

NEHRU AND SECULARISM

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THE NATURE of secularism incorporated in the Indian Constitution was determined by the renaissance of Indian tradition, colonial experience undergone by the society, ideological heritage of the nationalist movement, Nehru's perception of social realities and his search for an identity of the nation in modern terms. Nehru's writings reveal full awareness on his part of the need to strengthen nationalism and democracy in a multireligious society characterised by arrested development while his style of functioning is an acknowledgement of the limitations under which he had to work. After all India in 1950 was not a *tabula rasa* and Nehru was no dictator. The contribution of Nehru lies in having comprehended the true significance of the historical forces and in having provided nationalism with an ideological content. In the process Nehru had to make compromises but he never wavered in his commitment to the basic values. There were apparent contradictions too in his approach but these contradictions can be better understood if one goes deeper into the evolution of his socio-political outlook.

Nehru's patriotic urges received form and content from the humanist liberal tradition.¹ It was, however, not the integral or revolutionary liberalism.² Nehru acknowledged that "my roots are still perhaps in the nineteenth century, and I have been too much influenced by the humanist liberal tradition to get out of it completely. The bourgeois background follows me about..."³ It may, however, be added that rationalism imbibed by Nehru from the humanist liberal tradition made him anti-dogmatic and he refused to accept any single creed or ideology to guide him. The result was "groups within me."⁴ Gandhian was one group; Marxism and liberalism the others.⁵

The humanist liberal approach of Nehru in its application to the Indian problems had to be transformed in order to meet the objective conditions in the society. Nehru had to reckon with the historical truth that the "new nationalism in India, as elsewhere in the East was a religious nationalism."⁶ The moderates in Congress no doubt had a secular outlook but they lacked a mass base. The masses were with Gandhi, who was not sectarian but his

1. Ganesh Prasad, *Nehru : A Study in Colonial Liberalism* 63 (1976).

2. For different phases of the humanist liberal tradition, see Ganesh Prasad, *id.*, chapters I and II.

3. Jawaharlal Nehru, *An Autobiography* 591 (I Ind. ed., 1962).

4. Frank Moraes, *Jawaharlal Nehru* 43 (1958).

5. *Supra* note 1.

6. Nehru, *supra* note 3 at 24.

worldview was deeply influenced by religion. The idiom of discourse of Gandhi was totally religious. Actually modern secularism was not an integral part of nationalist movement. Raja Ram Mohan Roy, Dayanand Aurobindo, Tilak, Gandhi, Lajpat Rai, Malaviya and other leaders of the Hindu intelligentsia which received western education attempted a revival of nationalism based on Hindu scriptures. The basic premises and rationale of the *khilafat* movement also, which attracted a number of Muslim leaders to the nationalist movement was religious. Nehru used to feel troubled "at the growth of religious elements in our politics both on the Hindu and Muslim side. I did not like it at all."⁷ Gandhi's Ramaraj jarred upon him and he did not support the *khilafat* movement fully because it was essentially a religious issue.⁸ While unequivocally rejecting the religious basis of nationalism, Nehru realised the difficulty in defining nation's identity without reference to India's past. His approach was that :

[W]e shall have to keep many of the links with our past, but we shall also have to break through the prison of tradition whenever it prevents us from our onward march.⁹

Much in India's past "instinctively thrilled"¹⁰ Nehru. But he would not blindly accept everything from the past. According to him

A blind reverence for the past is bad and so is contempt for it, for no future can be founded on either of these. The present and future inevitably grow out of the past and bear its stamp, and to forget this is to build without foundations and to cut off the roots of national growth.... Nationalism is essentially a group memory of past achievements, traditions and experience...¹¹

What Nehru admired in the ancients was 'their love of truth and beauty', 'the basic values that they set up', 'their understanding of life's mysterious ways' and 'their toleration of ways other than theirs'.¹² It was the aesthetic, the rational, the faith, the spirit of inquiry, the tolerance for other point of view in the ancient culture which fascinated Nehru. He never identified culture with religion. Despite his admiration for the ancient Indian culture, he believed in the cultural pluralism and synthesis. He was influenced by the concept of synthetic universalism propounded by Tagore and had no sympathy for the religious approach to nationalism.¹³ Nehru refused to talk in terms of Hindu culture, Muslim culture or Christian culture. He

7. *Id.* at 72.

8. Patil, *Nehru and the Freedom Movement* 39 (1977).

9. Nehru, *Glimpses of World History* 22 (1942).

10. Nehru, *Discovery of India* 37 (4th ed., 1956).

11. *Id.* at 528.

12. *Id.* at 522.

13. *Supra* note 9 at 437; see also Verma, *Modern Indian Political Thought* 379 (4th ed., 1971).

saw in the Indian history “the gradual growth of a composite culture of the Indian culture”.¹⁴

Nehru on religion

Nehru was neither irreligious nor anti-religious but his approach to religion also was influenced by the three basic assumptions of humanist liberal tradition viz., individualism, rationalism and universalism.¹⁵ Nehru was not attracted at all towards religion as practised and accepted even by thinking minds, nor did he accept the idea of personal God.¹⁶ Organised religion with its dogma and ceremonials filled him with horror because it encouraged a temper which is the very opposite to that of science and tended to close and limit the mind of man and produced a temper of a dependent and unfree person.¹⁷ Further, the organised religion presented a philosophy of submission to nature, to established churches and to the prevailing social order. It has “checked the tendency to change and progress inherent in human society.”¹⁸ Yet, Nehru admitted that some kind of religious belief was necessary for the generality of mankind. It had provided a set of values to human life which have provided the foundation of morality and ethics.¹⁹ Nehru’s concept of religion is intended to serve the needs of an individual who is free, rational, ethical, sceptic and oriented to change and progress. Accordingly, he defined religion as “the inner development of the individual, the evolution of his consciousness in a certain direction which is considered good.”²⁰ His concept was based on deeper essence and universal message of all religions which could suit the requirements of a modern man and technological society. His vision in this regard is poignantly brought out in the following passage:

[I]f religion deals not with dogmas and ceremonials but with the higher things of life, there should be no conflict with science or *inter se* between religions. It must be the high privilege of India to help in bringing about this synthesis. This would be in India’s ancient tradition inscribed in Ashoka’s Edicts.²¹

Nehru’s views regarding religion were very clear but whether the society and even the political leadership of the country was prepared for it is a different matter. If the views of Nehru on religion were accepted, religion would create no problem in public life.

