



INTERNATIONAL LAW
JOURNAL

**WHITE BLACK
LEGAL LAW
JOURNAL
ISSN: 2581-
8503**

Peer - Reviewed & Refereed Journal

The Law Journal strives to provide a platform for discussion of International as well as National Developments in the Field of Law.

WWW.WHITEBLACKLEGAL.CO.IN

DISCLAIMER

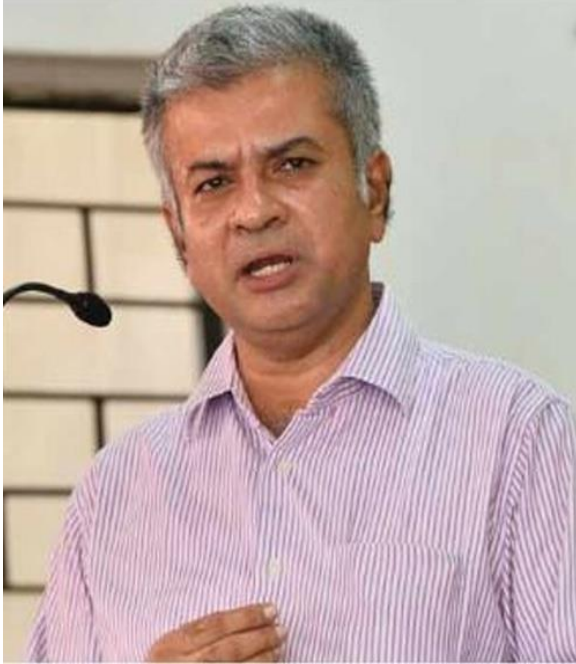
No part of this publication may be reproduced or copied in any form by any means without prior written permission of Editor-in-chief of White Black Legal

– The Law Journal. The Editorial Team of White Black Legal holds the copyright to all articles contributed to this publication. The views expressed in this publication are purely personal opinions of the authors and do not reflect the views of the Editorial Team of White Black Legal. Though all efforts are made to ensure the accuracy and correctness of the information published, White Black Legal shall not be responsible for any errors caused due to oversight or otherwise.

W H I T E B L A C K
L E G A L

EDITORIAL TEAM

Raju Narayana Swamy (IAS) Indian Administrative Service officer



Dr. Raju Narayana Swamy popularly known as Kerala's Anti Corruption Crusader is the All India Topper of the 1991 batch of the IAS and is currently posted as Principal Secretary to the Government of Kerala . He has earned many accolades as he hit against the political-bureaucrat corruption nexus in India. Dr Swamy holds a B.Tech in Computer Science and Engineering from the IIT Madras and a Ph. D. in Cyber Law from Gujarat National Law University . He also has an LLM (Pro) (with specialization in IPR) as well as three PG Diplomas from the National Law University, Delhi- one in Urban Environmental Management and Law, another in Environmental Law and Policy and a third one in Tourism and Environmental Law. He also holds a post-graduate diploma in IPR from the National Law School, Bengaluru and a

professional diploma in Public Procurement from the World Bank.

Dr. R. K. Upadhyay

Dr. R. K. Upadhyay is Registrar, University of Kota (Raj.), Dr Upadhyay obtained LLB , LLM degrees from Banaras Hindu University & Phd from university of Kota.He has succesfully completed UGC sponsored M.R.P for the work in the ares of the various prisoners reforms in the state of the Rajasthan.



Senior Editor

Dr. Neha Mishra



Dr. Neha Mishra is Associate Professor & Associate Dean (Scholarships) in Jindal Global Law School, OP Jindal Global University. She was awarded both her PhD degree and Associate Professor & Associate Dean M.A.; LL.B. (University of Delhi); LL.M.; Ph.D. (NLSIU, Bangalore) LLM from National Law School of India University, Bengaluru; she did her LL.B. from Faculty of Law, Delhi University as well as M.A. and B.A. from Hindu College and DCAC from DU respectively. Neha has been a Visiting Fellow, School of Social Work, Michigan State University, 2016 and invited speaker Panelist at Global Conference, Whitney R. Harris World Law Institute, Washington University in St.Louis, 2015.

Ms. Sumiti Ahuja

Ms. Sumiti Ahuja, Assistant Professor, Faculty of Law, University of Delhi, Ms. Sumiti Ahuja completed her LL.M. from the Indian Law Institute with specialization in Criminal Law and Corporate Law, and has over nine years of teaching experience. She has done her LL.B. from the Faculty of Law, University of Delhi. She is currently pursuing Ph.D. in the area of Forensics and Law. Prior to joining the teaching profession, she has worked as Research Assistant for projects funded by different agencies of Govt. of India. She has developed various audio-video teaching modules under UGC e-PG Pathshala programme in the area of Criminology, under the aegis of an MHRD Project. Her areas of interest are Criminal Law, Law of Evidence, Interpretation of Statutes, and Clinical Legal Education.



Dr. Navtika Singh Nautiyal

Dr. Navtika Singh Nautiyal presently working as an Assistant Professor in School of law, Forensic Justice and Policy studies at National Forensic Sciences University, Gandhinagar, Gujarat. She has 9 years of Teaching and Research Experience. She has completed her Philosophy of Doctorate in 'Intercountry adoption laws from Uttranchal University, Dehradun' and LLM from Indian Law Institute, New Delhi.

