CHAPTEIr I

INTRODUCTION

The question whether India is secular or not is a controversial one. The Constitution of India does not refer expressly to the concept of a secular state. In the Constitution, however, are laid down the principles of inter-relationship between the state and religion; these principles are subject to varied interpretations. According to Marc Galanter, the Constitution of India is 'openly and determinedly secular'.¹ Justice Gajendragadkar admits that the Indian Constitution does not use the word 'secularism' in any of its provisions but he emphatically states that the 'spirit of secularism permeates all the material provisions of the Constitution.'²

Dr. Ved Prakash Luthera, on the other hand, states that the Constitution of India does not establish a secular state. It establishes a state which is very near to a jurisdictionalist state and is very far away from a secular state.³ He thinks it appropriate to describe it as

'religiously impartial' or 'non-communal' (non-denominational) state. He considers institutional separation of state and religion as the determinant of the secular state and conceives the Constitution of the U.S.A. as an exclusive ideal model of a secular state.

Dr. Luther's conception of a jurisdictionalist state is one which maintains equal status for the confessions within its domain. It is not separated from the churches; instead, it is intertwined with all the churches (religions), and controls and regulates the affairs of all.

Donald Eugene Smith does not however agree with the findings of Dr. Luther. He defines a secular state as one which guarantees individual and corporate freedom of religion, deals with the 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. According to him, 'the conception of a secular state involves three distinct but inter-related sets of relationships concerning the state, religion and the individual. They are:

1. Religion and the individual (freedom of religion).
2. The state and the individual (citizenship).

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4 Ibid., p. 155.
5 Ibid., p. 12.
6 Ibid., pp. 21-23.
3. The state and religion (separation of state and religion). 7

He emphatically reminds us that 'the completely secular state does not exist. Even the classic example, the United States, illustrates the reluctance to separate state and religion completely. ... While Indian secularism is deficient in several respects when judged by the American standard, in other respects the Indian practice is a closer approximation to the theory of the secular state.' To the question whether India is secular, his answer is a qualified "Yes". 'India is a secular state in the same sense in which one can say that India is a democracy', he adds. 9

C. H. Alexandrowicz, without accepting a final definition, conceives the secular state generally as one which 'presupposes two separate and mutually non-interfering spheres of activity i.e. the state and the Church or the religious organization. 10 He distinguishes the secular state from the idea of secularism which advocates a materialistic and anti-religious theory of life. While

7 India as a Secular State. Oxford University Press (1963), p. 4.
8 Ibid., p. 499.
9 Ibid., p. 500.
secularism has a hostile attitude towards religion, the secular state remains neutral in religious matters. It simply abstains from interference and the American precedent shows that such abstention is accompanied by a rather constructive attitude towards religion quite similar to that prevailing in India. He undertakes a comprehensive comparative study of the constitutional provisions and judgments of the Supreme Courts in the U.S.A. and India and points out that 'the wall of separation in the United States is more impregnable than that in India, both countries pursue and are bound to pursue a constructive attitude towards religion which they consider reconcilable with their secular outlook. The state in India is in the process of enlarging its jurisdiction at the cost of religion and applies extensive powers to bring the relationship between state and religion to the same level as that prevailing in other secular countries.' He is of the opinion that 'India is a secular state, the difference between her and the United States being that the latter is statically secular while India is dynamically secular'.

This brief reference to the opinions of authorities on the subject suggests that there is a perceptible degree of disparity of views on the issue of deciding whether India

11 Ibid., pp. 274-75.
12 Ibid., p. 295. Italics mine.
is secular or not. It may, however, be broadly accepted that no state in the world is secular in the sense of implying absolute separation between state and religion. Even the United States of America, which is considered an ideal model, is not a secular state in this sense. At best, it may be described as one which ensures a considerable degree of separation between the state and religion. The institution of religion is as old as the state, if not, older. The influence of religion is all pervading and even the most modern sophisticated materialist society like the one in the U.S. has not been able to erase the influence of religion completely. What is postulated in such a society is that the state follows the policy of least interference in religious affairs of the individual; and religion, on the other hand, does try least to dictate terms to the state. The commonly acceptable denominator of a secular state is freedom of religion or freedom of conscience permitted to people belonging to different faiths, and the degree of secularism would depend upon the degree of freedom of conscience permitted in a state. The second chapter is devoted to the implications of secularism and a historical retrospect of the development of the secular state.

The Constitution of India guarantees freedom of conscience, practice, profession and propagation of religion;\(^\text{15}\) permits religious denominations to establish and maintain institutions for religious and charitable purposes;\(^\text{16}\) to own, to acquire and to administer the properties of such institutions.\(^\text{17}\) It prohibits taxation, the proceeds of which are devoted for the promotion or maintenance of any particular religion.\(^\text{18}\) Similarly, it provides that no religious instruction shall be provided in any educational institution maintained out of state funds.\(^\text{19}\)

All these rights are provided by the Constitution of India in the form of justiciable fundamental rights, implying thereby that any citizen can approach the judiciary for the enforcement of these rights.\(^\text{20}\) The Courts, in this connection, are authorised by the Constitution to issue appropriate writs and injunctions and arbitrate in litigations arising out of the exercise of these fundamental rights. It is in this context that the judiciary assumes a significant role as an impartial adjudicator. The third

\(^{15}\) Article 25.