In view of the present problem of mixing up of religion with politics,

14. Nehru, *Speeches*, Vol. 3, at 413.

15. *Supra* note 1 at 1.

16. *Supra* note 10 at 12.

17. *Id.* at 526.

18. *Id.* at 524.

19. *Id.* at 12.

20. *Supra* note 3 at 379.

21. Jawaharlal Nehru, *Speeches*, Vol. IV at 6.

it would be relevant to recall the observations of Nehru on this problem. According to his perception, religion had played little part in Indian political conflicts, though the word religion was often used and exploited.²² The so-called communal question was, according to Nehru, not a religious question, but a political question of upper middle class and their demand for additional jobs and seats in legislature.²³ Accordingly the communal problem was the one of adjusting the claims of minorities and giving them sufficient protection from majority action.

Few shared Nehru's rational outlook on religion and his perception of the communal problem.²⁴ The communal divide had gone deep into the society and the stronghold of the religious prejudices in the two major communities could not be overlooked. This gave rise to the minority problem which became the major issue in the solution of the political problem of the country, culminating in the partition after large-scale violence.

Historical background

The assurance of religious freedom and establishment of secular state was the response of Nehru and other nationalist leaders to the demand of the Muslim minority for separate electorate and separate homeland for Muslims. The Commonwealth of India Bill, 1925 moved in the British House of Commons on behalf of the Indian nationalist leaders contained a provision for "freedom of conscience and the free profession and practice of religion."²⁵ The list of fundamental rights in the *Nehru Committee Report* also included "freedom of conscience and the free profession and practice of religion...subject to public order or morality."²⁶ The Indian National Congress all through stood by its commitment to guarantee religious freedom to the minorities.²⁷ The election manifesto issued by the Congress in 1946 also promised neutrality of the state in religious matters.²⁸

From 1946 onwards, the popular mood in the country underwent a sudden change. The partition of the country on the basis of two-nation theory accompanied by large scale violence, influx of refugees from Pakistan. Pak

22. *supra* note 10 at 387.

23. *Id.* at 386.

24. "Many a Congressman was a communalist under the national clock". See Nehru, *supra* note 3 at 136.

25. For Text, see Shiva Rao, *Framing of the Indian Constitution: Selected Documents*, Vol. I at 43.

26. For text see *id.* at 58.

27. See, for example, the resolution on fundamental rights and duties passed by the Indian National Congress at its Karachi session in 1931. The resolution provided that every citizen shall enjoy freedom of conscience and the right freely to profess and practise his religion subject to public order and morality.

See also the resolution of the Congress Working Committee in 1939 demanding a Constituent Assembly to frame the Constitution for India. The resolution promised that the rights of minorities would be protected to their satisfaction. See Gwyer and Appadorai, *Speeches and Documents on the Indian Constitution*, Vol. II at 496-97.

28. See Rosinger, *Restless India* 121.

invasion of Kashmir and worsening communal situation in the country contributed towards an atmosphere in which a secular state did no longer appear to be a certainty. The fast undertaken by Gandhi to stop the killing of Muslims was met with the slogans of 'Let Gandhi die'.²⁹ The impression was that even the Home Minister of India, Patel was not enthusiastic in treating Muslims in India with impartiality while Hindus were being maltreated in Pakistan.³⁰ In these circumstances, it was Nehru who strove valiantly, almost single-handed to lay the foundations of secular state.³¹ In the atmosphere prevailing during the months following independence it was an act of courage and evidence of unflinching commitment to declare that

[W]e cannot think of any state which might be called a communal or religious state. We can only think of a secular, non-communal, democratic state in which every individual to whatever religion he may belong, has equal rights and opportunities.³²

The presence of Nehru, 'the leading champion of a non-communal, secular state'³³ at the helm of affairs during the formative stages of our Republic ensured that India would not be a theocratic state whatever be the provocations. This did not mean, however, that India would adopt the stereotype of secularism evolved in Europe and embodied in the American Constitution. The American doctrine of 'wall of separation' could not serve the needs of a plural, traditional and under-developed society. Secularism in India could not ignore the problems generated by social, cultural and economic backwardness and had to act as an instrument for modernisation of society.

Secularism in the European tradition meant complete separation between *sacerdotium* and *imperium*. It was a reaction against the attempt of one to dominate the other and the long history of conflict between the two. India did not undergo this experience. According to Smith one of the factors which paved the way for the emergence of a secular state in India was the absence of large-scale organisation in the Hindu religion and its doctrinal tolerance.³⁴ In India, neo-Hindu thinkers like Radhakrishnan tried to fuse secularism with his Hindu tradition.³⁵ Gandhi's respectful regard for all the religions of mankind was truly in this tradition. However, Nehru's secularism had its basis in his agnostic belief or paganism and his essentially

29. *The Statesman*, Jan. 15, 1948 at 1, 7.

30. Brecher, *Nehru: A Political Biography* 381 (1959).

31. *Id.* at 553.