Dr. Rinu Saraswat



Associate Professor at School of Law, Apex University, Jaipur,
M.A, LL.M, Ph.D,

Dr. Rinu have 5 yrs of teaching experience in renowned institutions like Jagannath University and Apex University. Participated in more than 20 national and international seminars and conferences and 5 workshops and training programmes.

Dr. Nitesh Saraswat

E.MBA, LL.M, Ph.D, PGDSAPM

Currently working as Assistant Professor at Law Centre II, Faculty of Law, University of Delhi. Dr. Nitesh have 14 years of Teaching, Administrative and research experience in Renowned Institutions like Amity University, Tata Institute of Social Sciences, Jai Narain Vyas University Jodhpur, Jagannath University and Nirma University.

More than 25 Publications in renowned National and International Journals and has authored a Text book on Cr.P.C and Juvenile Delinquency law.



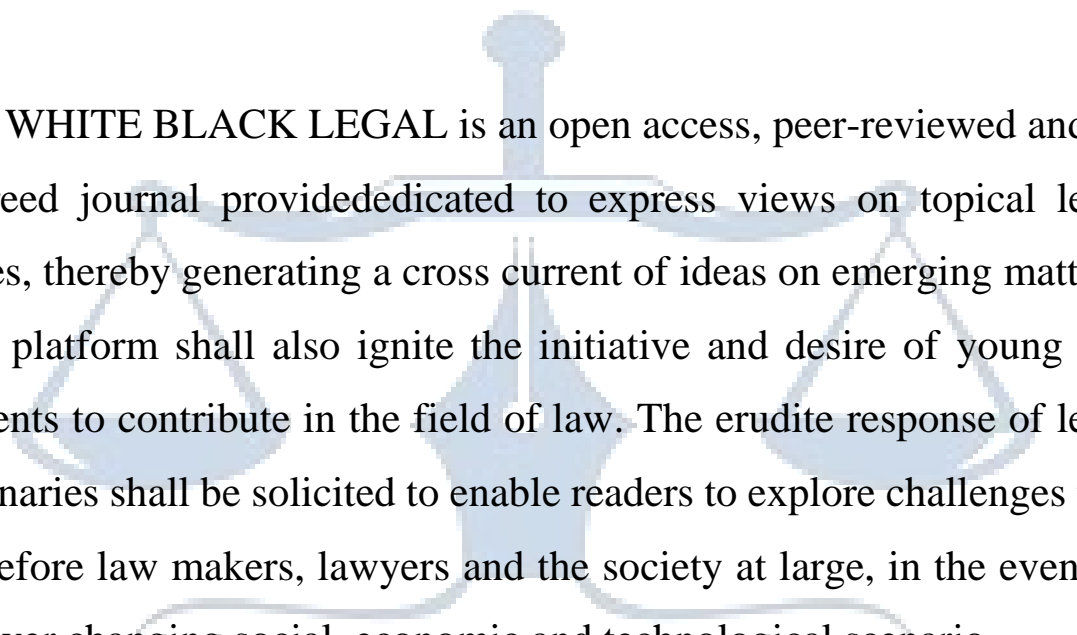
Subhrajit Chanda



BBA. LL.B. (Hons.) (Amity University, Rajasthan); LL. M. (UPES, Dehradun) (Nottingham Trent University, UK); Ph.D. Candidate (G.D. Goenka University)

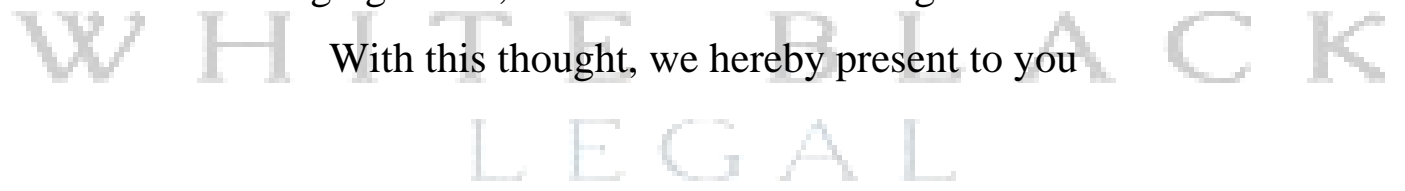
Subhrajit did his LL.M. in Sports Law, from Nottingham Trent University of United Kingdoms, with international scholarship provided by university; he has also completed another LL.M. in Energy Law from University of Petroleum and Energy Studies, India. He did his B.B.A.LL.B. (Hons.) focussing on International Trade Law.

ABOUT US



WHITE BLACK LEGAL is an open access, peer-reviewed and refereed journal providededicated to express views on topical legal issues, thereby generating a cross current of ideas on emerging matters. This platform shall also ignite the initiative and desire of young law students to contribute in the field of law. The erudite response of legal luminaries shall be solicited to enable readers to explore challenges that lie before law makers, lawyers and the society at large, in the event of the ever changing social, economic and technological scenario.

With this thought, we hereby present to you



EXPLORING SECULARISM IN INDIA AND THE USA - A CROSS-CULTURAL COMPARATIVE ANALYSIS

AUTHORED BY - JAI GANESH. B

ABSTRACT

The term 'secularism' is often used by the media and legal scholars in India whenever any matter related to religion arises. However, the true meaning and interpretation of the concept of secularism in India have often been distorted and confused in India. The entire concept of secularism has been misused interchangeably in India due to the emotional context in which it is used.

