CHAPTER 1
NATURE AND MEANING OF RELIGIOUS FREEDOM

1. MEANING OF RELIGION

It is hardly a coincidence that democracies have flourished in communities with a strong religious consciousness in the widest sense of religion. Such a sense of religion embraces all kinds of faiths in the fraternity of men and their equality before the spirit of the universe, however widely conceived. Oblivious of the differences in their religious thoughts, they turn to each other in a cause which belongs to all of them and not just a few who hold the same ideas. Thus, the freedom of religion is intimately a part of the structure of liberty, without which a democratic complex can never arise or flourish. It is, therefore, that democracy and theocracy have never been known to go along together. In other words, the concept of a secular State in essence means that the two powers growing the life of individuals have separate fields in which they operate. Its first and foremost characteristics is that an individual enjoys his rights of citizenship irrespective of religion.

The right to propagate one's religion means the right to communicate a person's belief to another person or expose the tenets of that faith, but would not include the right to convert another person to the former's faith.\(^2\) Of course, the latter person is free to adopt another religion in the free exercise of his conscience, but nobody has the fundamental right to convert him to another religion where he does not do it out of his free choice.

What constitutes the essential part of a religion is primarily to be ascertained with reference to the doctrines of that religion itself, which are subject to judicial scrutiny for this purpose.\(^3\)

A. Definition of Religion: A Dilemma

The Constitution of India does not define religion but it has been established that religion is not necessarily theistic, and there are well known religions in India like Buddhism and Jainism which do not believe in God. The freedom of religion conferred by Article 25 is not confined to citizens of India but extends to all persons including aliens\(^4\) and individuals exercising their rights individually or through institutions. The Constitution of India protects

\(^3\) Quareshi v. State of Bihar, AIR 1958 SC 731.
not only freedom of religious opinion but also acts done in pursuance of religion. Thus religion is not a mere doctrine or belief but also practices, rites, ceremonies, functions, which are integral part of religion. From this right would follow the right to take out a religious procession, subject to restrictions imposed in the interest of preventing a breach of the peace or obstruction of the through fare.

The definition of 'Religion' becomes the crucial point in the application of the Articles dealing with the right to freedom of religion. Another notable definition of 'religion'. Certainly, the individual, the religious body, or the State would not be the proper authority to define it. Therefore, naturally, the responsibility has been shouldered on the courts which also found it difficult to define the term 'religion'.

It is really difficult to give a definition of 'Religion' which would satisfy the adherents of all religions of the world. However, the courts have attempted to define the term 'religion', while interpreting the Constitutional provisions.

7. Article 25 and 26, Constitution of India.
In the Supreme court of U.S.A. in the case of Davis v. Benson, Justice Field observed:

"the term religion has reference to one's views of his relations to his 'CREATEOR', and the obligations they impose of reverence for his being and character and of obedience to his will."

Article 25 and 26 of our Constitution are based for the most part upon Article 44 (2) of the Constitution of Eire and we have great doubt whether a definition of 'religion' as given above could have been in the minds of the Constitution maker when they framed the Constitution. Religion is certainly a matter of faith with individuals or communities and it is not necessary theistic. A religion undoubtedly has its basis in a system of beliefs or doctrines which are regarded by those who profess that religion as conducive to their spiritual well being, but would not correct to say that religion is nothing else but a doctrine or belief. A religion may not only lay down a code of ethical rules for its followers or to accept, it might prescribe rituals and observances, ceremonies and modes of worship which are regarded as integral parts of religion, and these forms and observances might extend even to matters of food and dress.

8. 133 U.S. at 342, 1889.

9. Ibid.
(B) Basic Common Elements of Religion

It is very difficult to find any definition of "religion" which is or can be universally accepted. In view of this difficulty, we can only delineate some basic elements of religion which can be regarded as its distinguishing marks and which, taken together, constitute the essence of religion. These basic elements are found in all religions in various degrees and in some form or the other, whether these religions are primitive or developed and theistic or non-theistic.  

(i) Belief in the Supernatural

The first distinguishing mark and the fundamental constituent of religion is the belief in the existence of a supernatural power - in whatever way this power is conceived. Some religious persons may believe in many supernatural powers known as 'deities' or 'goods'. These powers are considered to be supernatural in the sense that they are beyond nature and hence are not subject to natural laws which govern the whole universe. The important features of these powers is that they are super sensible that is to say, they cannot be perceived by our senses which are the basic sources of our knowledge of the external world. The existence of these supernatural powers is

accepted merely on faith which, is an indispensable feature of religion.

(ii) Belief in the Sacrosanct

The belief of religious people in a supernatural power or powers makes some places, objects, writings and persons sacred or holy, because they are thought to be specially related to this power or these powers. All religious whether primitive or developed theistic or non-theistic have their own places of worship where religious rites and rituals are performed and which, for this reason, are considered to be sacred or holy by the devotees. Similarly, there are certain objects pertaining to religious rites, rituals and worship which are regarded as holy or sacred by them. Some persons, such as prophets or saints, are also thought to be sacred because of their good and miraculous deeds and because of their special relation to a supernatural divine power or powers.

(iii) Worship and Prayer

The belief in the supernatural gives rise to another essential features of religion, namely worship and prayer. The literal meaning of 'worship's reverence or respect shown to a superior person by those who consider themselves inferior to this person. Now, every religion necessarily has one or more objects of worship to which it accords the highest reverence expressed through some religious rites,
rituals or ceremonials performed by the devotees in the places of worship. The object of worship may be either an invisible supernatural power itself or some pictures or idols symbolizing this power.

In advanced religions of the present era, too, prayer generally manifests some needs of the devotees performing this religious act. But, at the same time it must be admitted that prayer is a prominent means of expressing a devotee's feeling of reverence for his or her object of worship.

(IV) Revelation and Scripture

Another essential features of religion is revelation, which means the self communication of the supernatural to some select individuals. This a particular kind of relationship between a supernatural power and human beings. It is believed by religious people that supernatural powers or beings voluntarily communicate with certain chosen persons, such as prophets and saints, in order to reveal some important divine truths to them. These deviance truths are concerned with religious doctrines pertaining to the existence and nature of a supernatural power or powers, creation of the world, life and human conduct. These revealed doctrines thought to be infallible, for they are supposed to have been received by human beings directly from a divine (supernatural) source or sources. revelation can,
thus, be defined as a deliberate and definite act of self communication on the post of a supernatural being or beings with some select persons for revealing to them directly or indirectly infallible truths.

