



# INTERNATIONAL JOURNAL FOR LEGAL RESEARCH AND ANALYSIS

Open Access, Refereed Journal Multi Disciplinary  
Peer Reviewed Edition :

[www.ijlra.com](http://www.ijlra.com)

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# COMPARATIVE LAW REVIEW OF SECULARISM

AUTHORED BY - JAYANTI DHINGRA

Secularism has been recognised by the Constitution of India. The term secularism is used to define the separation of state and religion. The practice of secularism has become a much - debated topic in many countries. India has a diverse culture and contains various sects in terms of race, religion, creed, language, etc. But the application of secularism in India also needs to be analysed through looking at the practice of secularism in other countries. The deeper understanding of secularism is not confined to understanding and analysing the relationship between the religion and the state. Instead, thinking comparatively about secularism helps to analyse the social structure as a whole.

## SECULARISM IN INDIA

The Preamble<sup>1</sup> of the Indian Constitution declares India as a secular state. This was added through the 42 Constitutional Amendment Act, 1976.<sup>2</sup> Freedom of religion is also enshrined in the Constitution as a fundamental right (Part III) under Articles 25-28<sup>3</sup>. The Constitution provides for freedom of conscience and prohibits discrimination based on religion. It also prohibits state funding to support any particular religious group. The Constitution also stipulates that endeavour should be made to adopt Uniform Civil Code for all religions across the country. The main principles using which the states work on are “*Sarva Dharma Sama Bhava*” meaning “all religions are the same” and “*Dharma nirapekshata*” meaning the removal of the state from the affairs of religion.

There have been many cases in which the debate on freedom of religion came up. In *Aruna Roy v Union of India*<sup>4</sup>, the New Education Policy of 2002 was challenged in the court as violative of Article 28. The court upheld NEP by emphasising on the positive meaning of secularism and said that secularism can be implemented if a policy tries to focus on a particular section of a religious

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<sup>1</sup> INDIA CONST. Preamble

<sup>2</sup> 42 Constitutional Amendment Act, 1976, 42 (India)

<sup>3</sup> INDIA CONST. art. 25-28

<sup>4</sup> *Aruna Roy v Union of India*, AIR 2002 SC 3176

group. In *S.R Bommai v Union of India*<sup>5</sup>, the Supreme Court held that secularism constitutes the 'basic structure' of the Indian Constitution. It is also been recognised that the concept of secularism is best expressed when linking the right to equality with right to freedom of religion, protection of minority groups and is considered as a duty of the State to protect this.<sup>6</sup> Article 25 guarantees the right to freedom of religion to every citizen of India. The right under article 25(1) are not absolute, but subject to public order, morality and health. Article 26 tends to protect the minority groups from dominating groups. *Kesavananda Bharati v State of Kerala*<sup>7</sup> judgement is considered to be the cornerstone of the idea of secularism in India. It ignites the fire of an undying discourse on Indian secularism and its fundamental principles. The court held that Parliament cannot alter the basic structure of the Constitution.

There has been quite controversy over allowing certain groups to enter the temples. In *India Young Lawyers Association v State of Kerala*<sup>8</sup>, the Supreme Court held that prohibiting entry of women aged between 10-50 years to Sabrimala temple is discriminatory. There is also tussle over usage of loud speakers in temples. In *Moulana Mufti Syed Md. Noorur Rehman Barkati v State of West Bengal*<sup>9</sup>, it was held by the Calcutta High Court that it is a right for people to live in a noise-free environment and therefore it upheld the restriction imposed by the police on the use of loudspeakers during Azaan. The same was upheld in the case of *Afzal Ansari and others v State of Uttar Pradesh*<sup>10</sup> **where it held that using loudspeakers is not an essential practice in Islam. Similarly, in the case of *Church of God (Full Gospel) in India v. K.K.R. Majestic*<sup>11</sup>, the court stated "No religion prescribes that prayers should be performed by disturbing the peace of others nor does it preach that voice amplifiers or beating of drums should used."**

**There has also been a growing debate on Uniform Civil Code (UCC).** The British government submitted its report in 1835 stressing the need for UCC. There was a need to develop a uniform system of laws for all personal religions relating to marriage, inheritance, etc. That is why personal laws were created. But disputes arose as to what constitutes personal law. A debate about the code's application has been going on since the Constitution was drafted. Article 35 of the draft