This research work intends to identify the true meaning, interpretation and scope of what secularism originally meant. This is done by tracing the origin of the concept of secularism which is actually from western countries. To further understand how the Indian version of secularism is different from the original western versions a comparative analysis is done between the relevant laws and principles of India and the USA. The circumstances and factors that prompted this modified interpretation in India are also considered in this research.

CHAPTER - I INTRODUCTION.

The concept of secularism was initially propounded in Europe to draw a line between the influence of Western Churches and governance of the state and political affairs¹. India has for a long time remained as a place of diversity with multiple cultures, languages and religious faiths living together. Although various "provisions of the Constitution of India" reflect a sense of secularism, the drafters of our Constitution did not find it necessary to include the word 'secular' in the preamble.

The term 'secular' and 'socialist' was added to the "preamble of the Constitution only after the 42nd

¹ Mohr, Richard. "The Christian origins of secularism and the rule of law." *law and religion in public life*. Routledge, 2011. 44-61.

Amendment was brought in 1976” by the then Prime Minister of India Smt. Indira Gandhi². Although the 42nd amendment was overruled by the Supreme Court as unconstitutional certain amendments like the one to the preamble (socialist, secular) were retained and further strengthened as forming “part of the basic structure of the Constitution” of India. The “Constitution” also safeguards the freedom to profess and practice any religion under Articles 25 and 26 as a fundamental right.

The United States, on the other hand, has the first amendment, 1791 in its Constitution which completely prohibits the US Congress from making any law regarding the establishment or prohibition of religion³. It was made in such a manner to prohibit the Church from interfering with government affairs and similarly, the government shall also in return completely restrain itself from interfering in the affairs of religion and Churches. However, in India, the government and judiciary have time and again interfered in the affairs of religion using the ground of “public order, morality, health” etc. It is interesting to note that these words are itself ambiguous and capable of multiple interpretations.

The main objective of this research is to understand the interpretation of secularism in India and the USA and analyse the difference between the two countries. It also analyses the similarities and differences in the practice of secularism between these two countries and also looks into how successful both of these countries are in achieving the goal of secularism. The research work also aims at bringing out the problems in the practice of secularism in India and suggests measures to strengthen it using its comparative analysis with the USA.

CHAPTER - II

BRIEF ANALYSIS ON THE CONCEPT OF SECULARISM.

The true meaning of a secular state.

A “secular state is a state that does not promote” or interfere with any religion or religious affairs of the state. In India’s case, it is completely different as a secular state is viewed as one that guarantees its people “freedom of religion” but is still subject to certain reasonable restrictions and grounds⁴. In the Indian context, the government and judiciary are permitted to interfere with the religious affairs

² Rao, V. Venkata. "Constitution Forty Second Amendment Act 1976 (A Critical Study)." (1978): 142-148.

³ Meiklejohn, Alexander. "The First Amendment is an absolute." *The Supreme Court Review* 1961 (1961): 245-266.

⁴ Marbaniang, Domenic. *Secularism in India: a historical analysis*. Lulu Press, Inc, 2011.

of a religion. A truly secular state is completely detached from religion and it is neither religious nor anti-religious it is completely detached⁵ from it.

Thus, a secular state in a positive sense “provides equal freedom to all religions” and does not make any discrimination based on religion⁶. In a negative sense, a secular state is a state with no religion of its own. It also does not recognize itself as a state of a particular religion and does not provide any “special status to any religion” or its followers. For example, Saudi Arabia and Pakistan cannot be considered as secular states as they have officially adopted Islam as their state religion and declared themselves as Islamic republics. Similarly, China also cannot be said to be a secular state as it does not guarantee freedom to practice any religion to the people.

Therefore, when Saudi and Pakistan fail to satisfy the negative conditions of secularism, China lacks a positive sense of secularism. However, India has satisfied both conditions as no particular religion is officially adopted as the state religion and followers of all religions are guaranteed freedom to practice any religion of their choice and discrimination based on religion is also prohibited. All citizens of India irrespective of their religion are equally entitled to “fundamental rights in part III of the Constitution” protected by the Judiciary.

Need for secularism in democratic countries.

Almost every country in this world has more than one religious group living in them and within these religious groups, one particular religious group will be in majority. Even in a democratic country where the will of the majority prevails, they can easily rise to positions which will give more access to State power etc. This administrative and financial power can be used to discriminate against or target people from other religious minorities⁷. Moreover, India has a heterogeneity of religion and culture and there are bound to be differences and disputes among them.

In a secular country, the minority religious group will have an assurance from the state that they are free to practice their religion and faith without any fear. Further, there is a need to separate the

⁵ Kothari, Rajni, and Rushikesh Maru. "Caste and secularism in India case study of a caste federation." *The Journal of Asian Studies* 25.1 (1965): 33-50.

⁶ De “Roover, Jakob, Sarah Claerhout, and S. N. Balagangadhara”. "Liberal political theory and the cultural migration of ideas: The case of secularism in India." *Political Theory* 39.5 (2011): 571-599”.

⁷ Chishti, S. M. A. W. "Secularism in India: An Overview." *The Indian Journal of Political Science* (2004): 183-198.

governance of the state from being influenced by one particular religion. It also ensures the individual freedom and right to leave one religion and embrace another religion or have a different interpretation of the same religious teaching. Secularism also helps in further strengthening the principles of rule of law and equality and equal treatment before the law.