(V) Salvation and Deliverance:

Besides the above mentioned essential features, some sort of conception of man's salvation is an indispensable characteristics of religion. all religions claim to provide, in some form or other, a way of man's deliverance from sorrows and sufferings in this world. They hold that all human beings have to face the great hazards of physical calamities, misfortunes, diseases, old age and, finally, inevitable death.

Every major religion has its own conception of salvation which is variously known liberation, moksha, kaivalya, nirvana, nijat, etc. Every religion also presents a specific way, or several ways, for achieving this salvation. It formulates a moral code consisting certain virtues and strict rules of right conduct for this purpose. Thus, it is the conception of man's salvation which makes religion a way of life and which is considered to be the essence of religion.\(^\text{11}\)

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Summarizing all the above-mentioned essential constituents on features of religion, we can attempt to define it as follows:

Religion away of life with a moral code for man's salvation through the belief in an imperceptible supernatural power which reveals itself to some chosen individuals and which produces a feeling of worship in the faithful who express this feelings individually or collectively through rituals, rites or ceremonies performed at home or in certain select places supposed to be sacred or holy.

This definition of religion clearly shows that faith or belief in any supernatural power with a feeling of worship or an attitude of reverence towards this power is the fundamental basis of religion which distinguishes it from all other aspects or activities of human life.

(C) Meaning of Religious Freedom

Ancient Indian society, institution and belief gradually developed and a definite shape was given to them. Many important beliefs and doctrines of present Indian society are deep rooted in ancient Hindu ideology. Dharma was the main and was, the most important concept of Hindu legal and political thought. The term Dharma denotes the

rights, privileges, duties and obligations of a man, his standard of conduct as a member of the Aryan community, as a member of one of the castes and as a member or person in a particular stage of life. King was the supreme authority of the State. He protected the purity of class, caste and the family system as well as maintained social order.

The Constitution of India confers on every person the right freely to profess practice and propagate religion. It throws open Hindu religious institutions of public character to all classes and sections of Hindu, thus, recognizing the unity of personal and institutional aspects of religious freedoms. Since no freedom can be absolute, the Constitution subordinates the religious freedoms to the needs of social order, social justice and morality. Thus, the State has been empowered to enact laws so as to curb, restrict or regulate those religious activities which militate against social peace and morality.

The provisions ensuring the freedom of religion that is, Articles 25 to 28 are incorporated in the form of justifiable fundamental rights and every citizen in the country irrespective of his religion is allowed to move the supreme court (Art.32) for enforcement of these rights which form the basic core of Constitutional secularism. It is in

this way that the judiciary has assumed a significant role in ensuring the protection of freedom of religion and thereby preserving and promoting the secular tendencies in India.

2. SOME OTHER CONCEPTS AND RELIGIOUS FREEDOM

A. Theocracy: A General Paradigm

In ancient Indian texts 'Dharma' covered rules governing matters ranging from celestial to civil. It comprised in wider sense rules and principles of conduct relating to men and extended to entire range of Hindu society, all classes and castes within its folds. According to Kane 'Dharma' used in the ancient texts with various meanings e.g. religious ordinances, rites, fixed principles or rules of conduct, duties of ashramas, etc.15 Yajnavalkya smiriti by Vijnaneshwara enumerates different connotations of the term to include canonical law, law proper, religion, duty justice, etc.16 An eminent Western ideologist exclaims: I find no English word by which I can fully express all the meanings of the Sanskrit Dharma.17 Thus dharma conceived rules for celestial to civil subjects of this sacred law the sources were, tells Manu, four-fold: Veda, tradition,

17. Epigraphica Indica, IX, p. 113, No. 7.
Dharma is the State and Dharma is the king. Hindu thought courts dharma as the true sovereign of the State; the rule of the law. The King is the executive called the Dharma to uphold and enforce the decreed of the dharma as the spiritual sovereign. In this way, maintains Radha Kumud Mookerjee democracy descends to the villages and the lowest structure of the social structure and operates as the most potent agency of uplifting the masses. This ancient Hindu monarchy was a limited monarchy. Under the very Constitution of the State.  

Law and order were very important in the life of the ancient Indians. Justice was an aspect of dharma; idea of justice flawed like a natural element from the concept of dharma. Protection of the subjects for which the institutions of State was devised was impossible without the exercise of Dharma - punishment; but the Dharma awarded should also be within the bounds of equity; Saddharma or righteous law. Progressively separate law courts were established according to Manu Smiriti, as adjunct of the State and helped to maintained social order. The great

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18. Manu, 11, 6, 7, 12; cited by Sáltoère, B.A. Ancient Indian Political Thought and Institutions, (Asia, 1963), p. 22.

grammarian Panini continued the connotation of dharma in the sense of custom or usage and of religious merit. When we reach the age of Kautilay, we find that a new chapter was opened in the history of law in regard to its concept, making a bold departure from Manu; Kautilya defined the four limbs of law thus: Sacred Law, Evidence, History and edicts of Kings- one source - Edicts- he calls 'nyaya,. By adding man made law to the body of ancient traditional law and by laying stress on the edicts of king which he raised to the dignity of 'dharmanyaya', Kautilya advanced over Manus concept of Law. Kautilya States:

"Whenever sacred law (Dharmasastra) is in conflict with rational law (Dharmnyaya), then reason shall by held authoritative, for there the original text is not available".20

These theocratic foundations are most naturally apt to be viewed by the European writers antithetic to civil liberties comprising freedom of religion. The history suggests that for the western thinkers, religion signified sect rather universal philosophy or universal science of 'God'. Even the divinity of king in the divine origin of State theory was essentially his conformity to Christianity. The whole western approach towards religion-secularism inter relationship was tight oriented and basically antagonistic.

Similarly, the evolution of the concept of freedom or liberty is essentially a counter action to State domination. Therefore, liberty was a matter of right to be snatched from the unwilling ruler by confrontation. The effective check on the erring king is envisaged by the concept of revolution, not religion.  