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<sup>5</sup> S.R. Bommai v. Union of India, (1994) 3 SCC 1

<sup>6</sup> M. Ismail Faruqui v Union of India, AIR 1995 SC 605 A

<sup>7</sup> Kesavananda Bharati v. State of Kerala, (1973) 4 SCC 225

<sup>8</sup> India Young Lawyers Association v State of Kerala, (2019) 11 SCC 1

<sup>9</sup> Moulana Mufti Syed Md. Noorur Rehman Barkati v State of West Bengal, 1998 SCC OnLine Cal 73

<sup>10</sup> Afzal Ansari and others v State of Uttar Pradesh, 2020 SCC OnLine All 592

<sup>11</sup> Church of God (Full Gospel) in India v. K.K.R. Majestic, (2000) 7 SCC 282

constitution, i.e., the idea of UCC, was added to the Indian Constitution as Article 44<sup>12</sup>, a directive principle of state policy so that it could be incorporated in the constitution when the country is ready for it. It requires the state to establish uniform set of laws for all the religions to protect the secular character of the country. But it has not been without problems. If the code is enacted, it will proceed to simplify the laws that are currently highly segregated based on religion and religious beliefs of citizens, like the Hindu Code bill, Sharia Law, and others. “The code will simplify the complex laws around marriage ceremonies, inheritance, succession, and adoptions making them one for all. The same civil law will then be applicable to all citizens irrespective of their faith.”<sup>13</sup> India is a diverse country and it can be difficult to form a uniform code for people of all the religions. It could mean encroachment on the religious customs of people. It could also mean subjugation of religious practices of marginalised groups by the dominant group which will defeat the entire purpose of secularism that the UCC is purported to save. But still, there is a growing popularity on UCC. In the case of *Mohd Ahmed Khan v Shah Bano Begum*<sup>14</sup>, the court held that a “common civil code” should be adopted for national integration. The same was reiterated in the case of *Jordan Diengdeh v S.S. Chopra*<sup>15</sup>, in which the Indian Christian Marriage Act, 1872 was discussed. Goa is the only state in India in which all communities have the same personal laws relating to marriage, inheritance, divorce, etc. The state is governed by the Portuguese Civil Code of 1867.<sup>16</sup>

There has been rising cases of religious conversions in India. This has been particularly attractive to marginalised groups, who have from centuries, faced discrimination from the hands of upper caste people. The prevalence of caste system in India proves to be a challenge to the secular identity of the Indian nation. During the British era, many people began converting themselves to Christianity, as this meant being free from the shackles of caste system. Due to the rising cases of proselytization, many states have passed anti-conversion laws like the Uttar Pradesh Prohibition of Unlawful Conversion of Religion Act, 2021.<sup>17</sup>

After India’s independence in 1947 and following the India and Pakistan partition conflict, which

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<sup>12</sup> INDIA CONSTI, art. 44

<sup>13</sup> BUSINESS STANDARD, <https://www.business-standard.com/about/what-is-uniform-civil-code> (last visited Oct. 19, 2022)

<sup>14</sup> *Mohd Ahmed Khan v Shah Bano Begum*, 1985 SCR (3) 844

<sup>15</sup> *Jordan Diengdeh v S.S. Chopra*, 1985 AIR 935

<sup>16</sup> Portuguese Civil Code, 1867

<sup>17</sup> Uttar Pradesh Prohibition of Unlawful Conversion of Religion Act, 2021

led to communal riots between Hindus and Muslim, presented a tough challenge for India. To adjust the different diverse religious beliefs into one system paved the way for the concept of secularism being enshrined in the Indian Constitution. Its commitment towards secularism was an important first step. But it was not enough. As in Indian society, people have their identities tied to religion, their religion defines their dignity and self-worth. The state had to make space for the plurality of religious and cultural practices so that people of different religions could participate in public life with harmony while also upholding their beliefs. It gave the minorities the right to set up religious and educational institutions. It is the duty of the government to safeguard minorities from perpetration through their policies. But the incidence of community riots like Muzaffarnagar in 2013 and Gujarat riots in 2002, can be seen as examples of violence being perpetuated on minorities. India has its own problems with diversity and religious beliefs, from religious violence to the existence of caste. According to the USCIRF report 2022<sup>18</sup>, religious freedom conditions in India are taking a drastic turn downward, with national and various state governments tolerating widespread harassment and violence against religious minorities. Therefore, efforts should be made on ensuring harmony in diversity.