32. Nehru in a Press Conference at New Delhi on Oct. 12, 1947 quoted in V.K. Sinha, *Secularism in India* 8(1968).

33. Palmer, *The Indian Political System* 109 (2nd ed., 1971).

34. Smith, *India as a Secular State* 27 (1973).

35. McIand, *The Secularization of Modern Culture* (1966).

materialist outlook. The only concession he made was out of his conviction that the minorities had to be integrated gradually through democratic process and overall the society had to be modernised. As rightly observed by Palmer, "it was also necessary to ensure that within each community the stranglehold of religious traditions and prejudices was steadily relaxed so as to make room for the growth of a free society."³⁶ Nehru's commitment to the values of individual freedom and equality was no less than his belief in secularism. For him, a secular state was not only a historical necessity but something quite natural and normal in the modern world. Speaking on the citizenship issue in the Constituent Assembly, he made it clear:

It is brought out in all contexts, as if by saying that we are a secular state we have done something amazingly generous, given something out of our pocket to the rest of the world, something we ought not to have done, so on and so forth. We have done everything which every country does except a very few misguided and backward countries in the world.³⁷

In determining the role of modern state in matters of religion, the fact could not be overlooked that the successive governments in India had played an active role in relation to religion and religious institutions. In the absence of an organised church, religion had depended on the state to effect reform.³⁸ It is well known that the Hindu King was supposed to be the upholder and promoter of religion and protector of religious institutions. This role was assumed even by the East India Company as heirs to the predecessor governments. Under a regulation passed in 1817 the company assumed the administration of many temples, collected pilgrims tax and even appointed Hindu priests in the temples.³⁹ In fact the Madras Government was managing as many as 7500 Hindu shrines in 1833 when the directors under the pressure of Christian missionaries issued orders to the company to cease to have direct connection with the religious institutions.⁴⁰ The direct connection was severed but some of the provincial governments continued to have departments to supervise the management of temples. In addition, the British Parliament provided for the appointment of Christian religious functionaries at government expenses. This ecclesiastical department of the Government of India was abolished in 1948.

Accordingly, Nehru defined a secular state as "one which honours all faith equally and gives them equal opportunities...it does not allow

36. Palmer, "Jawahar Lal Nehru and Modern India" in Shah, *Jawaharlal Nehru: A Critical Tribute* 15-16 (1965).

37. IX CAD 398-401.

38. *Supra* note 34 at 25.

39. Bearce, *British Attitude Towards India 1784-1838* 61(1961); see also O'Malley, *modern India and the West* 591 (1941).

40. O'Malley, *id.* at 591.

itself to be attached to one faith or religion, which then becomes the state religion".⁴¹ In his concept of secular state, however, religion would not be permitted to stand in the way of the implementation of basic political decisions. He made it clear that secular state does not obviously mean a state where religion as such is discouraged. It means freedom of religion and conscience, including freedom for those who have no religion, *subject only to their not interfering with the basic conceptions of our state.*⁴²

Obviously Nehru did not visualise a non-interventionary state on the American model. His was a non-discriminatory state which 'honours all faiths equally'. This was quite different from the American concept where the Supreme Court has held that the separation of church and state did not mean merely equal treatment of all religions but 'uprooting all relationship between the two.'⁴³ In Nehru's thinking 'certain basic conceptions of our state' could not be compromised. Presumably these basic conceptions were liberty, equality, social justice, modernisation and national integration.

Constituent Assembly Debates

The difficult task of operationalising the concept of secularism fell upon the Constituent Assembly. It is significant that Nehru did not intervene even once in the discussions on the clauses relating to religious freedom. Of course in the objective resolution moved by Nehru 'freedom of belief, faith and worship' and also 'provision of safeguards for minorities' was emphasised. But as expressed succinctly by Indira Gandhi: "The spirit of the constitution bears the imprint of Nehru's inspiration even though the forms might have been devised by professional lawyers."⁴⁴ Another point to be noted is that the constitution as adopted in 1949 did not describe itself to be secular⁴⁵ nor did it use the term 'secularism'. According to Justice Gajendragadkar, the use of these terms "might unnecessarily introduce by implication the anti-religious overtones associated with the doctrine as it had developed in the Christian countries."⁴⁶ Whatever be the reason, nearly all the members participating in the debate on religious freedom assumed that India was going to be a secular state. Nobody questioned the assumption, though the

41. In Foreward to Raghunath Singh, *Dharma Nirapeksha Raj* (1961), excerpted in Gopal, *Jawaharlal Nehru: An Anthology* 330 (1980).

42. In a circular to the Pradesh Congress Committee dated 5th Aug. 1954, excerpted in Gopal, *id.* at 327 (*Emphasis added*).

43. *Everson v. Board of Education*, 330 U.S. 1; see also the observations of Frankfurter J., in *Mc Collum v. Board of Education*, 330 U.S. 203 that the spheres of two agencies remained separate and independent.

44. Excerpted in Subhash Kashyap, *Jawaharlal Nehru and the Constitution ii* (1982).

45. The word "Secular" appeared only in clause 2(a) of Article 25, which permitted regulation of any economic, financial, political or other *secular* activity associated with religious practice.

46. P.B. Gajendragadkar, *Secularism and the Constitution of India* 52(1971).

amendment moved by T.K. Shah to have the 'word secular' added in article I of the Constitution was rejected.⁴⁷ Another attempt by him to have the following article incorporated in the constitution—

The state in India being secular shall have no concern with any religion or creed or profession of faith; and shall observe an attitude of absolute neutrality in all matters relating to the religion of any class of its citizens or other persons in the Union...[was also rejected without a serious debate.]⁴⁸

The only limb of religious freedom which generated some controversy was the right to propagate religion. As noted earlier,⁴⁹ only the freedom of conscience and the right to profess and practise religion had been emphasised in course of the nationalist movement. The fundamental rights sub-committee of the Constituent Assembly also reported that the guarantee of religious freedom was to include the rights to profess and practise religion. It did not include the right to propagate. However, the advisory committee decided to incorporate the right to propagate religion as well.⁵⁰ This met with considerable opposition in the Constituent Assembly. One of the members, Tajamul Hussain moved an amendment for the deletion of the right to propagate.⁵¹ This amendment was rejected after K.M. Munshi explained⁵² that the proposal to have the right to propagate included was based on a compromise arrived at with the minority groups in which the Christians emphasised upon the right to propagate as propagation was a fundamental part of their tenet. Evidently, the constitution-makers wanted to accommodate to the extent possible the susceptibilities of the minority community.