In a secular country, both the believers and dissents of a particular religion will be treated equally by the government and they can exercise their free will⁸. The objective of secularism is to ensure “freedom of thought and conscience” and not curtail religious freedom⁹. The concept of secularism assures the individual’s right to absolute freedom of religious beliefs as long it does not affect the rights and freedom of others. Moreover, a secular democratic country will uphold human rights above religious mandates which are often discriminatory.

A secular state also guarantees its citizens equal access to the public services offered by it. Almost everyone must share public services like hospitals, schools, transport etc and secularism ensures that no one is disadvantaged or denied access on the unreasonable ground like religion. Further, most of these state services are funded by the state with the money sourced from tax payments of the common people. In a secular state both the believers of a religion or faith and those who oppose it can express their beliefs publicly. However, secularism must not be confused with atheism as secularism is simply staying neutral or not getting affiliated with any religion while atheism challenges the very origin and existence of God etc.

CHAPTER - III

ANALYSIS OF SECULARISM IN INDIA.

The concept of “secularism in India was never defined properly by our constitutional drafters or political parties”. The reality is that there was never a proper attempt to define the same owing to the multi-religious diversity and vote bank politics of India. The liberals view secularism as promoting minority rights by containing the majority while the conservatives view secularism as a threat to majority religious groups like Hindus¹⁰.

⁸ Bhargava, Rajeev. "What is Indian secularism and what is it for?." *India Review* 1.1 (2002): 1-32.

⁹ Alam, Javeed. "Ethically speaking, what should be the meaning of separation for secularism in India." *Social Scientist* (2007): 3-18.

¹⁰ Bhargava, Rajeev, and T. N. Srinivasan. "The distinctiveness of Indian secularism." *The Future of Secularism*, Oxford University Press, New York (2007).

In India, secularism found its roots during the pre-constitution era in Mahatma Gandhiji's freedom struggle against the British where there was a need to unite members of all religious groups to put a common front against the colonial British. Thereafter when the Muslim League demanded a separate country for themselves the Congress party and various leaders like Gandhiji tried to assure them that a post-colonial country will be secular in values¹¹. The original "Constitution of India that came into force on 26th January 1950" despite being secular did not use the words "secular or secularism" anywhere in the Constitution¹².

Thus, the Indian Constitution was in spirit secular although its political ideology varied with time. However, to truly understand the Indian model of secularism it is important to look into its historical evolution to some extent. The drafting committee of the Constitution of India was constituted on 29th August 1947 after the independence of India to make a constitution following the recommendations of the Constituent Assembly¹³. The drafting committee used the "Government of India Act of 1935 as a basic framework to draft the new Constitution".

However, certain provisions and ideas were adopted from various Constitutions of other countries. For example, "Part III of the Indian Constitution consisting of fundamental rights" which mainly deals with the Indian version of secularism (Article 25 – Article 28) was adopted to some extent from the Constitution of the USA. However, the drafters of the Indian Constitution refused to include the word "secular" or "secularism" in any of the provisions or the preamble of the Constitution¹⁴. The word secular was considered as giving an atheist sense to the Constitution and was viewed as a completely Western ideology which will not suit the Indian societal interest.

The term "secularism or secular" was not used by the "first Prime Minister of India Mr. Jawaharlal Nehru" in his speech before the Constituent Assembly where he moved his "Objectives Resolution" which also did not make any mention of the term¹⁵. There was no mention of the term even in the speech of the Chairman of the Drafting Committee Dr. B.R. Ambedkar. Thus, it appears that the

¹¹ Rajagopalan, Swarna. "Secularism in India: Accepted principle, contentious interpretation." *The Secular and the Sacred*. Routledge, 2004. 235-251.

¹² "Brass, Paul". "Indian secularism in practice." *Indian Journal of Secularism* 9.1 (2006): 115-132.

¹³ "Laborde, Cécile, Minimal Secularism: Lessons for, and from, India, *American Political Science Review* 115.1" (2021): 1-13.

¹⁴ Majeed, Javed. "the crisis of secularism in india." *Modern Intellectual History* 7.3 (2010): 653-666.

¹⁵ Thapar, Romila. "Secularism, history, and contemporary politics in India." *The crisis of secularism in India* (2007): 191-207.

omission of the term “secularism or secular” was not accidental but deliberate.

Further, the “former Chief Justice of India Dr. Gajendragadkar stated that the omission of the term secular was deliberate and not accidental as the constitutional makers felt that the inclusion of the term specifically will unnecessarily introduce an anti-religious mask” to the Constitution¹⁶. Thus, to prevent anti-religious impressions which may arise from the inclusion of the term “secular” explicitly it was purposefully omitted from the original preamble.

The term secular was finally included through the “42nd amendment to the Constitution of India in 1976”. The original Indian Constitution enacted in 1950 did not mention the term “secular” before the 42nd amendment. However, the term “God” was only used in the 3rd schedule of the Constitution which dealt with the form of oaths or affirmations.

The addition of the terms “socialist and secular” was to a large extent influenced by former Prime Minister Indira Gandhi’s close association with the Soviet Union and to draw the vote bank of minority religious groups¹⁷. It was also done during the most controversial times of national emergency in the History of India. The 42nd amendment was the most controversial amendment of that time and many parliamentarians “questioned the Parliament’s power to amend the Constitution” but no member specifically “opposed the inclusion of the term secular”.