The ancient Indian polity never needed this confrontational experience with the philosophies of 'secularism' and 'liberty' for fostering religious freedom. Absence in the Vadas of a proper noun for religion (in the sense of the religion) is not a case of imperfection but an indication of the singularity and universality of religion, conceptually and factually. General Paradigm of religious and cultural rights were just inextricably interwoven in the very fabric of the civil life of the ancient Indian. Religious freedom was an integral atom of social life of man, the most important part; indeed instead of his clamoring for increasing religious freedom the society itself was anxious to see he rendered upto God what was due to him.

(ii) State, citizen and Religion

While the concept of supremacy of dharma governing the king envisaged rule of law as against rule of man, it

debarred the citizen of the right to punish the king for his
delinquencies. Thus there was no right to revolution in
opposition to the king's Tyranny. Modern political science
approaches the subject of citizen State relationship from
the angle of reciprocal rights of the two parties, while the
ancient Hindu Constitutional writers describe not the rights
of citizens but the duties of the two entities. Therefore,
the contemporary concept of civil liberties has been
conspicuous by its absence in the ancient political
thoughts. The all pervading scope of dharma bound the State
and the citizens in their respective duties, the performance
of which would yield the desired pleasures. The ordainment:
law protects those who protect law—applied both the king and
the citizen.

Though citizenship was not classified into different
categories unlike the Greece of Yore and the king regarded
the inhabitants in his land as equal before law, the
customary law itself recognized Varna distinctions. with


23. Ibid.

24. Where there were three classes of citizens: citizens
proper, who participated in Government: Slaves and
Aliens; the last who being disqualified from the
privilege of the first.

25. Brahmana, Kshatriya, Vashyas, Sudra.
the introduction of caste system by the Aryans in the beginning, some of the social equilibrium was disturbed. In the beginning the caste system was only an expression of division of labour. But soon the Brahminical order established caste hierarchy and with themselves at the worked out elaborate rules of distinction, heaping all the adverse discrimination on the Shudras.

The first jolt to the hegemony of Brahminism was given by Buddhism. originally, Buddhism, Jainism and Sikhism were reformist movements which had absolutely no quarrel with the general principles of the 'Sanatan Religion' (i.e. Hinduism), nor any ambition to establish a separate religion. They were partly Protestants reactions against through less overplay of self importance by the Brahmanical order and partly genuine efforts to simplify and reform the overdone ritualism. 26

(ii) Equality Before Religion

Equality of all castes and both sex, was the new cardinal principle of Buddhism. Buddha preached social equality and depreciated the caste distinctions and discriminations contrary to Brahminical practice of excluding the 'Shudras' from religious for holy meditation.

State was to endeavour, he preached, to be an political cum-social organization that required all citizens to follow their respective dharma. His ideal was Dharma chakka the empire of righteousness.

In the 8th and 9th centuries a revival of Hinduism took place chiefly under the influence of the two great delectations, Kumarily and Sankara (born a.d. 788) partly owing to the activity of these opponents and partly to its own degeneracy caused by increasing approximation to Hinduism, the religion of Buddha gradually lost ground in India. The Mohammedan invasion in the 12th and 13th centuries practically drove out Buddhism from the land of its origin to find fresh pastures in the neighboring countries.

The perfect harmony between the three school of ecclesiastical thought was symbolic of the liberal outlook in matters academic entertained by the leading thinkers of the time. Any interpretation of God, choice of any path to the salvation of the should was accommodated by the Hindu religious philosophy with the sincere belief, expressed in terms of 'neti neti' that the Brahman was beyond definition.

29. Hinduism, Jainism and Buddhism.
The Muslim invasion shock the Hindu and for the first time drew him out of the deep inner sanctum of his temple. for the first time, the native masses realized that Hinduism and the bodies of it ripped out from its chest were not the only religion on earth.

The Muslim theocracy in India under the Sultanate was based on distinction between the Hindu and the Hindu subjects. Though in pure Islamic theory divinity could not be considered an attribute of human king, the Muslim thinkers, in order to combat the intrinsic human tendency to anarchy exhalted the State to canonical necessity. The Caliph was regarded the representative of the prophet and the Supreme ruler of the Islamic world. The succeeding rulers self delegated this states on the selves by performing the investiture ceremony.

The Islamic State stands for certain ideals for the realization of which the Muslims could be forced (in terms of religious conformity) to live, according to the laws of the Shariat. In short, the best authority is the repeated proclamations of the Muslim Kings themselves who declared that they ruled over Muslim States, according to Shariat. Indeed, for that matter, there is yet probably no historical instance of a 'pure' theocracy. different polities are distinguishable historically not because a single principle exhausts them, but because some are principle is dominant
with them.  

Though the general civil, revenue and criminal law of the land was Muslim law in the Muslim States, the personal law and family matters of the Hindus continued to be governed by their traditional Hindu law. But, religious sanction being no more applicable as a check on the despotism of the ruler, and the idea of revolution having been never regarded in theory and practice in the past as anything more than a storm in tea cup, the hitherto complacent Hindus remained defenceless and bankrupt of the ideological weaponry of claim to the right to religious freedom as a political front against the State, till their new rulers, the British unwittingly initiated them to the western language of political philosophy of people, rights and individual liberty as antidote to power intoxication of the government. So it was in modern political sense that the Hindu who in the past performed religious worship as his religious duty, began demanding a right to freedom of worship; and the fellow citizen Muslim, who has till only a recent past enjoyed the reassuring of his religious interests, began realizing the necessity of a 'secular' State that would grant him, and not withhold, his right to religious freedom. The philosophy of duties was being

30. Hastings James, (ed.) Encyclopaedia of Religion and Ethics, XII, p. 287.
gradually transformed into a 'Bill of Rights'.