Religious freedom under the Constitution

The provisions regarding individual⁵³ and corporate⁵⁴ rights to religious freedom (except the right to propagate) finally emerging from the Constituent Assembly had unanimous support of the members. None of the amendments moved related to substance of the provisions. An analysis of article 25 brought out clearly the fact that Nehru's concern for individual freedom, liberty and progress are fully reflected in this provision. As rightly pointed out by Tripathi:

[T]he freedom of religion was guaranteed in this secular state not out

47. VII CAD 400.

48. *Id.* at 815-16.

49. See *supra* notes 25, 26 and 27 and the connected text.

50. *Supra* note 25 at 262.

51. VII CAD 817.

52. *Id.* at 827.

53. See article 25 guaranteeing individual right to religious freedom.

54. See article 26 guaranteeing corporate right to religious freedom.

of concern for religions, generally, much less, for any particular religion, but solely and unmistakably out of concern for the individual, as an aspect of the general scheme of *his* liberty, and as incidental to *his* well-being.⁵⁵

This conclusion is fortified by the drafting pattern followed in article 25 for delimiting the scope of religious freedom. The freedom of conscience and the right freely to profess, practise and propagate religion under article 25 (1) have not only been made subject to 'public order, morality and health' but also to 'the other provisions of this part'. It is significant that in guaranteeing religious freedom the Constitution follows a pattern quite different from that generally followed in the case of other fundamental rights in Part III. In case of other rights, the relevant articles first lay down the right and in the next clause the state is empowered to impose by law restrictions on specified grounds. But in the case of religious freedom, article 25(1) provides that "subject to Public Order, morality and health and to the other provisions of this Part, all persons are equally entitled to freedom of conscience and the right freely to profess, practise and propagate religion."

Thus the Constitution rather than leaving it to the legislature to impose restrictions on religious freedom from time to time, delimits this freedom in such a manner that even in the absence of legislative curtailment, it can be claimed only in an area circumscribed by public order, health, morality and, more importantly, other provisions of this part. Consequently religious freedom under the Constitution, would be subject to other fundamental rights, for example, right to equality, right against untouchability, right to freedom and right to personal liberty. The same formula has been followed in the drafting of the religious freedom of denominations in article 26.

Clause (2) of article 25 empowers the legislature to regulate or restrict 'any economic, financial, political or other secular activity which may be associated with religious practice.' Under this sub-clause according to Tripathi, "State jurisdiction exists as long as this secular element persists and is not affected by the presence or degree of the religious element that may be found enmeshed in it."⁵⁶ The same scholar reads this sub-clause as an "expression of the complete supremacy of secular authority and secular interest over religious authority and interest."⁵⁷ These observations are fully in consonance with the national philosophy and Nehru's ideology regarding state-religion relationship, but the Supreme Court, in some of the cases at least, took a different approach. In these cases⁵⁸ the court extended the scope of religious freedom to the essential part of religion according to the teachings of that religion and conceded to the state the power to regulate or restrict only the residue.

55. P.K. Tripathi, "Secularism and Judicial Review", 8 *JILI* 6 (1966).

56. *Id.* at 9.

57. *Ibid.*

58. See *infra* notes 61, 65, 66 and 69.

It is clear that article 25 broadly reflects the national philosophy and Nehru's ideology towards state-religion relationship. One aspect of article 25, however, does not fully fit in the pattern. Why should 'freedom of conscience' be subjected to the same restrictions to which the rights to profess, practice and propagate religion have been subjected. Freedom of conscience is an integral and most important part of individual freedom and it is difficult to visualise a situation when it would come in conflict with any social or individual interest.

The right to religious freedom has been guaranteed not only to the individuals but to the denominations as well. Article 26 guarantees to every denomination and section thereof the right to establish and maintain religious and charitable institutions; the right to manage its own affairs in matters of religion; the right to own and acquire immovable property; and the right to administer such property in accordance with law. Despite Nehru's abhorrence of organized religion, established church and vested interests, this provision can perhaps be explained with reference to the nation's concern for minorities and the need to assure them. What cannot be easily explained is the absence in article 26 of all the restrictive clauses to which individual right under article 25 has been subjected to by the Constitution. The corporate right under article 26 has been made subject to public order, morality and health but not to the other provisions of this part. Nor has the state been empowered to restrict this freedom on the grounds on which clause (2) of article 25 permits restrictions on individual right to religious freedom. This has serious implications. A literal interpretation would suggest that the individual freedom is subject to the denomination's rights (which is one of the other provisions of this part). The absence in article 26 of a clause corresponding to clause (2) of article 25 might as well give rise to a claim that denomination rights are neither amenable to the regulatory power of the state in secular activities associated with religious practice nor to the measures of social welfare and reform or of throwing open of Hindu temples to untouchables. It is difficult to say whether it was an inadvertence in drafting or a deliberate decision borne out of concern for minorities. The omission has been taken advantage of by the denominational authority (incidentally of the minority community) to suppress the freedom of conscience of an individual member⁵⁹ and in another case⁶⁰ by a denomination of the majority community to resist the state move to throw open a Hindu temple to all classes and sections of Hindus.