However, former Prime Minister Indira Gandhi reasoned the move to amend the preamble by stating that “the founding fathers of the constitution of our country had intended Indian society to be a secular and socialist country and we are just incorporating them explicitly in the Constitution¹⁸”. She also believed that specifically and explicitly mentioning the term “secular” in the preamble will be a reference to the judiciary and the government making policies.

Constitutional provisions related to secularism in India.

After the 42nd amendment,¹⁹ the “Preamble of the Constitution explicitly declares that India shall be a secular state” thereby meaning and assuring all religious groups in India that the state shall not

¹⁶ “Tejani, Shabnum, *Indian secularism: a social and intellectual history, 1890-1950*, Indiana University Press”, 2021.

¹⁷ “Ali, Md Musa, *Secularism in India: concepts, historical perspective and challenges*, *Asia Pacific Journal of Research Vol: I. Issue XXIV*” (2015).

¹⁸ Alam, Javeed. "Ethically speaking, what should be the meaning of separation for secularism in India." *Social Scientist* (2007): 3-18.

¹⁹ The Constitution (42nd Amendment) Act, 1976.

prioritize or discriminate against any religion. Thus, the country guarantees pluralism and enacts and enforces parliamentary laws rather than religious laws. Further, Article 12²⁰ while defining State also makes no mention of a state religion as usually done in States with official religions like Pakistan and Saudi Arabia. Thus, it further assures that “no religion is superior or inferior” in India.

The judicial decisions and views that can be observed from various case laws also reflect the same idea of upholding secularism. In the landmark case of “*Kesavananda Bharati v. State of Kerala*,”²¹ the Supreme Court has clearly stated that secularism is a part of the basic structure of the Constitution”. The same principle was upheld and reiterated in “*S.R Bommai v. Union of India*”²² case. The Supreme Court in this case also mentioned that secularism does not mean atheism but tolerance to all religions and more heterogeneous society. Similarly, in the “case of *Ahmedabad St. Xavier’s College v. State of Gujarat*,”²³ the Supreme Court held that secularism” separates state from God and ensures that there will be no discrimination based on religion.

The decision of the Supreme Court is binding all other courts in India and further guarantees the protection of secularism across India. Furthermore, Article 13(2)²⁴ of the Constitution of India prohibits the State from making any laws in contravention of the Constitution. Further, Article 14²⁵ “guarantees equality and equal protection” to everyone before the eyes of the law. This is further complemented by Article 15²⁶ which states that “no person shall not be discriminated” against on grounds of religion, race, caste etc.

Further, Article 16²⁷(1) and (2) states that everyone shall be equally provided with an opportunity in matters of “public employment or appointment” to any position under the state and there shall be no discrimination on the ground of religion etc. However, the presence of Articles 25²⁸ and 26 in the Indian Constitution distinguishes the “Indian version of secularism from the Western version of secularism”. Article 25 guarantees to the citizens of India their “right to freely profess, practice and

²⁰ Article 12, The Constitution of India, 1950.

²¹ AIR 1973 SC 1461.

²² 1994 SCC (3)

²³ (1975) 1 S.C.R. 173.

²⁴ Article 13, The Constitution of India, 1950.

²⁵ “Article 14, The Constitution of India, 1950”.

²⁶ “Article 15, The Constitution of India, 1950”.

²⁷ “Article 16, The Constitution of India, 1950”.

²⁸ “Article 25, The Constitution of India, 1950”.

propagate any religion” of their choice though subject to certain grounds like public order, morality and health. Similarly, Article 26 guarantees the freedom to establish and maintain religious institutions and manage its affairs independently.

Further, Article 27 prohibits forced taxation for the “promotion or maintenance” of any particular religion. Article 28 permits the establishment of educational institutions by a different religious group to impart their own religious instructions. However, it prohibits “religious instruction in educational institutions funded by the State”. Further, Article 29 and Article 30 provides for the conservation and protection of cultural and educational institutions related to their religion. The Fundamental duties provided in Article 51²⁹ A though not of binding nature guides the state in drafting policies and laws in (e) lays down an obligation on all citizens to promote harmony and a spirit of common brotherhood³⁰.

Relevant cases on secularism in India.

The “Supreme Court of India” discussed about the concept of secularism for the first time in the 1967 case of *Sajjan Singh*³¹ where it observed that “secularism is a state with no religion. Thereafter in the landmark case of “*Kesavananda Bharati v. State of Kerala*”³², 1973 the Supreme Court held that secularism forms a part of the basic structure of the Constitution”. In the same case it was held that while the Parliament may amend the Constitution it cannot change the basic structure of the Constitution. It was for this reason this case was also called as the basic structure doctrine case.

Further, in *Minerva Mills v. Union of India*³³ case it was reiterated that the “parliament cannot change the basic structure of the Constitution” and in this case, Justice Khanna held that the secular character of the State and judicial review also forms a part of the basic structure of the Constitution.

This case further strengthened the concept of secularism in the Indian legal framework. Furthermore, the same principles were reiterated in the “case of *S.R Bommai v. Union of India*”³⁴, 1994”. In this case, the Supreme Court cleared the misconception around the word secularism and observed that

²⁹ “Article 51, The Constitution of India, 1950”.

³⁰ Bhargava, Rajeev. "What is Indian secularism and what is it for?." *India Review* 1.1 (2002): 1-32.

³¹ 1964 AIR 464

³² *Supra* Note 21.

³³ 1980 AIR 1789

³⁴ 1994 AIR 1918

secularism is not atheism but a way of making the society more tolerant to all religions and heterogeneous³⁵. The state shall not favour or discriminate against anyone.