\(^{16}\) Article 26(a).

\(^{17}\) Article 26(a)(d).

\(^{18}\) Article 27.

\(^{19}\) Article 28.

\(^{20}\) Article 32.
chapter is devoted to the study of the nature of fundamental rights, their justiciability and the nature and scope of judicial review in relation to these rights.

The purpose of this thesis is to understand the role of the judiciary in ensuring the protection of these rights and thereby preserving and protecting the secular tendencies in this country. As the Constitution has made these rights justiciable, the judiciary has to decide the province of both - the state and religion. It has to draw a line of demarcation to decide where the area of freedom of religion ends and where the province of state intervention begins.

Attention has been confined to some specific aspects of the problem. The areas concerned with personal law of marriage and divorce, of inheritance and succession, etc. are very significant and controversial areas of the application of civil law in a secular state but these have not been included in the scope of our study. Emphasis is placed on corporate institutional freedom. It may, here, be pointed out that the distinction between individual freedom and corporate freedom is very thin and reference to individual freedom is inescapable even though the area of corporate freedom is the focus of our study. As pointed out by the Supreme Court itself -

"Institutions as such cannot practise and propagate religion, it can be done only by individual persons and
whether these persons propagate their personal views or the tenets for which the institution stands is immaterial for purposes of Article 25.\textsuperscript{21}

Religious denominations are allowed to establish and maintain institutions for religious purposes and to manage their own affairs in matters of religion\textsuperscript{22} and therefore an important issue in connection with corporate or denominational freedom of religion is to know what constitute matters of religion and what do not. The fourth chapter is devoted to the study of the basic approach adopted by the judiciary in deciding what matters of religion are.

In the study of denominational freedom, attention is primarily devoted to the analysis of religious endowments. Hindus constitute the majority community in India and the disputes pertaining to the endowments of this community, naturally, are more numerous than those relating to other communities. Hinduism is one of the oldest religions in the world and has flexibly modified itself during the course of centuries of Indian history. The fifth chapter, therefore, is devoted to the analysis of how the judiciary has interpreted the term 'Hindu'.

It has to be noted that individuals are definitely related to the religious endowments established by them in


\textsuperscript{22} Article 26(b).
one capacity or another. They are either the worshippers or the office-bearers of these institutions. Temples and Maths are important Hindu religious endowments with long historical standing. The Waqf is a characteristic Muslim endowment. Office-bearers such as Shebeit, Pujari, Panda in case of temples, Mahant or Mathadhipathi in case of Maths, and Mutawalli in relation to Waqf are important examples of these office-bearers. They have a certain status in the management of these institutions and as such they enjoy certain rights and privileges and their position requires them to perform certain duties. These traditional rights and duties have been sanctified by statutory legislation. On various occasions the courts have to mediate in deciding the exact position of the contending parties.

Equally important, or perhaps even more important question is about the position of these office-bearers vis-a-vis the state officials. It may, in this context, be noted that the state has to regulate the affairs of religious institutions in the interest of the general public. The state is expected to regulate the secular administration of religious institutions. Here arises a delicate question of deciding what are matters of religious freedom and what constitutes the secular administration of religious institutions. An attempt is made in Chapters VI, VII, VIII, IX, X, XI to understand how the judiciary decides these controversial matters. These chapters have been related integrally to one
another. They may be regarded as constituting a unit by itself. As the cases regarding endowments other than those affecting Hindus and Muslims were few and far between, no separate chapter regarding the same has been constituted.

Freedom of conscience is the sphere of religion while 'law and order' is a province of the state. The state, consequently, does not permit those activities which disturb and destroy peace and order as well as social morality within the state. Freedom of conscience is, therefore, naturally subject to certain restrictions. The Constitution of India has specifically referred to these restrictions of 'public order, morality and health'. The result of this limitation clause has been that those religious practices which go against 'public order, morality and health' are likely to be disallowed by the state. Any action by the state to this effect, either executive or legislative, is usually challenged by citizens as one impinging on their fundamental freedom of practice and profession of religion. Whether a particular religious action or practice affects social order and peace or not, has been an important controversial issue and on numerous occasions the courts have been asked to step in and adjudicate. Here an attempt will be made to find out how the courts have resolved these controversies. This is however only the negative aspect of the problem.

23 Article 25(1) and Article 26.
But the state does not stop merely at imposing limitations and prohibiting certain activities. Religion is an age-old institution and people persist in continuing even those practices which are considered superstitious and obsolete in the context of modern times. Every social institution needs to be reformed in the context of changing times and religion is not an exception to this. Religious practices such as human sacrifice, infanticide, Sati, untouchability, etc. which were considered religious practices cannot now be continued and given social and legal sanction. It is natural, therefore, that the state should undertake effective programmes of social legislation with a view to reforming the laws regarding religious practices, administration of religious institutions and their properties, etc.