## **SECULARISM IN UNITED STATES OF AMERICA:**

The Indian Constitution borrowed many features from the American Constitution like the power of judicial review, the preamble, the concept of fundamental rights, etc. The concept of fundamental rights being borrowed also brought in the concept of a secular state from the American Constitution and the idea of freedom of religion. India and US are both pluralistic societies characterized by religious diversity. They are both liberal democracies with secularism as a foundational principle of public life. So, it will be helpful in knowing about the concept of secular state in the American Constitution and how it has been applied in the Indian context.

For a long time, there has been a demand from the people in the U.S. regarding freedom from religious persecution. This was brought forth in the First Amendment of 1791. The First Amendment of the American Constitution reads as:

*“Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people*

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<sup>18</sup> Religious Freedom Conditions in India | USCIRF, Uscirf, <https://www.uscifr.gov/countries/india> (last visited October 25, 2022)

*peaceably to assemble, and to petition the Government for a redress of grievances.”*<sup>19</sup>

The concept of freedom of religion states that one has the right to follow any religion and the State can't put any arbitrary restrictions on the practice of religion. It is people's choice to practice any religion.

The 'establishment clause' in the American Constitution relates to the separation of Church and State. There will be no religion which will be established by the State. President Jefferson declared in a letter written to the Baptists in Danbury that the purpose of the First Amendment was to "create a wall of separation between the Church and the State."<sup>20</sup> This clause prevents the government from establishing an official religion. The 'strict separation' between the Church and the State has some problems. The government will absolutely not infringe upon anyone's religion. But it is known that there are frequent mentions of God in oaths, like in the *Pledge of Allegiance*. In the Pledge of Allegiance<sup>21</sup>, there is a line saying "under God". This one line was added to the Pledge of Allegiance in 1954 by former U.S. President Eisenhower. "By the government incorporating God into the Pledge of Allegiance, it is favouring religions with one god and is neglecting people with no religion or those that have religions with multiple gods. Most public schools are making it mandatory to stand for the Pledge of Allegiance. Despite this, many public schools are becoming aware of people with any or no religion. By changing Christmas parties to holiday parties and morning prayers to the moment of silence public schools are providing their students with more freedom of religion. While all these changes are complying more with the First Amendment, activities like the Pledge of Allegiance and a feeling of underlying religion block public schools from supplying their students with complete religious freedom."<sup>22</sup>

The First Amendment says that the State cannot discriminate against anyone on the basis of their religious sect. This was laid down in case of *Board of Education of Kiryas Joel Village School District v Grumet*<sup>23</sup>, decided in 1994. Here, the disabled children were given separate public school districts. This was held to be arbitrary and was consequently struck down. There is a test, called

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<sup>19</sup> U.S. CONST. AMEND. I

<sup>20</sup> Mount Steve, US Constitution,

<https://usconstitution.net/jeffwall.html#:~:text=He%20was%20a%20staunch%20believer%20in%20the%20separati%20on,copy%20of%20the%20Danbury%20letter%20is%20available%20here> (last visited October 21, 2022)

<sup>21</sup> "The Pledge of Allegiance", Ushistory <https://www.ushistory.org/documents/pledge.htm?vm=r> (last visited October 21, 2022)

<sup>22</sup> "Freedom of Religion | Case Study Template", A Case Study. <https://acasestudy.com/freedom-of-religion/#:~:text=Biased%20by%20their%20own%20religion%2C%20many%20decisions%20made,the%20saying%20%E2%80%9CIn%20God%20We%20Trust%E2%80%9D%20on%20U> (last visited October 24, 2022)

<sup>23</sup> Board of Education of Kiryas Joel Village School District v. Grumet, 512 U.S. 687 (1994)

the “*Lemon Test*” which assesses the validity and the practice of legislations relating to the first establishment clause. It is the 1971 case of *Lemon v. Kurtzman*.<sup>24</sup> It raises the question whether the state funding to non-secular schools violates the Establishment Clause of the First Amendment. The Supreme Court held that funding religious educational institutions is clearly a violation of the Establishment Clause, as it states that “there should be no funding, financial support, sponsorships towards any religious institution.” Here, the tripartite Lemon test was laid down. It said,

1. *“Government’s action must have a secular purpose.*
2. *Government’s action must neither advance nor prohibit religion.*
3. *Government’s action must not result in the excessive government involvement with religion.”*<sup>25</sup>

If any of the above points are violated, then the order is unconstitutional.