Thereafter, in the “case of *Ahmedabad St. Xavier’s College v. State of Gujarat*³⁶ the Supreme Court again reiterated that secularism does not affirm that God” is there or not there. The only goal of secularism is to see that there is no discrimination based on religion and that the state shall not subscribe to an official religion. The presence of various religions in India makes secularism an essential component for the unity of India.

CHAPTER – IV

COMPARATIVE ANALYSIS BETWEEN INDIA & USA

Secularism In USA.

The United States has a completely different and simplistic notion on the concept of secularism. In the U.S secularism simply means the separation of the State and religion in such a manner that both are truly independent of each other. The U.S drafted the First Amendment’s Establishment Clause as early as 1777³⁷. It was first put forward in the General Assembly of Virginia and was finally passed in 1786. The First Amendment in simple and direct terms states that the State or government is prohibited from making any laws regarding any religion specifically with regard to the establishment or governance of religion³⁸, having an official religion for the state and favouring a particular religion over another.

Thus, the First Amendment completely prevents the government of the United States from making any law regulating freedom of religion³⁹. The First Amendment (establishment clause) was viewed by legal scholars and critics in the U.S from different perspectives. Some viewed the First Amendment as a tool primarily designed to protect the Church institutions from the State while others viewed it as a tool to protect the State from the dominance of the Church. There were other views that believed

³⁵ “Padhy, Sanghamitra., Secularism and justice: a review of Indian Supreme Court judgments, *Economic and Political Weekly*” (2004): 5027-5032.

³⁶ *Supra* Note 23.

³⁷ Baker, Joseph O., and Buster G. Smith. "American secularism." *American Secularism*. New York University Press, 2015.

³⁸ McClay, Wilfred M. "Secularism, American-Style." *Society* 44.6 (2007): 160-163.

³⁹ McCrary, Charles. “*Sincerely Held: American Secularism and Its Believers*, University of Chicago Press, 2022”.

that the First Amendment was intended to prevent the federal government of the U.S from interfering with the individual states' right to govern local religious affairs.

However, the bottom line is both the State and Church cannot interfere in the affairs of the other after the amendment. Thus, religion has no role in the affairs of the governance of the State and similarly, the government will also have no role in the affairs of religion. There is a clear separation of power between both ultimately ensuring independence for both. The United States' secularism mandates complete neutrality on the part of the government towards religious and non-religious beliefs. However, there is also an alternative view that the First Amendment only prohibits the State from giving special treatment to one religion over other and there is no bar on the government from giving assistance to all religions in general as long as there is equal treatment for all.

The jurisprudence on the concept of secularism in the United States is confusing and to get more clarity the relevant cases and judicial decisions of the U.S Supreme Court regarding its understanding of the U.S version of secularism must be analysed. In the case of *Everson v. Board of Education*⁴⁰, 1947 it was held that the federal government of the U.S or the State itself cannot establish a Church or enact laws favouring a particular religion over other religions. Thus, the perspective of the U.S Supreme Court, in this case, favours the idea that the State must maintain neutrality between various religions and non-religious believers. Moreover, the government is prohibited from forcing any individual against his will to attend or prevent him from having any religious beliefs or disbeliefs.

Thus, the government is prohibited from expressly or covertly taking part in the affairs of any religion. The U.S Supreme Court has specifically formulated a test to develop a better understanding and interpretation of the establishment clause known as the “Lemon test or purpose test” in the case of *Lemon v. Kurtzman*⁴¹. This test has three parts in it and the first one states that the action of the government must have a secular objective and secondly the principal or core effect must be such that it does not help in the progression or inhibition of a particular religion and thirdly the action of the government should not interfere with any religion.

Thus, when a law is challenged in the U.S it must pass all the three tests to be considered as consistent

⁴⁰ 330 U.S. 1 (1947)

⁴¹ 403 U.S. 602 (1971)

with the establishment clause in the First Amendment of the U.S Constitution. The laws enacted by the government and its actions can be challenged under the purpose test or lemon test. The Court while examining a law or government action under this test uses the “objective observer standard” which looks into the wordings used in the law, surrounding circumstances, logic, context, historical relevance and method of implementation⁴².

The second part of the test states that even if the law or government action satisfies the purpose test but its principal objective is to advance or restrict a religion the law is still invalid. However, just because a law has a distant effect to advance or inhibit a particular religion it cannot be said to be void as long as the principal objective promotes some legitimate government action and does not excessively interfere with religious affairs.

However, in certain cases, some judges expressed their dissatisfaction with the “Lemon test” and gave alternatives to this test. The alternative tests adopted by the jurist are known as the “Endorsement test and Coercion” tests. The first test (“endorsement test”) is basically a fundamental question that “whether a reasonable and informed observer will view the action of the government as an endorsement of a religion”. Thus, it basically focuses on the perception as to whether the government’s action is viewed as supporting or giving preference to one particular religion over other religious groups.

The main objective behind the “Endorsement test” is to prohibit the government from “conveying or trying to convey a message that one particular religion or a particular religious belief is preferred or promoted”. The “Endorsement test” has been viewed by some judges in certain cases as a test suggested in the first two parts of the “Lemon test” itself while others consider it as a distinctive separate test by itself. The second alternative test which is the coercion test has been derived from the context of school prayer issues.

