Describing the contradiction between these two parts of the project of modernist secularization, Chatterjee writes that the interventionist violation, by the state, of secularism’s principle of the separation of state and religion “was justified by the desire to secularize.”²⁶ Thus he notes that the temple-entry reforms or the reform of the personal laws of the Hindus, which served the “public interest” only of the majority religious community rather than of all citizens, cannot claim to be based on nonreligious grounds of justification. Chatterjee also points out that the enormous powers vested in the Tamil Nadu Government’s Commissioner for Hindu Religious Endowments is in contradiction with the secular principle of the separation of state and religion. As another such anomaly or contradiction he mentions the fact that the principle of the equality of religions is compromised by the exclusion of persons professing certain religions from the benefits of positive discrimination given to the scheduled castes. Turning to the recent shift in the ideological articulation of Hindu nationalism, Chatterjee points out that its present championing of “positive secularism” is meant not only to deflect accusations of its being antiseccular but also to rationalize, in a sophisticated way, its campaign for intolerant interventions by a modern, positively secular state against the religious, cultural or ethnic minorities in the name of “national culture” and a homogenized notion of citizenship. “In this role,” writes Chatterjee, “the Hindu right in fact seeks to project itself as a principled modernist critic of Islamic or Sikh fundamentalism and to accuse the ‘pseudo-secularists’ of preaching tolerance for religious obscurantism and bigotry.”²⁷

The quandaries generated by the career of the secular state in India and the potentially disastrous nature of the new politics of “positive secularism” lead Chatterjee to the conclusion that the theory and practice of the secular state cannot bring about what, according to him, is really needed in India, namely, the toleration of religious, ethnic and cultural differences.

²⁶Partha Chatterjee, “Secularism and Toleration,” *Economic and Political Weekly*, 1994, 1768.

²⁷Tensions between the Hindu and Sikh communities are testimony to this fact. See Partha Chatterjee, “Secularism and Toleration,” 1770.

It is interesting to note that in the landmark case of *S. R. Bommai v/s Union of India* (1994), Justice Kuldeep Singh noted that ‘communal’ parties do not have a right to exist as their existence violates the ‘basic structure’ of the Constitution. These comments by the learned judge are often regarded as the *Obiter Dicta*²⁸ of the case, the *Ratio Decidendi*²⁹ being the misuse of Article 356 and its implication on Centre-State relations. Maybe the time has come to take these observations seriously. This would go a long way in banning parties that misuse religion for political ends. In fact even leading jurists like Soli Sorabjee,³⁰ have stated that the observations made by Justice Kuldeep Singh have to be treated as “the law of the land.” This would go a long way in banning parties that misuse religion for political ends. However it is a great tragedy for this country that the words of wise judges like Kuldeep Singh are ignored. There have been international precedents like in Turkey where in 1998, the Turkish Constitutional Court dissolved the Refah Party as a “center of activities contrary to the principle of secularism.” The banned party took the Turkish state to the European Court of Human Rights (ECHR), where the court upheld the ban.³¹

6. Conclusion

While it is very difficult to reconcile all these different viewpoints, it is nevertheless important to engage in this discourse and seek out answers, so that both the State and Religion survive as ethical entities that continue to serve the cause of humanity. The Indian state has to follow the principle of *sarva dharma samabhava* in both letter and spirit. The primary task of the Indian state is to bring in clarity with regards to the constitutional position on secularism. While some sections may feel tempted by the Turkish model of secularism, it would not work in a country like India. Religion is here to stay and it is time for the state to ruminate on its relationship with religion. The state has to undertake the amendment of the Indian

²⁸*Obiter Dicta* literally means ‘said by the way.’ It is a remark or observation made by a judge that, although included in the body of the court’s opinion, does not form a necessary part of the court’s decision

²⁹*Ratio Decidendi* is the rationale of a decision or ‘the principle which the case establishes.’ It is the seminal point in a case which determines its judgement.

³⁰Soli J. Sorabjee is a senior advocate of the Supreme Court. He was formerly the Attorney General of India.

³¹*Refah Partisi (The Welfare Party and others) v. Turkey* (Applications nos. 41340/98, 41342/98, 41343/98 and 41344/98), European Court of Human Rights, Strasbourg, 13 February, 2003.

constitution in order to change the legal tenets that violate the principle of secularism. There cannot be partiality when it comes to the states treatment towards religions, it cannot and should not be allowed to patronize a particular religion at the cost of others. There will be turbulent times ahead and many stiff challenges posed by communal forces in the future. A change in the constitution can be a positive step to meet these challenges and preserve democracy in India for eternity.