Whenever such an attempt is made by the state, it is likely to be, and is questioned by the authorities of the religion concerned, alleging that such action interferes with their basic freedom of religion and is, therefore, unconstitutional. The secular state cannot be a passive spectator to social evils. Hence, the judiciary has to interpret the constitution, protect the legitimate areas of religious freedom, permitting at the same time, desirable and legitimate changes in social life. In conflict between personal freedom, social welfare and economic development,
the judiciary has been called upon to act as an impartial arbiter, and it shall be the endeavour, hereafter, to see how far the judiciary has performed this task successfully.

A secular state contemplates equal treatment to citizens belonging to different religions, prohibits discrimination on the basis of religion and caste, and guarantees legal and social equality to all. The Constitution of India, therefore, grants equality before the law and equal protection of the laws, prohibits discrimination on grounds of religion, caste, etc. with regard to places of public importance, provides for equal opportunity in matters of public employment and abolishes untouchability.

One of the perpetual problems of a secular state is to see how the interests of religious minorities can best be secured. The minorities usually fear the hand of oppression from the members of the majority and an important task of a secular state is to release the minority from this fear. The Constitution of India permits religious minorities to conserve their script, language and culture and allows them to establish and administer

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25 Article 14.
26 Article 15.
27 Article 16.
28 Article 17.
29 Article 29.
educational institutions of their choice. The best safeguard for the minorities, when they feel their rights encroached upon, is to approach the judiciary and get its verdict on the same. In numerous cases brought up before them, the task of the courts has been to see whether the minorities did enjoy the assurances and guarantees given them by the Constitution. The Chapters XII and XIII have been devoted to the study of this aspect of the problem.

The period chosen covers the first two decades after the adoption of the Constitution in 1950. The rationale behind the selection of this period is that this is a very significant formative period when the foundations of a future secular state were being laid down and what has happened in this period is sufficiently indicative of what is in store for the future. This can be described as the period of trial, the period of testing the provisions of the Constitution. During this period, numerous laws have been enacted by the state and the validity of these laws in the light of constitutional provisions has been put to test on numerous occasions. Hundreds of cases pertaining to the issues discussed above were referred to the judiciary at various levels. It will not be possible to do justice to all these cases and care is taken to concentrate on those disputes which were taken to the Supreme Court.

30 Article 30.
Court of India under original, appellate or advisory jurisdiction. Wherever it has been necessary, the history of specific cases with special attention to the passage through various courts, has been traced and arguments at different levels have been touched upon. Whenever the Supreme Court has reversed the decision of the High Court or has arrived at the same decision following a different reasoning, the matter has been dealt with more extensively. Emphasis has been placed, by and large, on the arguments of the Supreme Court itself.  

The reason for concentrating on the decisions of the Supreme Court of India is that it is the final appellate tribunal of the land. It is the Court of Record in the sense that its acts and proceedings are enrolled for a perpetual memory and testimony. Its records are of such high authority that their truth cannot be questioned in any court. The law declared by the Supreme Court is binding on all courts within the territory of India.

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31 This is why the present tense has been retained in the treatment of the Supreme Court's arguments.


33 Article 129.

34 Supra n. 32, p. 418.

35 Article 141.
authorities, civil and judicial, in the territory of India act in aid of the Supreme Court. The Court has impressive and formidable powers. It is the ultimate interpreter of the Constitution. It is the guardian of the Constitution and the laws of the land.

Though emphasis is being placed on the decisions of the Supreme Court of India, some relevant judgments of the High Courts, in the context of the issues discussed, are also being noted. On numerous occasions the Supreme Court has relied upon related judgments of the courts in other countries of the world and the judgments of the Supreme Court of the U.S.A. in particular. Such comparative references, wherever found necessary have also been mentioned. It may be noted that at some places various cases have been discussed in the context of an issue, while, at others, a case is discussed elaborately referring to the various issues involved therein. Critical comments appearing in the law journals regarding the judgments and the reasoning adopted by the courts have also been taken note of.

Law is the foundation of social order. Law is an instrument of social change as well. The judiciary

36 Article 144.
interprets the law, and thus ensures protection of existing order, and necessitates desirable social change. Much depends upon the approach adopted by the Judiciary in interpreting the law, constitutional as well as ordinary. The unwarranted emphasis on an approach of formal legalism is likely to make society static while the excess of liberal dynamism is bound to accelerate a change which society might resist with all its strength. The framers of the Constitution of India desired to create a secular state in India. The government, whose task it is to make the necessary law and implement the same in practice is trying to give effect to the related provisions of the Constitution. The judiciary has been called upon to sit in judgment over the efforts of the government in the light of the constitutional mandate; and the purpose of this critical study is to analyse the role of the judiciary in evolving and protecting the secular state in India.