In this test, unless direct aid is provided by the government thereby giving rise to a perception that it favours a particular religion, its actions are not violating the establishment clause. The action of the government must not give the perception of forcing people to support or take part in a religion against

⁴² Cady, Linell. "Choosing our better history: religion, secularism, and American public life." *Macalester Civic Forum*. Vol. 3. No. 1. 2009.

their will⁴³. Further, the “Free exercise clause” is enacted with the objective of guaranteeing protection to every individual religious belief and expression from the interference of the government. However, while this right to religious belief is an absolute right, the right to do religious practices is not.

The series of evolutionary tests adopted by the U.S Supreme Court for years to determine whether the government’s action, law or policy affects or threatens secularism resulted finally in the introduction of the “Sherbert test” which was developed from the case of *Sherbert v. Verner*⁴⁴, 1993. The main purpose of this test is to identify and determine if the actions of the government are threatening the right of religious exercise of an individual. The “Sherbert test” is divided into four parts. The first two parts apply to a person alleging that his “free exercise right” has been infringed. The next two parts apply to government organs which are alleged to have violated such rights.

Any person claiming protection under the free exercise clause must first show to the court that he has approached the forum because his “sincere religious beliefs” has been “substantially burdened” by the action of the government. The usage of the word sincerity of belief is interpreted as “not necessarily be logical, rational, sensible, or popular. Furthermore, there is no requirement for the individual approaching the court to be part of an organized religious denomination. If the plaintiff successfully demonstrates the presence of a substantial burden in the action of the government, then they must show to the court that its actions are based on a “compelling state interest”⁴⁵ only and that it has acted in pursuance of that interest in a manner which is less restrictive or least burdensome to the religious right under consideration.

The court analyses whether there is a “compelling interest” behind the actions of the government. The rationale is the government’s actions must not be “under-inclusive or overbroad”. The action or law passed by the government is considered to be “under-inclusive” when its main objective is to restrict or regulate religious practices but does not regulate non-religious conduct which also causes the same harm.

⁴³ Devine, Colin A. "A Critique of the Secular Exceptions Approach to Religious Exemptions." *UCLA L. Rev.* 62 (2015): 1348.

⁴⁴ 374 U.S. 398 (1963)

⁴⁵ Reeves, De'Siree N. "Missing Link: The Origin of Sherbert and the Irony of Religious Equality." *Stan. JCR & CL* 15 (2019): 201.

On applying this test if the government finds that the action or law of the government is “under inclusive” the court presumes that the governmental interest is not really compelling and thereby will not be considered to protect an interest of the highest order⁴⁶. Similarly, the court considers a government action or law to be “over broad” if it has placed restrictions more than what is necessary on a religion or any religious practice to achieve the stated compelling governmental interest.

However, the U.S Supreme Court has in the case of *Employment Division V. Smith*⁴⁷, 1990 case gave a new perspective to the “substantial burden test” if the law that is challenged does not specifically target any religion or its practices and is made generally applicable to all religions⁴⁸.

Comparative analysis of secularism in India and the United States.

The Republic of India and the United States of America are both democratic countries with the former being the largest democracy and the latter being the oldest democracy in the world. Both of these countries are pluralistic with various religions, races, cultures and ethnicity and therefore the two countries have adopted secularism as a part of their government. However, the Indian version of secularism and the U.S version of secularism has a lot of differences. As a part of a comparative public law exercise, it is pertinent to see how similar, different, better or worse is the concept of secularism in both countries.

Firstly, the main difference between the U.S version of secularism and the Indian version of secularism is that the U.S Government tries to maintain neutrality towards all religions by restricting and prohibiting itself from not enacting any law related to any religion. The idea was initially floated to prevent the State from influencing or favouring a particular religion with its vast power and resources and to similarly stop the Church which was once a powerful entity in Western civilizations. The tone and wordings of the First Amendment of the U.S Constitution itself reflect a policy of non-interference with the religious affairs of any religious or non-religious entity. The First Amendment specifically states that “Congress shall make no law regarding the establishment or free exercise of a religion.

⁴⁶ Choper, Jesse H. "The Religion Clauses of the First Amendment: Reconciling the Conflict." *U. Pitt. L. Rev.* 41 (1979): 673.

⁴⁷ 494 U.S. 872 (1990)

⁴⁸ Mykkeltvedt, Roald. "Employment Division v. Smith: Creating anxiety by relieving tension." *Tenn. L. Rev.* 58 (1990): 603.

However, it was only the judicial intervention that later paved way for some interventions of such nature when there is a grave threat to the society and again strictly restricted as to make sure that it does not affect the practice of that religion or force them against their will. Thus, to sum up, the U.S Constitution clearly mentions that religious affairs are not the business of the Congress and no laws shall be made regarding it but the judiciary has slightly interfered in certain aspects carefully to solve some issues.

The Indian Constitution mentions secularism in two places first in the Preamble and second in Article 25⁴⁹ which guarantees everyone the freedom of conscience, free practice, profession and propagation of any religion. The Preamble of the Indian Constitution is very neutral and only mentions that India shall be a secular state. However, the major difference between the U.S version of secularism and the Indian version of secularism can be seen in Article 25 of the Constitution of India when compared with the First Amendment of the U.S Constitution.

While the First Amendment of the U.S Constitution states that Congress which is a reference to the government and the State is prohibited from making any law regarding religion⁵⁰. The wording itself signifies a line of separation of power between the government and religious institution affairs and expresses that the U.S Constitution explicitly prohibits the government from interfering with the affairs of any religion. On the other hand, in Article 25 of the Indian Constitution which guarantees freedom of religion, it can be seen that there is a clear willingness and explicit wording permitting government interference.