B. Internationalism, Human Rights and Religious Freedom

In modern international law the seeds of the concept of religious freedom germinated in the field of minority problem. After First world war, even after Carafulre revision of the State boundaries with a view to create homogeneous States, the problem of nationalities defied solutions, leaving behind in Europe some 25 to 30 million dissatisfied minorities people who it was feared could any time create international friction. By way of political expediency the explosive was sought to be contained by inserting in peace treaties certain guarantee clauses with obligation on the league of Nations to watch execution. Indeed, during the long deliberations and committee considerations at the formative State of the Bill of Rights (B.R.) in the United nations organization (UNO) the majority opinion disfavoured inclusion of any article on minorities in the BR. Such a provision being regarded as outside the scope of the declaration (of Human rights) enumerating individual rights as opposed to group rights that the
concept of minority rights would be represent.\textsuperscript{32}

The U.N. charter reaffirms faith in and respect for fundamental human rights, freedoms for all\textsuperscript{33} and promote universal equality without distinction as to race, religion, etc.\textsuperscript{34} The Declaration of Human rights (1948) has provisions concerning religious freedom.\textsuperscript{35} It creating religious equality in entitlement to freedoms.\textsuperscript{36} It promises freedom of thought, conscience and religion, including right to change, teach and practice religion.\textsuperscript{37} Besides, references to religion are contained in Article 16 that grants equal right to marry and found family. Article 26 requires education to promote religious tolerance and Article 26 and 27 grant educational and cultural rights, respectively.

There has been more proliferation of documents on human rights, e.g. European convention for protection of Human rights and fundamental Freedoms, 1950; the International

\begin{itemize}
\item \textsuperscript{32} Statement of Mr. Hood (Australia); DOC E/ON4/SR/73, p. 10; cited by Haksar, U. Minority Protection and International Bill of Human Rights (Allied, 1974) pp. 52-53.
\item \textsuperscript{33} Charter of the United Nations: Preamble and Article 1.
\item \textsuperscript{34} Ibid. article 3.
\item \textsuperscript{35} Declaration of Human Rights (1948) Article 2.
\item \textsuperscript{36} Ibid., Article 18.
\end{itemize}
Covenant on civil and Political rights, which the human community is trying to achieve universalization of the recognition of religious freedom as part of International law. Recently, there is growing awareness of the problem of effective implementation of these rights. Transformation of international human rights into national fundamental rights is presently the most immediately and effectively available enforcement machinery, so long as the world body debates on their enforceability.\textsuperscript{38} Article 51 of the Indian Constitution commits the State to endeavour to foster respect for international law and treaty obligations.

C. Secularism and Religious Freedom

The concept of secularism in its modern form was articulately expressed by various thinkers as well as Jurists.\textsuperscript{39} The concise Oxford Dictionary shows that the adjective "Secular" means: "concerned with the affairs of this world worldly, not sacred, non monastic, not ecclesiasstical, temporal, profane, lay." According to the

\textsuperscript{38} According to Dr. Nagendra Singh, the most efficacious method of enforcement is through the instrumentality of national laws - Human Rights and International Co-operation (Delhi, 1969), p. 15.

\textsuperscript{39} In eighteenth century J.S. Mill and Bentham's "Principles of legislation" flowed the theories of utilitarians. These principles later on enunciated by "Holyouke" in his famous book. "Principle of Secularism" in 1859.
Encyclopedia Britannica, the world 'Secular' has two main branches of meaning (1) lasting or occurring for a long, indefinite period of time; and (2) non spiritual, having no concern with religious or spiritual matters. This meaning would show that 'Secularism' is distinct opposed to or not connected with religion or ecclesiastical things, temporal, as opposed to spiritual or ecclesiastical. The word 'secular' like the word 'religious', is amongst the richest of all words in its range of meaning. it is full of subtle shades which involve internal contradictions and of these contradictions the conventional dictionary meaning can in 1859 can scarcely give a correct view.

Secularism as a philosophical or political theory may have and has had existence independent from the Constitutional concept of a country in respect of religion. In its original conception secularism meant anti theism, but not atheism, it was philosophically a movement intentionally ethical negatively religious. View of S. Radhakrishnan regarding Secularism, Secularism is the Chief weakness of our age. It has political 'antecedents loading with anti-religion stance, it generally appears in history as.

identified with atheism or agnosticism.

In America it implies disregard of religion, "in view of the friendly relation of the State toward the church in the U.S. It would seem more appropriate to refer to this country as a law rather than secular State." In the Indian political terminology Secularism governing the term 'State', that is the expression secular State implies a contradiction to a theocratic State, or a State with an establish church, or to imply a polity that has no State religion or which is not a religion-ideological State.

The 42nd Amendment to the Constitution, made in the year 1976, inserted two words socialise and secular and substituted the expression unity and substituted the expression unity and integrity of the nation' in place of the expression unity of the nation,' in preamble to the Constitution. The idea was to nigh light the concepts of socialism, secularism and the integrity of the nation in the preamble. These concepts were already accepted by the framers of the Constitution. But the working of the Constitution over the period of 26 years created the necessity for emphasizing these concepts more prominently. Though the Supreme Court of India in a number of cases laid down that the preamble, though a part of the Constitution; 

43. Stokes, Anson Phelps, of Church and State in the United State (Harpar, N.Y. 1950), vol. 1 p. 3.
is neither a source of power nor a limitation upon the power and that it is intended primarily to reflect the hopes and aspirations of the people, it relies upon the preamble to decide a case.

Secularism as a Constitutional concept is a rhetoric. The viable constitutional concept is religious, freedom used here as a brief expression to convey the sense of freedom of religion, from religion and constitutional norms governing religion State relationship. When we examine the Indian academic and judicial gloss on the word secular and its derivatives, we find that the light is focused on the various shades, aspects and facts of religious freedom and religion State relationship. According to Justice Gajendragadkar, Secularism, as contemplated by Indian Constitution is not anti-God or anti religion. It recognizes that religion has relevance and validity in the lives of many but it shall not hamper the creation of a new secular social order. At another place the anuciated the following characteristics of Indian secularism based on constitutional provisions. Purely secular concept of the religion, he State loyalty to any particular religion, neither irreligious nor

44. See the views of Mathew and Chandrachud, JJ. in Indira Gandhi v. Raj Narain Known as the election case, 1975, Supp. SCCI: AIR 1975 SC 2299.

anti-religion State, equal freedom for all religious, irrelevance of religion in socio-economic problem of citizens. In the view of J.M. Shelat (J) the Constitution brings about a secular State of if by that nomenclatures what is meant is a political community which secures religious liberty coupled with a citizenship irrespective of the race, religion and creed of individuals comprised in it.

The importance of tolerance in the creation of secular order cannot be overemphasized. Whereas in India, many religions are practiced, the followers of every religion must, without any mental reservation, recognize the fact that their individual religion is not the monopolist of spiritual wisdom, that all religions are entitled to equal respect under the Indian Constitution, which means, no religion is superior and no religion is inferior.