Judicial interpretation

The Supreme Court was called upon to interpret articles 25 and 26 in *Commr. H.R.E. v. Lakshmindra Swamiar*,⁶¹ in which the constitutional

59. *Saifuddin Saheb v. State of Bombay*, AIR 1962 SC 853.

60. *Venkataraman Devaru v. State of Mysore*, AIR 1958 SC 255.

61. AIR 1954 SC 282.

validity of different provisions of the Madras Hindu Religious and Charitable Endowments Act, 1951 was challenged. In the present context, this decision is important not so much for the actual points decided (declaring certain provisions of the impugned Act void) but for certain general principles laid down. The definition of 'religion' given by Mukherjea, J., in this case set the course of judicial process in a direction which was to affect significantly the extent of state power in matters of religion. The court gave an answer to the question as to what are 'matters of religion' in respect of which every denomination has a right to manage its own affairs. Relying upon the views of Latham, C.J. of the Australian High Court,⁶² Mukherjea, J., adopted the following definition of religion:

A religion may not only lay down a code of ethical rules for its followers to accept, it might prescribe rituals and observances, ceremonies and modes of worship which are regarded as intergral parts of religion, and these forms and observances might extend even to matters of food and dress.⁶³

Justice Mukherjea further observed that "what constitutes the essential part of a religion is primarily to be ascertained with reference to the doctrines of that religion itself."⁶⁴

This definition of religion was reiterated in *Ratilal v. State of Bombay*⁶⁵ where it was laid down that

A religion undoubtedly has its basis in a system of beliefs and doctrines which are regarded by those who profess that religion to be conducive to their spiritual well-being, but it would not be correct to say... that matters of religion are nothing but matters of religious faith and religious belief. A religion is not merely an opinion, doctrine or belief. It has its expression in acts as well.

In *Venkatraman Devaru v. State of Mysore*,⁶⁶ the Supreme Court again held that "matters of religion in article 26(b) include even practices which are regarded by the community as part of its religion...."⁶⁷ This "dangerous theory of autogenesis of denominational authority"⁶⁸ was carried to its logical limits in *Saifuddin Saheb v. State of Bombay*⁶⁹ where the court reaffirmed that "what constitutes an essential part of a religion or religious practice has to be decided by the courts with reference to the doctrine of a particular religion and includes practices which are regarded by the community as a part of religion."⁷⁰

62. *Adelaide Company v. Commonwealth*, 67 CLR 116.

63. *Supra* note 61 at 290.

64. *Ibid.*

65. AIR 1954 SC 388.

66. *Supra* note 60.

67. *Id.* at 264.

68. Tripathi, *supra* note 55 at 18.

69. *Supra* note 59.

70. *Id.* at 868.

This trend of judicial opinion was totally inconsistent with the constitutionally assigned role of the state in the sphere of what have been considered in a traditional society to be religious activity. To distinguish between essential and non-essential within the framework of the teachings of a religion and the susceptibilities and beliefs of the community would prove in practical situations to be an impossible task. This raises a basic question whether the sphere of state action under a secular constitution can be made dependent upon the teachings of a religion. Moreover, different religions may have to be subjected to differential treatment if this doctrine were to be carried to its extreme. It might be relevant in this context to refer to Nehru's concept of secular state. Nehru's secularism meant "freedom of religion and conscience, including freedom for those who have no religion, *subject only to their not interfering with the basic conceptions of our state.*"⁷¹

Fortunately the potential for mischief in this interpretation of the term 'religion' was seen by the Supreme Court and Gajendragadakar, J., in *Durgah Committee v. Hussain Ali*⁷² struck the following note of caution:

[I]n order that practices in question should be treated as part of religion they must be regarded by the said religion as its essential and integral part; otherwise even purely secular practices which are not an essential or an integral part of religion are apt to be clothed with a religious form and may make a claim for being treated as religious practices within the meaning of article 26. Similarly even practices though religious may have sprung from merely superstitious beliefs and may in that sense be extraneous and unessential accretions to religion itself. Unless such practices are found to constitute an essential and integral part of a religion their claim for the protection under Article 26 may have to be carefully scrutinised; in other words, the protection must be confined to such religious practices as are an essential and an integral part of it and no other.⁷³

The Supreme Court in *Shri Govindalaji v. State of Rajasthan*⁷⁴ was more categorical and for all practical purposes overruled the definition of religion laid down in the *Shirur Math* and followed in the *Saifuddin* and *Devaru* cases. As to what practices are integral part of religion, Gajendragadkar J., observed:

This question will always have to be decided by the Court and in doing so, the court may have to enquire *whether the practice in question is religious in character* and if it is, *whether it can be regarded as an integral or essential part of religion*, and the finding of the court on such

71. See *supra* note 42 (*Emphasis added*).

72. AIR 1961 SC 1402.

73. *Id.* at 1415.

74. AIR 1963 SC 1638.

an issue will always depend upon the evidence adduced before it as to the conscience of the community and the tenets of its religion.⁷⁵

With this holding of the court, it was hoped that the doctrine of auto-genesis of denominations has been rejected and what constitutes matters of religion would now be decided by the court, and not by the denomination concerned. This alone can be an acceptable principle under the Indian secular system.

A question may at this stage be raised. In view of the rejection of the autogenesis doctrine by the Supreme Court, is the *Saifuddin*⁷⁶ decision still a good law? In this case, the Bombay law invalidating all kinds of excommunication of members of a religious community was declared unconstitutional on the ground that it interfered with the rights of the denomination "to manage its own affairs in matters of religion." The court in this case came to the conclusion that the head of the denomination (Dai) had, according to the tenets of the denomination, right to excommunicate a member for violation of certain rules of behaviour which was a matter of religion according to the belief of that sect. Accordingly the law interfering with this right of the denomination was inconsistent with article 26(b). This case really involved a conflict between individual's freedom of conscience on the one hand and the authority of the denomination as determined by its own tenets on the other. The individual's right to freedom of conscience had to give way under the then operating doctrine that what constitutes matters of religion had to be decided according to the teachings of the particular sect. Even after this doctrine had been displaced in *Durgah Committee* and *Shri Govindlal* cases, another difficulty remains. The religious freedom of individual guaranteed in article 25 is in terms of the Constitution subject, *inter alia*, to 'other provisions of this part' nor is amenable to laws implementing social welfare or social reforms.