Firstly Article 25 (1) starts as “subject to public order, morality, health and other provisions” a person shall have freedom of religion”. This part of the Article indirectly expresses the Constitution’s willingness that the government shall interfere in the affairs of religion under any of these grounds. The grounds like “public order and morality” by itself are vague and capable of multiple interpretations by anyone according to their needs.

Secondly, as if the indirect permission in Clause 1 of Article 25 is not sufficient in Clause 2 it is

⁴⁹ Article 25, The Constitution of India, 1950.

⁵⁰ Seligman, Adam B. "Secularism, liberalism and the problem of tolerance: The case of the usa." *Theoria* 55.115 (2008): 17-31.

specifically mentioned that “nothing in this article” which refers to the Fundamental Right of freedom of religion shall prevent the State from making laws to regulate or restrict the economic, financial, political and specifically secular activity of any religious practice”. Furthermore Clause 2 (b) specifically targets a single religion “Hinduism” by stating government can throw open any Hindu religious institution if needed. To reflect true secularism the Constitutional drafters could have instead mentioned it as “any religious institution”.

In comparison, while the U.S Constitution never hints at or permits government interference specifically in the form of making laws but the U.S Courts have at times cautiously and limitedly interfered with religious affairs. The Courts, practices and the Constitution in the U.S prohibits targeting a single religion. Furthermore, in certain States of India, the government has taken complete control of Hindu temples and regulate their daily administrative and economic affairs. They collect all the revenues from these temples and only distribute a part of it leaving many temples with poor to no maintenance.

Further, the U.S Constitution does not differentiate religion based on their population as “majority” or “minority” as they consider that secularism means the State should not favour one religion over another for any reason as it will make people of another religious group perceive that they are targeted. In India, the courts have often perceived secularism as upholding minority right specifically instead of putting in the U.S way that everyone’s rights to a religion shall be equally protected. The governments have also often used these religious distinctions for their political gains.

CHAPTER – V

FINDINGS OF THE RESEARCH

1. The understanding and application of the concept of secularism are completely different between the USA and India.
2. In Europe secularism was introduced to strip the Churches of their power and influence in the administration of the State apart from taking away the large amount of land controlled by them.

3. In India secularism was introduced taking into account the multi-cultural diversity and religious faith among the people. Further, it was also asserted that the constitution of India is secular to convince the Muslim League from claiming an independent state for themselves.
4. In the U.S secularism is assured in the First Amendment to the Constitution and it means that the government and religion both should not interfere in each other's affairs. It also specifically prohibited the legislative body Congress from enacting any laws that are favourable or unfavourable to any particular religion.
5. In India Secularism was a part of various provisions in the Constitution although there was no explicit mention of the term until the enactment of the 42nd amendment. In India secularism is often seen as a tool to protect the minority religious followers from the majority. The parliament is specifically under Article 25 (2) empowered to make laws in a favourable or unfavourable manner on a specific religion. Thus, the government if they want can interfere and control the religious affairs of any religion they want by basing it on vague and undefined grounds of "public order and morality".
6. The U.S does not differentiate their population on grounds of religious faiths as majority and minority and does not enact any laws in the favour of either of them and maintains absolute restraint from making any laws on the subject.

CHAPTER - VI

CONCLUSION & SUGGESTIONS

The Constitution and versions of secularism have been adopted by both countries to tailor to the societal needs and circumstances of each country. Thus, the Constitutional model of one country cannot be blindly followed without taking into account other factors like the prevailing societal circumstances and history.

The true meaning of secularism itself is complete non-interference in the religious affairs of any religion or making equal laws for all religions without any favouritism or bias for any reason. This value of secularism is rigorously followed in the U.S and from the perspective of a comparative public law, the same model can be adopted in India. The concept of secularism is recognized as a part of the basic structure of the Constitution of India and no change can be made to it but what remains to be determined is the true meaning of secularism and most importantly the implementation part.

The Indian Constitution could have prohibited the parliament from making laws based on the parameters of religion, majority, minority etc. If a person has suffered grave injustice in a particular religion the judiciary which is the guardian of fundamental rights and the Constitution can interfere in such a manner that it is not restricting the religious freedom of any religion.

Thus, there is a need to modify Article 25 (1) and (2) which explicitly permits the parliament to make laws to “regulate or restrict the economic, financial, political and specifically secular activity of any religious practice”. The presence of these wordings affects the secular nature of the Constitution itself as the true meaning of secular is State and religion shall be separate and neither shall interfere in the affairs of the other under any circumstances.

Furthermore, instead of mentioning in Article 25(2) (b) that the “government can throw open any Hindu religious institution if needed” the term “Hindu religious institution can be substituted as “any religious institution” as the true aspect of secularism prohibits the state from targeting any particular religion specifically. This clause has been inserted taking into account the historical inequality in Indian society in the past but the same issue is prevalent in various religions in India and as mandated by secularism there must be an equal application on all religions when a law is made regarding a religion.

Further, the presence of different personal law codes for every religion results in different citizens being treated differently based on their religion. The laws made are itself are based on religion as a parameter and to ensure equality and strengthen secularism in India a uniform civil code which will treat everyone equally irrespective of their religion is needed. India cannot move away from its secular nature as it is a very pluralistic society with various religions, cultures, and ethnicity.