If the true spirit of tolerance receives acceptance from all religions, on principle there would really be no scope for concerted organized efforts at propagation of religion or for making efforts at proselytizing. Indeed, it

46. Gajendragadkar, Secularism; Its Implications for Law and Life in India, in G.S. Sharma (Ed) Secularism: Its Implications for law and Life in India (ILI, Tripathi, 1966) p. 4.

47. Secularism, Principles and Applications (Tripathi, 1972). pp. 94-95.
maybe permissible to say that Hinduism has always accepted this spirit of tolerance and has not taken recourse to concrete, d active, large scale conversion of non-Hindus into Hindus. Therefore, education which has to play a major role in assisting Indian democracy in its task of creating a new social and secular order must cultivate in the minds of all citizens a true, genuine spirit of tolerance which honesty considers all religions as true and as such entitled to equal protection and freedom in India.

Thus, secularism as a counterpoise to theocracy has one kind of value and as a working principle in a multi religious society with liberal democratic traditions has a different kind of value. A stranger to constitutionalism is not unlikely to present secularism as an absolute principle complete in itself. On account of the single element that it represent relation of theocracy.

D. CONSTITUTIONALISM AND RELIGIOUS FREEDOM

England is a Protestants Christian State. As a matter of fact in a closely knit Christian society living within the boundaries of a small country, general freedom of religion was never an issue. But this is no peculiarity confined to religious freedom alone. The British Constitution contains no fundamental rights in strict sense, for the well entrenched theory of Parliamentary Supremacy can brook no fetters, not even of a written Constitutional
The rights of the individual in English law are the residue of freedom that is left after legislative and executive powers have been defined. Nevertheless keeping in time with the declarations on human rights internationally in vogue, the United Kingdom ratified the European Convention on human rights in 1951, which is binding on her morally alone. Independent and incorruptible judiciary is the only, but an effective guardian of liberties in England.

Maitland emphatically observes that in England religions liberty and religious equality are complete. This he summarizes in four points:

(i) The profession of any religion or no religion is no offence, subject to blasphemy which is a common law misdemeanour.

(ii) Every form of public worship is permitted, places of worship have to be registered only the Jesuits in theory at least are subject to the ridiculous requirement of a licence to reside in England;

(iii) The profession of any form of religious belief is not a condition for the existence or exercise of civil rights;


(iv) Nor is religious belief a condition for political rights, subject to the exceptions of crownship of England, Lord Chancellorship of England and Lord Lieutenantship of Ireland, who cannot be Roman Catholics (i.e. must be Protestant alone. 50

The constitutional rights of religious freedom to citizens was done by the first amendment to the Constitution of the U.S. in 1971. The simple Constitutional injunction that Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise of theory", developed in the course of American Constitutional history into a concept which in its total perspective not only spell out just one aspect of civil liberties but also telescopes a norm of State behaviour popularly called secularism. The American experiment imparted new dimensions to the natural human phenomenon of faith legal dimensions; to wit; it introduced a nation of security in documentation of the right.

The American Constitution; in legal language, the First Amendment religion clause prescribed three Constitutional principles; freedom to believe freedom to worship and a "wall of separation between Church and State". Religion has been an lament of prime importance in the American republic.

The Americans believe that civilized society rests on religion, and free government prospers best amongst religious people.

In a recent decision the U.S. Supreme Court advanced a tripple flanged test to determine the validity of a legislation under the establishment clause text; clearly secular legislative purpose, primary effect that neither advances nor inhibits religion, and avoiding excessive entanglement with religion. The last one is inescapably a test of degree.

Thus, we may conclude that the U.S. Constitution establishes a lay polity, forbids the establishment of a theocracy, and requires the State to protect and promote religious freedom for all. That the Constitution aims at complete religious freedom is a conclusion; that it establishes secularism is a point of discussion. In the constitutional context secularism means only this: obeisance of State hostility towards any one religion. It does not require levelling of all religious to contrivance the inevitable effects of a majority religion. The State Church relationship is defined by the Supreme Court as one of neutrality and not of hostility; and that too a benevolent neutrality and not a callous indifference.

The source of individual rights in Australia also is located in the common law principle of the Rule of Law. Therefore, Section 116 in the Commonwealth of Australia Constitution Act (1900) promising religious freedom conspicuous by its uniqueness in a Constitution reticent on fundamental rights. Another peculiarity in the clause, placed in the States, chapter, imposes the prohibition on the commonwealth parliament alone. This has a background established Church or religious intolerance or discrimination have never plagued the pre federation history of that continent.52

The judiciary protects the freedom of religion from encroachment on its character as such. The test of character as such is turn definitely influenced by the existing social norms. Australian society is overwhelmingly Christian. It can be conjectured that the commonwealth under the marriage power may prohibit polygamy. Christian religion is recognized as part of the common law, and it has formed the basis of the social order. Thus, it becomes inescapable that indirectly it is the majority community that influences the social norms of a country. And finally, section 116 does not guarantee religious equality to the people of Australia in

52. Pannam, C.L. Travelling s. 11.6 with a United States Road Map, 4 Melbourne University Law Review (1963), 41, p. 51.
as much as it is a restraint only on Commonwealth power, the State are still competent to legislate with respect to religion and religious matters.\textsuperscript{53}

British Government did try its level best to resolve the last of interests by sending Lord Wavell to India. Wavell the then Viceroy of India, issued a \textit{White Paper India} on the line of the Cripps Offer. This plan was named as Wavell Plan. The intention of this plan was to re-engineer India's new constitutional system according to the changing values of the people.\textsuperscript{54} The basic philosophy of Wavell plan was to study the complex interplay of interests both social and individual. The basic purpose was to reconcile the conflicting interests. Wavell tried to apply law as an instrument of social control avoiding collisions resulting from the conflicts of interests.