This relatively understained religious freedom of the denominations has given rise to other problems also. In *Venkataraman Devaru v. State of Mysore*,⁷⁷ the validity of temple entry legislation was challenged on the ground that the law encroached upon the denomination's right to manage its affairs in matters of religion, which included the right to regulate entry to the temple of the denomination. As article 26, of which the right "to manage its own affairs in matters of religion" is a part, contains no exception in favour of temple entry or social reform, the court had to resort to the rule of harmonious construction (between article 26(b) and article 25(2)(b) in order to save the temple entry law. The reasoning followed by the court was hardly logical because article 25(2) (b) is an exception to the right conferred in article 25(1) and if the law was void under article 26(b) it could not be saved by invoking an exception to the right conferred by article 25(1).

75. *Id.* at 1660-61 (*Emphasis added*).

76. AIR 1962 SC 853.

77. *Supra* note 60.

However, the court had to adopt this faulty logic in order to achieve a laudable objective. This had to be done in order to overcome the constitutional anomaly which arises due to omission in article 26 of provisions corresponding to article 25(2).

The doctrine of denominational autogenesis which seems to have been finally discarded by the *Durgah Committee* and *Shri Govindalaji* cases has recently raised its head again. In *Jagdishwaran v. Police Commr., Calcutta*⁷⁸ the constitutional validity of the ban on tandava dance by the Anand Margis was in question. It was claimed by the Anand Margis the performance of this dance in public accompanied by a human skull, sword, a symbolic knife and a trident was part of their religion. While upholding the validity of the ban on the tandava dance, the Supreme Court followed a reasoning which has dangerous implications. The easiest course for the court would have been to uphold the validity on the ground of public order. The court, however, preferred to follow a different course. It relied solely on the tenets of Anand Marg in coming to the conclusion that the performance of this dance in public places was not an essential rite to be performed by the members of the sect. This is a revival of the view firmly rejected in *Shri Govindalaji* and would unduly affect the power of the state to regulate whatever is considered by a denomination to be an essential part of its religion.

The *National Anthem* case⁷⁹ presented another dimension of the same problem. Here three school children were expelled from the school for not participating in the singing of the National Anthem as required by the school authorities and also the circular of the state government. It was contended on behalf of the children that their religion (Jehovah's Witnesses) did not permit them to join any rituals except in their prayers to Jehovah their God. Chinnappa Reddi, J., observed that :

The question is not whether a particular religion, religious belief or practice appeals to our reason or sentiment but whether the belief is genuinely and conscientiously held as part of the profession or practice of religion. Our personal views and reactions are irrelevant. If the belief is genuinely and conscientiously held it attracts the protection of Art. 25 but subject, of course, to the inhibitions contained therein.⁸⁰

In deciding that refusal to participate in the singing of National Anthem was part of their religion, the Supreme Court went solely by tenets of the Jehovah Witnesses. Conveniently enough, the court relied upon *Lakshmindra Swamier* line of cases and did not refer to subsequent decision of *Shri Givindalaji* in order to determine the meaning of religion under

78. AIR 1984 SC 51.

79. *Bijoe Emmanuel v. State of Kerala*, AIR 1987 SC 748.

80. *Id.* at 755.

article 25. According to this principle, even the extent and nature of respect to be extended to the National Anthem will be determined according to the religious beliefs of the sect concerned. If this reasoning is taken to its logical end, the individuals may be able to claim exemption from other legal obligations as well by pleading the prohibition dictated by their religious teachings.

State control over religious institutions

From the point of view of secularism, the Indian practice of elaborate control and supervision over the religious endowments calls for a few comments. As already pointed out,⁸¹ the British Government "by virtue of its sovereign power asserted.... the right to visit and supervise endowments of this kind."⁸² The states even after the commencement of the Constitution continue to assert this power. The states like Tamilnadu and Kerala have a government department for the supervision of Hindu temples. The power of the state to control the property and secular aspects of the management has been upheld in a number of cases. Sir C.P. Ramaswami Aiyer Commission on Hindu Religious Endowments in its report in 1962 suggested enactment of laws for supervision of Hindu temples which do not have such legislation, setting up of theological colleges for the training of priests in scriptures and rituals etc.... Commenting upon the Madras Hindu religious endowment law, Smith rightly observes that :

[T]he department of Hindu religious endowments has provided a kind of ecclesiastical structure which Hinduism previously lacked.... Within this structure, long-range plans are being made which will raise the prestige of Hinduism enormously.... temple worship is being revived as old temples are restored.⁸³

Smith further says :

[T]he Commissioner for Hindu Religious endowments, a public servant of the secular state, today exercises far greater authority over Hindu religion in Madras State than the Archbishop of Canterbury does over the Church of England.⁸⁴

All this is sought to be justified on the ground that the state does not interfere with the essentially religious activities and regulates only the secular activities associated with religion. Theoretically the state exercises this power in relation to all the religions but the fact is that there have been very few cases⁸⁵

81. See *supra* notes 39 and 40 and the related matter in the text.

82. *Raja Mutta Ramlinga v. Perinayagam*, (1874) IA 209 at 232.

83. Smith, *supra* note 34 at 246.

84. *Id.* at 246.