But sometimes, judges in the Supreme Court do surpass the “wall of separation”. In the case of *Bradfield v. Roberts*,<sup>26</sup> the court agreed with the Corporation to set up a hospital for treating poor patients, although the Corporation was the follower of a particular religion.

As a whole, the implementation of secularism has remained a problem in America. As per Statista estimates, “Although only 24% of Americans go to church every week, 40% consider themselves as highly religious.”<sup>27</sup> So, while the Constitution allows for the separation of Church and State, it is still mostly a Christian nation. Robert N. Bellah, an American Sociologist wrote in his 1967 article ‘Civil Religion in America’ gives another yet not ‘secular’ term to the political dimension of religion in the USA. He analyses the inaugural speech of John F. Kennedy (USA’s President from 1961-1963) as questioning as to “how a president is even justified to utter the word ‘GOD’ in the system where Church is polarized against State.” He would reach the conclusion that the U.S. does have a religious political dimension. “Secular USA's constitution has not denied the political realm a religious dimension. This becomes clear when we see examples like Americans observing ‘Sunday Holiday’, Church based marriages, and the American system possessing many religious based institutions, orphanages, food banks etc. which bear socio-political influence.”<sup>28</sup>

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<sup>24</sup> *Lemon v. Kurtzman*, 403 U.S. 602 (1971)

<sup>25</sup> Richard L. Pacelle Jr, "Lemon Test | The First Amendment Encyclopedia", Mtsu, <https://mtsu.edu/first-amendment/article/834/lemon-test> (last visited October 24, 2022)

<sup>26</sup> *Bradfield v. Roberts*, 175 U.S. 291 (1899)

<sup>27</sup> Erin Duffin, Church attendance of Americans 2021 | Statista, Statista, <https://www.statista.com/statistics/245491/church-attendance-of-americans/> (last visited October 24, 2022)

<sup>28</sup> Robert Bellah, Civil Religion in America, Journal of the American Academy of Arts and Sciences, [http://www.robertbellah.com/articles\\_5.htm?&\\$NMW\\_TRANS\\$=ext](http://www.robertbellah.com/articles_5.htm?&$NMW_TRANS$=ext) (last visited October 24, 2022)

Despite all of this, it still lends itself to a secular structure. Comparing the language of the Declaration of Independence<sup>29</sup> and the Constitution, there are references to religion in phrases like “Divine Providence” and “Nature’s God” in the Declaration. But in the Constitution, it lends itself more to a secular structure through the Establishment Clause, which is the main basis for the separation of the Church and the State.

India borrowed the ‘preferential theory of American model’, that is, the State will separate religion from Church. The Constitution of India lays down the mixed approach in which every person is entitled to due respect and recognition of their religions by the State and that the State shall not discriminate against any person on the basis of religion. The Indian Constitution does not define the separation like that of the Church and the State as in the U.S. Constitution. In U.S, as it is laid down in case of Board of Education of Kiryas Joel Village School District v Grumet, that there will be no religious funding, but in India, it does allow for religious instruction in schools through state funds (Article 28).<sup>30</sup> There is also a difference between the two countries as regards to the clauses mentioned in their constitutions. Article 25(1) of the Indian Constitution states that, *“Subject to public order, morality and health and to the other provisions of this Part (Fundamental Rights) all persons are equally entitled to freedom of conscience and the right freely to profess, practice and propagate religion.”*<sup>31</sup>

In India, the State can put reasonable restrictions on the freedom of conscience and the freedom of religious practice. But in America, the freedom of conscience is absolute and the right to religious practice can be interfered with by the State. Therefore, the Indian Constitution did not adopt the idea of “separation of church and state.” In India's case, religion is so constantly present in everyday life that state has to intervene in religious matters to protect different religious beliefs. Some of the acts passed to regulate religion in India are Hindu Marriage Act, 1955, the Special Marriage Act, 1954, etc. Therefore, both the countries’ constitutions have a secular character, but there are still many issues that need to be addressed with regards to minority groups and their fundamental rights.