The Constituent Assembly constituted for making the Constitution of India, came into existence in 1946. In its debates the Assembly emphatically pleaded for the welfare of the society as well as individual at all levels.\textsuperscript{55} The emphsis of the drafting committee was concentrated on the

\begin{itemize}
\item \textsuperscript{53} Wynes, W.A., \textit{Legislative Executive and Judicial Powers in Australia} (4th Ed.) p. 130.
\item \textsuperscript{54} Pylee, M.V., \textit{Constitutional, History of India} (1600-1950), pp. 113-15.
\item \textsuperscript{55} Shiva Rao, B., \textit{The Framing of Indian Constitution}, (1968) Vol. 11 p. 18.
\end{itemize}
settlement of conflicting interest of the individuals, State and society among themselves. The relation among citizens and between citizens and the State have been carved out in various articles of Fundamental Rights, Directives Principles, minority privileges and the independence of Judiciary to avoid the clashing interests. The aimed objectives of the Assembly informing the Constitution was to protect the interest of all the constituents of the territory by maintaining harmony. The opinion has been given the respect by inserting adult franchise in the Constitution.

The Constituent Assembly has widely taken into consideration the rights as well as duties of the every person as well as State for maintaining harmonious stability in constitution. Proper safeguards have been made with respect to minority section, backward classes, weaker and down trodden peoples, scheduled castes and scheduled tribes of the country. 56

The drafted Constitution of India seeks to reconcile the conflicting interests in such a way that maximum happiness of the people is possible with minimum of less and the goal envisaged by the constituent Assembly. Therefore,

56. Constitution of India, Part III and Part IV.
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that is of 'Welfare State' and the establishment of a 'socialistic State'. In order to remove poverty and to bring about a socio-economic revolution, the list of Directive Principles widened and so it has been provided that such welfare measures for the benefit of masses may not be defeated by capitalists and measure for the implementation of any of the directive shall be immune from any attacks in the courts on ground that such measures contravene any persons fundamental rights. Despite due preference to public and social interests, individual interest have also been safeguarded under various provisions of the Constitution.

3. RELIGIOUS FREEDOM - A RETROSPECT

The concepts of religious freedom embodied in the Indian Constitution is largely based on western ideas. Nevertheless, India's philosophical, cultural and political background furnished a favourable climate for the reception of this concept. India's historic past dating back over four thousand years gives ample testimony of its catholicity and toleration. Indeed, India has been described as a land of religious toleration.

58. See, 'Constitution (42nd Amendment) Act, 1976.'
Chronologically, Indian history may be divided into Ancient, medieval and British epochs. Most of the rulers of the first period were Hindus and those of the second were Muslims. The third period takes in British rule and the subsequent period of independence.

A. Ancient Period

It covers the period from the beginning of known history to the establishment of effective Muslim rule in substantial part of the country in 1206 A.D. 59

(i) Religions and Religious Freedom

'The real is one, the learned call it by different names' teaches the rigveda. 60 Indeed, Hinduism evinced an attitude of recognition and toleration, not one of scorn or persecution. Buddhism and Jainism - the other major religions though formidable rivals of Hinduism followed a similar policy. This attitude of toleration was also shown by other religious faiths (e.g. Christianity 61 and Zoraas


60. Ibid. p. 164, 46.

61. Christianity has flourished in India since the beginning of the Christian era. The Syrian Christians of Malabar believe that their form of Christianity is apostolic, derived directly from the apostle Thomas. See Radhakrishanan, S. East and West (Lond: George Allen and Unwin Ltd., 1955) p. 34.
The followers of zoroastrianism, when expelled from their country took shelter in India. They are said to have come to India about 700 A.D. Today, the followers of Zorasstriansm are hardly found any where else, S. Radhakrishnan, Eastern Religious and Western Thoughts (Oxford Uni. Press 2nd ed. 1940) p. 312.

63. See, Radhakrishnan, Eastern Religious and Western Thoughts (1942), p. 42.

64. Ibid. 12 & 13.


No religion is free of divisions. In realm there are over seventy sects. Similarly Christianity is split up into numerous denominations. Hinduism too, has numerous divisions and sub divisions. But the diversity of views and practices among the Hindus is confined more to form than to substance. Hardly any attempt was made by one Hindu sect to terminate the existence of another. Early Indian Christianity like Hinduism, Buddhism, and Jainism, followed a policy of toleration. The Christians considered themselves an integral part of the general Indian community and discouraged proselytization.

(ii) State and Religion

Indian religious as well as secular works express definite views on the system of government and duties of rules. The root of ancient political thought is embedded in the principles of ancient Indian philosophy which recognized the concept of religious freedom. Of course, any discussion of religious freedom in the context of polity must begin with the philosophy of dharma. According to the Vedic and Smiriti literature, the function of the State was to protect the three prime ideals of human life—dharma (virtue), Artha (acquisition of wealth) and karma (sense pleasure). In

67. The Sanskrit word "Dharma" should not be confused with the word law. See Altekar, A.A. The State and Government in Ancient India (Motilal Banarsidass, 1958)p. 259.
theory dharma was above the king, the people, society above everything. Just as the European positive law (just civil) could not violate the principle of natural law (just naturals) the king was asked to decide law in accordance with the rules of dharma.\textsuperscript{68} Indeed, the Brahadaranayaka Upanishada says that dharma is the king of kings.\textsuperscript{69}

The ancient Indian law which was structured on the philosophy of dharma did not have much scope for religious discrimination. In the Bhagavadgita righteousness has been described as the essence of dharma.\textsuperscript{70} Indeed, the State was to promote dharma not by championing any particular sect or religion but by fostering a feeling of piety and religiousness by encouraging virtue and morality, by extending help to the establishments belonging to all religions. It should be noted that there was no institutional separation of State and religion in ancient India: Secularism meant support and toleration of all sects and beliefs. Not only the Dharmasastras but also the arthasatras sought to protect individual religious freedom. Kautilys States that it was the duty of the king to offer equal protection to all irrespective of religious

\textsuperscript{68} Kane, P.V. 3 History of Dharamshastra (Poona: Bhandarkar Oriental Research Institute, 1946) p. 241.
\textsuperscript{69} Ibid., p. 4-14.
\textsuperscript{70} IV - 7.
affiliations.

The so called 'Varna theory' also helped the growth of the secular State in India. This theory was an important aspect of the philosophy of dharma, and is also known as the Varnadharma theory. It sets out the duties of individuals according to their castes viz., Brahman, Kshatriya Vaishya and Sudras. The purpose of Varna theory was to bring about separation of the State from the church. There was no serious attempt of the religious authority to usurp the royal function.  