85. One of the rare exceptions is provided in *Durgah Committee v. Hussain Ali*, *supra* note 72.

in which the state has interfered with minority institutions. Besides, the day-to-day control exercised over the Hindu temples has not been and cannot be extended over minority institutions for political reasons. On the one hand, it constitutes an interference in the management of the Hindu institutions and on the other it amounts to promotion of Hindu religion. The administration of temples by the government also involves in case of deficit in the income of the temple, requisite grants from the state to the temple.⁸⁶ One of the justifications given at times for the state control of Hindu shrines and for government appointment of managing board is that these denominations had lost their right to manage to the then rulers before the Constitution.⁸⁷ It is strange indeed that the Supreme Court should have sought justification from the practices during the lawless conditions of feudal period. It is doubtful if the Hindu king under the original Hindu law had the power to control the management of Hindu temples. In any case it is hardly in consonance with the principle of secularism which is one of the cornerstones of our nation. No other state claiming to be secular would interfere in the management of religious shrines at this scale.⁸⁸

Ban on cow slaughter

One of the controversial issues in the context of the secular nature of state has been that of legal ban on cow-slaughter. The prohibition of cow-slaughter is one of the directive principles in article 48. It may be recalled that when the prohibition of cow slaughter was proposed in the Constituent Assembly as part of organization of agriculture and animal husbandry on modern and scientific lines, the Muslim members accepted it only as a concession to the sentiments of the majority community.⁸⁹ The validity of the laws enacted by certain states to ban cow-slaughter were challenged in *Mohd. Hanif Qureshi v. State of Bihar*,⁹⁰ *inter alia*, on the ground of religious freedom of Muslims. It was held that the total ban on the slaughter of cows of all ages and their calves was valid while a total ban on the slaughter of useless she-buffaloes, bulls and bullocks was invalid. The decision was sought to be justified on economic considerations but the following observations by the court give an indication of the inarticulate premise of the court :

While we agree that constitutional question before us cannot be

86. See, for example, *State of Rajasthan v. Sajjanlal*, AIR 1975 SC 705.

87. See for example *Shri Govindalaji and Durgah Committee* cases, *supra* notes 74 and 72 respectively.

88. See for example *Watson v. Jones*, 80 US 679 in which the American Supreme Court held that in accordance with the constitutional doctrine of separation of state and church, the court could neither interpret ecclesiastical law, nor decide a basically religious dispute.

89. See VII CAD 578.

90. AIR 1959 SC 731.

decided on grounds of *mere sentiment*, however passionate it may be we, nevertheless, think that it has to be taken into consideration, though only as one of many elements, in arriving at a judicial verdict as to the reasonableness of restrictions.⁹¹

Gajendragadkar J., who delivered the unanimous decision of the court himself conceded subsequently in his lectures that the claim of the majority community for total ban on cow-slaughter “amounts to converting the secular democracy of India into a theocratic state; and that is a position which no secularist in the country will accept.”⁹²

The views of Gandhi on legal ban on cow slaughter are worth quoting:

The Hindu religion prohibits cow slaughter for the Hindus, not for the world. The religious prohibition comes from within. Any imposition from without means compulsion. Such compulsion is repugnant to religion. India is the land not only of the Hindus, but also of the Musalmans, the Sikhs, the Parsis, the Christians and the Jews and all who claim to be Indian and are loyal to the Indian Union. If they can prohibit cow slaughter in India on the religious grounds, why cannot the Pakistan Government prohibit, say, idol worship in Pakistan on similar grounds.⁹³

Let us also see what Nehru had to say on the problem :

It should be remembered that the stoppage of cow slaughter means stopping non-Hindus from doing something which they might do. For economic reasons steps can always be taken because they are justified on economic grounds. But if any such step is taken purely that on grounds of Hindu sentiment, it means that the governance of India is going to be carried on in a particular way, which thus far we have not done....⁹⁴

One cannot escape the feeling that “mere sentiment” of the majority community proved more irresistible than the national commitment to secularism in deciding upon the validity of the legal ban on cow slaughter as individual without losing one’s own identity.

Right to propagate

As already discussed,⁹⁵ the right to propagate religion was incorporated in article 25 as a result of a compromise with the minority groups in the

91. *Id.* at 745.

92. *Supra* note 46 at 181.

93. Quoted in Shah (ed.), *Cow Slaughter: Horn of a Dilemma* 14 (1967).

94. Nehru in the letter dated 7 Aug, 1947 to Rajendra Prasad, quoted in Gopal, *supra* note 41 at 257.

95. See *supra* note 52.

Constituent Assembly. The Christian members insisted upon the inclusion of this right because the propagation of religion and conversion of the non-believers to Christianity was a basic part of their religious tenets. It is well known that the issue of conversion to Islam and Christianity has evoked strong sentiments amongst the majority community. The Madhya Pradesh Government passed a law prohibiting conversion from one religion to another by use of force or allurements or by fraudulent means. The validity of this law in the context of religious freedom was considered by the Supreme Court in *Rev. Stanislaus v. State of M.P.*⁹⁶ Dismissing the appeal, it was held that :

What the Art. 25(1) grants is not the right to convert another person to one's own religion but to exposition of its tenets... there is no fundamental right to convert another person to one's own religion because if a person purposely undertakes the conversion of another person to his religion, as distinguished from his effort to transmit or spread the tenets of his religion, that would impinge on the "freedom of conscience," guaranteed to all the citizens of the country alike.⁹⁷

The principle laid down is unexceptionable insofar as it goes. One wonders, however, if the court has not tried to take a very simple view of a complicated problem. Unfortunately the court did not take up the issue of conversion under the threat of divine displeasure. If the followers of a religion sincerely and conscientiously believe in propagating that theirs is the only true faith and non-adherence to it would incur divine displeasure, can conversions secured under this communication be penalised? The judgment in *Rev. Stanislaus* offers no answer to this question. But this is the question which has been bothering some of the minority communities. The answer to this question cannot be avoided for long if a proper adjustment between the sentiments of the majority community and the fears of the minority community has to be made within a secular framework.