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<sup>29</sup> Declaration of Independence: A Transcription | National Archives, Archives, <https://www.archives.gov/founding-docs/declaration-transcript> (last visited October 24, 2022)

<sup>30</sup> INDIA CONST, art 28

<sup>31</sup> INDIA CONST. art. 25(1)

## SECULARISM IN INDONESIA:

In terms of religion, India and Indonesia are connected in many ways. They are home to multiple languages, ethnicities, cultural customs and religions. India and Indonesia have divergent ways of dealing with their respective great diversity. In India, religious family laws of Hindus, Muslims, Christians, and Parsis are incorporated into a legal system and directly applied. “In Indonesia, by contrast, the legal system is bifurcated: for family matters, Muslims are subject to jurisdiction of Islamic courts where religious judges apply codified Islamic law, while non- Muslims are subject to secular law applied by the civil court.”<sup>32</sup>

In the Indonesian Constitution, Chapter XI relates to Religion. According to Article 29 of the Indonesian Constitution of 1945,

- *“The State shall be based upon the belief in the One and Only God.*
- *The State guarantees all persons the freedom of worship, each according to his/her own religion or belief.”* <sup>33</sup>

Indonesia has the highest percentage of Muslims among its total population among countries of the world. “There are over 200 million Muslims living in Indonesia, accounting for 13% of the world’s Muslim population. Islam is also the dominant religion in the country with 88% of the country’s population being Muslims.” <sup>34</sup> Muslims are in majority in Indonesia, whereas in India, Muslims constitute a minority. So, India and Indonesia have religions with the majority and minority religions reversed.

While the Indonesian Constitution enshrines the principle of ‘belief in the one and only one God’. But with such a high proportion of Muslims in the country, the only one religion is usually seen to be Islam. Since Indonesia got independence in 1945, it promoted the ideology of Pancasila (literally, “five principles”), which comprises: “monotheism, civilized humanity, national unity, deliberative democracy, and social justice.”<sup>35</sup> It was first propounded by the first president of

<sup>32</sup> YÜKSEL SEZGIN and MIRJAM KÜNKLER, Regulation of "Religion" and the "Religious": The Politics of Judicialization and Bureaucratization in India and Indonesia, Jstor, [https://www.jstor.org/stable/pdf/43908509.pdf?refreqid=fastly-default%3A9b1ef548f9c2cefed320e6d40c3b30f0&ab\\_segments=0%2Fbasic\\_search\\_gsv2%2Fcontrol&origin=search-results](https://www.jstor.org/stable/pdf/43908509.pdf?refreqid=fastly-default%3A9b1ef548f9c2cefed320e6d40c3b30f0&ab_segments=0%2Fbasic_search_gsv2%2Fcontrol&origin=search-results) (last visited October 25, 2022)

<sup>33</sup> Indonesia 1945 (reinst. 1959, rev. 2002) Constitution - Constitute, Constituteproject, [https://www.constituteproject.org/constitution/Indonesia\\_2002?lang=en](https://www.constituteproject.org/constitution/Indonesia_2002?lang=en) (last visited October 25, 2022)

<sup>34</sup> John Misachi, Islam In Indonesia, [Islam In Indonesia - WorldAtlas](https://www.worldatlas.com/articles/islam-in-indonesia.html) (April 25, 2017), <https://www.worldatlas.com/articles/islam-in-indonesia.html> (last visited October 25, 2022)

<sup>35</sup> Indonesia 1945 (reinst. 1959, rev. 2002) Constitution - Constitute, Constituteproject,

Indonesia, Sukarno, on June 1, 1945, on Indonesia's independence. Article 156A of the Indonesian criminal code, also known as the Blasphemy Law,<sup>36</sup> says that only six religions are recognised and protected under the Indonesian Constitution. These are - Islam, Protestantism, Catholicism, Buddhism, Hinduism, and Confucianism. This means that those religions who belong to the minority groups, that is, who are not part of these six main religions, are the most vulnerable people facing punishment. The people belonging to minority groups are considered to be 'unorthodox'. Offenders can be imprisoned for up to five years.