Ghosal states that Brahmins throughout ancient India failed to assert (except in theory and legend) their claim to control kings and emperors.  

To solve the religious conflict of his time, Ashoka, adopted a fourfold solution viz.,

1. promotion of the essence of all religions;
2. refraining from the criticism of other faiths;
3. gathering the exponents of different religions;
4. learning the texts of other religions.

73. Ashoka Ruled From 272 B.C. to 232 B.C.
These measures could be successfully used to solve the communal problems of even today.\textsuperscript{74} His ideas of universal religion may perhaps be regarded as the precursor of modern reformist movements.\textsuperscript{75}

Ashoka was undoubtedly the most tolerant and enlightened monarch of ancient India. His catholicity is without a parallel in the history of the world, but many other rulers also showed a marked degree of religious toleration.

Most of the rulers followed a unique policy of aiding all religions. Ashoka, of course, started this tradition, although he was avowed Buddhist, he is known to have dedicated barberry will caves to Ajivi Kas. His dedication, remarks R.C. Majumdar, is a noble monument to his catholicity.\textsuperscript{76}

It is noteworthy that the Buddhist University at Nalanda owed its prosperity to the patronage from the Hindu Gupta emperors. Ashoka also Stated the long lived practice of appointing Religious censors or inquisitors whose main


\textsuperscript{75} Majumdar, R.C. and Altekar, A.S. \textit{The Vakatake Gupta Age} (Delhi: Varanasi: Motilal Banarsidass, 1967) p. 366.

\textsuperscript{76} Majumdar, R.C. \textit{An Advanced History of India} (London: Melbourne: Toronto: MacMillan 1965) p.275-76.
function was impartially to look after the spiritual needs of all sects. Charitable institutions were not run on religious lines. A Chinese traveler of the Gupta period recounts that houses of charity were open to followers of all religions.

B. In Medieval Period

With the advent of the Muslims we come to a critical phase of India's history. This phase was dominated by the Muslims and their social system was based on religion. When they established their hegemony in India, Hinduism was the prevailing religion of the country. It determined the life style of the vast majority of Indians all over the country who greatly outnumbered the Muslims.

Although Muslims did not accept the religion of Hindus, the relation between Hindus and Muslims was at one of continual hostility medieval India did not present anything like the catholic Protestants struggle in Europe. In fact, after the advent of Islam, a new synthesis was gradually worked out between the Hindu and Muslim approaches which is reflected in a number of aspects.


Islam in India showed a somewhat different perspective. The Muslim philosophers like the Hindu, proclaimed faith in the oneness of God, immortality of soul, the ephemeral character of all material things.\textsuperscript{80} Hinduism as a whole also felt the impact of new ideas. The monotheism of Islam influenced Hinduism and pantheism of the Hindus has its effect on the Indian Muslims.

Ramanand preached the Gospel of Bhakti i.e. grace through devotion. It was a new Hindu interpretation of God in terms of Islamic monotheism and egalitarianism. The most illustrious follower of Ramanand was Kabir. Like Bhagwadgita he proclaimed that God is one.\textsuperscript{81} His ideas were quite in keeping with the Vedic and Upanishadic doctrines propounded in India long ago and they greatly helped to bring Hindus and Muslims together.

Another great preacher of the time was Nanak, the founder of Sikhism. He spent his whole life in preaching his Gospel of universal toleration based on all that was good in Hinduism and Islam. As a matter of fact, this mission was put to an end to the conflict of religion. It is remarkable that Sufi saints of Islam adopted the same universal

\textsuperscript{80} Prasad, R. \textit{India Divided} (Bombay: Hindu Kitabs, 1946) p. 37.

approach as did Kabir, Ramanand and Nanak. They also tried to build ideological bridges to unite Hindus and Muslims.

In Arabia, Persia and all the places and lands where Islam prevailed, paganism was also popular there marginally in very old days. Hazrat Mohammad, a prophet, sent by Allahu (God) raised his influential voice against all evils practices and idol worship. Soon Islam prevailed in Arabia, central Asia, Asia Minor, Persia, Afghanistan, India and in a substantial part of Europe.

In Islam, religion and politics have been interwoven, which can never be separated, therefore, the Muslim kings possessed political as well as religious powers, but they could not do any thing contrary to the commands of the Holy Koran, as the Muslims believe the Holy Koran to be a perfect book revealed personally from Allah (God) wherein everything needed for the humanity can be traced out. It is finally authority for religious as well as political purposes.

In the Muslim period, kings had religious faiths different from most of their subjects. Most of them made such rules as to facilitate their work and to administer peace among people. But there others who would like to abide by the laws of the Holy Koran. They practised partiality with the believers of other religions who had to pay a religious tax 'Jazia' for their protection and safety. This practice widened the gulp between the rulers and ruled. It
caused unfavorable atmosphere and brought decline in their power which one day ceased to exist.

C. In-Post Independence Period

After two centuries of foreign rule India attained her independence in 1947. Despite the creation of Pakistan, there were still a large number of Muslims in India. There were also Christians, Sikhs, Parsees, Jains, Buddhists, Jews and others. Those who professed Hindu religion formed the majority. The task of framing a Constitution for this multi-religious and multi-cultural country was assigned to the Constitution Assembly.\(^8\) It may be noted that the tragic memories of the partition of the country were still there in the minds of the members of the Assembly, who therefore wanted to make Indian secular democracy based on the pillars of justice, equality, liberty and fraternity.