Use of public funds for religious purposes

One of the requirements of secularism is that public funds should not be spent for religious purposes. In the American Constitution, it is a part of the general doctrine of non-establishment. The Constitution drafted by the Nehru Committee in 1928 contained a provision that :

4(xi) There shall be no state religion for the commonwealth of India or for any Province in the Commonwealth nor shall the state, either

96. AIR 1977 SC 908.

97. *Id.* at 911.

directly or indirectly, endow any religion or give each religion any preference....⁹⁸

The fundamental rights sub-committee of the Constituent Assembly also recommended a clause to the effect that "The State shall not recognise any religion as the State religion."⁹⁹ This was, however not incorporated in the Constitution. The proposal of K.T. Shah to have a non-establishment clause in the Constitution was also rejected.¹⁰⁰ The Assembly ultimately decided to incorporate the following provision :

27. Freedom as to payment of taxes for promotions of any particular religion. No person shall be compelled to pay taxes, the proceeds of which are specifically appropriated in payment of expenses for the promotion or maintenance of any particular religion or religious denomination.

In India, the state has been taking measures to highlight liberal, humanitarian and noble traditions from all the religions. This is being done with a view to promoting composite national culture, of which Nehru was a great protagonist, as an aid to national integration. It is in pursuance of this policy that the government celebrated the 2500th anniversary of Lord Buddha; the 400th anniversary of Tulsidas; 2500th anniversary of the attainment of 'Nirvan' by Lord Mahavir; and 1400th anniversary of Hijri era. The use of public funds for these purposes has been criticised and in some cases challenged in the courts.¹⁰¹ Justifying the expenditure on the anniversary of Lord Mahavir, the government argued that it had been commemorating the distinguished persons who had contributed to India's cultural heritage by focusing attention on their ideals. The aim of the policy, according to the government, was to kindle in the younger generation an awareness of the national heritage and to promote mutual understanding.

Conclusion

The concept of secularism adopted in the Indian Constitution is not an exact replica of the American model. In giving secular character to the Constitution and also to the society, Nehru's views played a prominent role. Actually, secularism "is likely to be his most enduring contribution to India, and it is the one of which he is most proud."¹⁰² Nehru's secular

98. For the text of *Nehru Committee Report*, see Shiva Rao, *supra* note 26.

99. *Id.* at 259.

100. See *supra* notes 47 and 48.

101. In *Suresh Chandra v. Union of India*, AIR 1975 Del 168, the Delhi High Court found no infirmity in state grants to celebrate Mahabir Jayanti and in *D.A.V. College v. State of Punjab*, AIR 1971 SC 1732, the Supreme Court rejected the objection raised against the state law providing for the setting up of a university with one of the objectives as study and research on the life and teachings of Guru Nanak.

102. Brecher, *supra* note 30 at 626.

state honours all faiths equally "gives them equal opportunities", does not attach itself to one faith or religion and grants freedom of conscience and religion to all. But this freedom of conscience, according to Nehru, would not be allowed to interfere with the basic conceptions of our state. Accordingly, the Indian Constitution makes freedom of religion subject to other values underlying the fundamental rights. The creation of a secular state in India was beset with immense difficulties. A multi-religious society imbued with superstitions and blind faith, culturally and economically backward could hardly be a soil for a secular state. In such a society, the state entrusted with the responsibility of ushering in modernisation could not have uprooted all links with religion. As such secularism in India had to be more of an ideal to be achieved and the Constitution has been made an instrument of social reform, national integration and cultural synthesis. Besides, for historical reasons too, the susceptibilities of the minorities had to be taken into account. This might give rise to imbalances but is only an acceptance of social and political realities.

There have been some problems in the operationalisation of the constitutional provisions regarding religious freedom. Some of these problems are inherent in the constitutional provisions, particularly those guaranteeing right to the denominations to manage their affairs. It is unfortunate that the denominational freedom has not been subjected by the Constitution to the same limitations to which individual freedom has been. This seems to have been one of those matters in which lawyer-members were able to bypass Nehru's views. The interpretation of these provisions could not but be influenced by the nature of interests pressed before it. Most of the cases in which the Supreme Court laid down general principles regarding interpretation of religious freedom involved denominational freedom to manage its affairs in matters of religion. These cases naturally involved substantial property interests of denominational authorities. The denominational claims found the earlier court quite sympathetic and rather wide scope was given to denominational autonomy. It is unfortunate that the court in successive cases decided to determine the scope of 'matters of religion' on the basis of the tenets of the religion concerned, thus unduly curtailing state power to regulate religious freedom. Thus interpretation of religious freedom has influenced the scope of individual religious freedom as well and despite the additional restrictions on it permitted by the Constitution, applied the same definition of religion under article 25. The inevitable result has been a distortion in the concept of secularism as evolved in the country. The state measure to ban ex-communications has been frustrated; the Hindu sentiments regarding cow slaughter and conversion have been accommodated and religious freedom has been allowed to be used to claim immunity from singing National Anthem. In some cases the court has, no doubt, been helpful in the implementation of social reforms (temple entry) and in curbing fanatical expression of religious faith in public

(tandava dance) but in both these cases the logical basis of the decisions can hardly be described as sound. The basic weakness in the structure of article 26 can be removed for good only by a constitutional amendment but the court can certainly revert to the views of Gajendragadkar J., on the scope of 'the matters of religion.' This would bring the judicial process closer to the vision of Nehru and other national leaders. In sum, it might be stated that the goal of perfect secular state in a society like India is not easy to attain. So long those entrusted with the responsibility of working out the Constitution keep the ideology of Nehru in mind, the country will be nearer the goal.