Article 156 A prohibits the expression of sentiments or acts:

1. *"That fundamentally and by their nature are hostile, abuse or disgrace [penodaan] a religion practiced in Indonesia"*.
2. *"With the intention that persons should not practice any religion at all that is based on Belief in Almighty God"*.

A particularly important case which enhanced the standing of the criminal justice system was *Indonesia vs. Suzethe Margaret*<sup>37</sup> which brought forth the problems faced by minority groups, especially Christians. The majority of the Muslims in Indonesia are Sunni Muslim, but the country is also home to some smaller Muslim groups such as Shi'a Muslims, Ahmadiyya Muslims, etc.<sup>38</sup> Moreover, there are a lot of other minority groups who are not part of the six main religions as written in the Blasphemy Law. They face religious persecution. Most of the people are accused for blaspheming Islam. So even though, Indonesia's Constitution protects religious freedom, but members of religious minorities and atheists are being subjected to discrimination. Atheists are considered to be 'godless'. These people are considered as going against public harmony. The purpose of the Blasphemy Law was supposed to create harmony and prevent religious discrimination. But in reality, whatever is considered as going against the beliefs and tenets of Islam, faces punishment and are not acknowledged by the state. The Blasphemy Law and its subsequent implementation has raised several human rights concerns over recent years amid an increasing number of cases and restrictions of religious freedom. Churches that engage in

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[https://www.constituteproject.org/constitution/Indonesia\\_2002?lang=en](https://www.constituteproject.org/constitution/Indonesia_2002?lang=en) (last visited October 25, 2022)

<sup>36</sup> Indonesia-Code-of-Criminal-Procedure-1981-eng.pdf, Icj, <https://www.icj.org/wp-content/uploads/2013/01/Indonesia-Code-of-Criminal-Procedure-1981-eng.pdf> (last visited October 25, 2022)

<sup>37</sup> Andreas Harsono, Indonesian Woman Tried for Blasphemy Over Mosque Incident, HRW, <https://www.hrw.org/news/2019/10/11/indonesian-woman-tried-blasphemy-over-mosque-incident> (last visited October 25, 2022)

<sup>38</sup> *Supra* note 34

evangelistic outreach are constantly at risk of being targeted by Islamic extremist groups. Christians and other religious minorities are forced to convert to Islam. As a result, the United States Commission on International Religious Freedom (USCIRF) placed Indonesia on the State Department's Special Watch List (SWL) in 2022 to supervise the government which allows "severe religious restrictions".<sup>39</sup>

Even though there are many cases of religious persecution in Indonesia, it also promotes the secular idea. The Hindus are comprised of a mere 1.7% of the Indonesian population<sup>40</sup> but there are many instances in which many Hindu gods and goddesses are portrayed as symbols. In front of the Indonesian Embassy, there is a statue of *Saraswati*, the Hindu goddess of learning. The national emblem of Indonesia is *Garuda Pancasila*. *Garuda* is the bird of *Lord Vishnu*. *Hanuman* is the official mascot of Indonesia's military intelligence. At 1997 South-East Asian Games conducted by Indonesia at Jakarta, the official mascot was Hanuman. The National flag of Indonesia, "*Sang Saka Merah-Putih*" (The Sacred Red and White) is designed according to a banner of the *Majapahit Empire*. Hinduism and Buddhism were the dominant religions in the *Majapahit Empire* at that time. "This can be seen in a province of Indonesia, Bali, where many people have their origins from Hinduism or Buddhism. The epic of *Mahabharata* and *Ramayana* are famous among its people."<sup>41</sup> So here, it can be seen the idea of a secular nation that Indonesia holds. Despite being a Muslim majority country, there are many instances in which Hindu traditions and Hindu mythological practices can be seen. This can be seen as a lesson for India, where there are a lot of communal riots and tensions between Hindus and Muslims. Following the 1947 partition of Indian subcontinent to India and Pakistan, Hindu - Muslim communal violence is still evident in many parts of the country. The Citizenship Act, 1955<sup>42</sup> provides Indian citizenship only to non-Muslim migrants from Afghanistan, Bangladesh, and Pakistan already residing in India. This potentially exposes millions of Muslims to "detention, deportation and statelessness when the government completes its planned nationwide National Register of Citizens."<sup>43</sup> The othering of non-Hindu people through legislations has turned India's diverse and