Jawahar Lal Nehru in his broadcast to the nation on 19 August 1947 clarified the secular approach of the government. He said: "The Government of India... will treat every Indian on an equal basis and try to secure for him all the rights which he shares with others. Our State is not a

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82. The Assembly was composed of members elected by the provincial legislatures and the princely State according to a formulate evolved in consequence to the visit to India of the Cabinet Mission in 1946. See A.C. Banerjee, The Constituent Assembly of India (1947), B.R. Sharma, Socio-Economic Justice Under Indian Constitution, (1984), Chapter II, f.n.1.
communal State, but a democratic State in which every citizen has equal rights. The Government is determined to protect these rights." 83

On December 13, 1946, Nehru moved the Objectives Resolution for the consideration of the Assembly wherein he promised to move on secular and national lines. He laid down that the future Constitution of India would among other things guarantee freedom of thought, expression, belief, faith and worship. 84 The members of the Assembly were deeply impressed by the urge of making India a secular State. Lokanath Misra felt that the State should "keep its hands off all religious institutions and wanted the State not to bother about the management of any religious institutions". 85 On the other hand, to Lakshmi Kant Maitra the secular State meant that the State meant that the State would not make any discrimination whatsoever on the ground of religion or community against any person professing any particular from the religious faith... that no particular religion in the State will receive any State patronage whatsoever. The State is not going to establish, patronise

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83. Quoted in India - since Independence, 10 (1971),
or endow any particular religion to the exclusion of origin preference to other and no citizen in the State will have any preferential treatment or will be discriminated against simply on the ground that he possessed a particular form of religion."86 To quote him: "When I say that a State should not identify itself with any particular religion, I do not mean to say that a State should be anti-religious or irreligious. We have mean to say that a State should be anti-religious or irreligious. We have certainly declared India to be a secular State. But to my mind, a secular State is neither a Godless State nor an irreligious nor an anti-religious State."87

The preamble to the Constitution of India speaks of the resolve "to secure to all citizens... liberty of though, expression, belief, faith and worship." The Constitution guarantees the freedom of religion implicit in the concept of a secular State. These freedoms are enshrined in two important provisions, namely, Article 25 guarantees to every person the freedom of conscience and the free profession, practice and propagation of religion: and likewise Article 26 guarantees to every religious denomination, or a section of it, the right to manage its own affairs in matters of

86. Id., at 831.
87. Id., at 825.
religion and the right to establish and maintain institutions for religious purposes. This does not mean, however, that this freedom is an unconditional or unregulated one. The Constitution has provided a framework of limitations within which the freedom of religion is to be exercised by the citizens in this country. Accordingly these freedoms are to be exercised in such a way as not to impair peace, order and social morality.\textsuperscript{88} The State has been, thus, allowed to curb, restrict or regulate those religious activities which militate against social peace and morality. The Constitution has further laid down that these freedoms will not prevent the State from reforming Hindu religious institution. It is in this context that the State has abolished untouchability\textsuperscript{89} and has left open Hindu religious institutions to all sections of the Hindus.\textsuperscript{90}

4. REVIEW

It is true that today the role of religion is not as vital and comprehensive as it was in the primitive and ancient times when religion dominated virtually aspects of life of man. Its role has been considerably diminished

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\textsuperscript{88} See Articles 25, 26, 27, 28, 29, 30. Other relevant provisions are contained in Article 14, 15(1)(2)(4), 16(2) and (4), 23(2) and 29(2).
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\textsuperscript{89} Article 25(1).
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\textsuperscript{90} Cf. Art. 25(2)(b).
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during the last three or four centuries, specially after the rise of science and technology.

Today, instead of only praying to God observing some other religious rituals, we often use science and technology to solve our personal and social problems, like sickness, poverty, hunger, illiteracy, unemployment and dealing with natural calamities. Most of us now generally believe that instead of simply depending as a supernatural being for overcoming these problems, we ourselves should deal with them effectively.

But it does not mean that religion has now completely lost its hold on man's personal and social life. Even today the lives of the masses all over the world are governed by religious beliefs and which are regarded by them as absolutely true and certain. Whenever confronted with any serious personal or social crisis, people resort to religion for overcoming it.

It is clear that in ancient India the State not merely recognized religious freedom in theory is but also gave effect to this recognition in practice. It may be noted that in India secularism did not merely mean institutional separation of the State and religion. It signified protection of all religions by the State and not patronage of just one. During the medieval period of Indian History the State
in India was not completely secular. It was not a theocracy either. Generally speaking the Muslim State in India was independent of religion; and real source of the king's authority was not religion but his military strength, and he was more largely guided by considerations of State expediency than anything else. Some Muslim rulers were also religious fanatics but most of them were quite enlightened.

In fact, despite the contrast between Hinduism and Islam which is one to the most striking phenomena of the world's cultural history, when they came face to face in India they integrated with each other to a remarkable degree. Each was drawn to some aspects of the other which were lacking in itself. The result was a remarkable synthesis of culture and thought, manifesting itself in such philosophies as Bhakti and sophism. The fusion was not confined to politics but was also reflected in art, architecture, music and language and not the least important in the area of religious toleration and law.

The religious policy of the British was mainly guided by commercial imperial concerns. As a result they did not interfere much in the religious affairs of the Indians. On the other hand, they passed a number of laws to prove their religious neutrality. However, many aspects of their rule were not consistent with their policy of religious neutrality. They followed a policy of divide and rule on a
religious basis and encouraged the Muslim demand for a separate home land. They supported the Church of England and encouraged Christian missionary activities as a result of which sizable numbers of Hindus were converted to Christianity. They also introduced English education with a view to spread Christianity. Western education however, did not have the effect desired by the British. On the contrary, it introduced Indians to the New Learning and liberal though of the west. It was in fact an important contributory factor leading to the creation of a secular State in India.

The study of Roman Law shows that the period of customary law in the due course led to the era of jurisprudence. This era may be called the era of codes. The Twelve Tables of Roman can be testified as the best representative of this era. The Twelve Tales, it may be noticed, deal rather with adjectival laws and not with substantive laws. Even during this early stage of development of ancient law, it may notify that whereas law tends to be stable, and seeks to make the social structure steady and enduring, changing social environments exercised pressures for a change, and an attempt appears always to have been made to bridge the gulf between the letter of the law and the needs of the changing social structure.

The constitution of Indian accepts the concept of secularism and provides for a secular State. However, many modifications are made in the concept of secularism in view of the State and society in India. Indian secularism is not modelled complexly after the Western pattern of secularism. The Constitution of India has provided for its own form of secularism which is based on Indian tradition of tolerance and freedom of religion in modern times. Thus, the Indian concept of secularism does not involve a denial of our rich religious heritage, which is very dear to the people and provides them with a vision of good life.

92. The term 'Secular State' refers to "a State which guarantees corporate and individual freedom, deals with individual as a citizen irrespective of his religion, is not constitutionally connected to a particular religion nor does it seek either to promote or interfere with religion." See D.E. Smith, India as a Secular State, (1963) p. 4.