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<sup>39</sup> USCIRF Releases 2022 Annual Report with Recommendations for U.S. Policy | USCIRF, Uscirf, <https://www.uscirtf.gov/news-room/releases-statements/uscirtf-releases-2022-annual-report-recommendations-us-policy> (last visited October 25, 2022)

<sup>40</sup> Ajay Mankotia, What India can learn from Indonesia on religious tolerance, DAILYO, <https://www.dailyo.in/politics/indonesia-hindus-islam-intolerance-minorities-religion-sukarno-mahabharata-ramayana-ganesha-secularism-7852> (last visited October 27, 2022)

<sup>41</sup> *Ibid*

<sup>42</sup> The Citizenship Act, 1955

<sup>43</sup> *Supra* note 18

pluralistic society into hostile state for religious communities like Muslims, Christians, Adivasis, etc.

The Indian Supreme Court has devised the “Essential Religious Practices Test” to determine the essentiality of religious practices as integral to a particular religion. For example, in the recent hijab case, the Karnataka High Court said that wearing hijab is not ‘essential and integral to the practice of Islam’. While most women in India are demanding the right to wear hijab and supporting that hijab is an ‘essential practice of Islam’, the women in Indonesia are seeking freedom from hijab that is being forced upon them. A similar incident happened in Indonesia when a Muslim student was forced to wear a hijab by her teachers, which caused her severe depression and anxiety<sup>44</sup>. This incident brought forth the issue whether individuals can make their free decisions in this country as part of their basic human rights. It showed intolerance prevalent in Indonesia.

Even though both India and Indonesia uphold and advocate religious freedom, there are still serious cases of religious persecution being experienced by both the countries. As vibrant democracies with ethnically diverse populations, both India and Indonesia need to grapple with issues concerning religious majorities and minorities.

## Conclusion:

Therefore, the doctrine of secularism is applied differently in different countries. The United States of America has adopted the concept of *mutatis mutandis*<sup>45</sup>, i.e., the principle of mutual non-interference, non-discrimination on grounds of religion, and freedom of religious practice.<sup>46</sup> Therefore, western secularism involves a strict separation of religion and the state. On the other hand, in India, the state has taken a neutral position on religion. In the United States, the stance of being secular is more of passive neutrality rather than an active effort to rid religion of the public indefinitely.<sup>47</sup> Religion is a strong way of expression in India; it is a part of our everyday life and has extreme control over the social order. Thus, it made no sense to follow secularism the way the

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<sup>44</sup> Siddhi Somani, Islamists in Indonesia force schoolgirls to wear hijab: How the symbol of oppression is first mainstreamed, then becomes a mandate, <https://www.opindia.com/2022/09/islamists-in-indonesia-forcing-schoolgirls-to-wear-hijab-howburqa-first-mainstreamed-normalized-then-becomes-a-mandate/> (last visited October 25, 2022)

<sup>45</sup> U.S. CONST. AMEND. I

<sup>46</sup> C.H. Alexandrowicz, *The Secular State in India and In the United States*, 2, JOURNAL OF THE INDIAN LAW INSTITUTE, 273, 274, (1960).

<sup>47</sup> Jordan Sanderson, *Legal Secularism and Politics*, 8 CORE 90, 104.

USA does, in essence, the 'separation of the church and the state' was not a viable choice. The state may support or participate in matters of faith and religious affairs but at the same time, religion is separated from the political, economic, social, and cultural spheres of the state. Even though both USA and India follow the principles of secularism, the social and cultural differences, i.e., the interactions within the society, make the application very different.

Similarly in Indonesia, although it is a Muslim majority country, the application of secularism is very different in India. India doesn't have a law similar to Blasphemy Law, and therefore, lends itself to a secular culture. But the situation of minority religions needs to be seen critically. To uplift people from these religions, efforts are made by the government by implementing affirmative actions. For example, the Tamil Nadu government has provided Muslims and Christians with 3.5% seats each in the arenas of education and employment. Kerala Public Service Commission has a quota of 12% for Muslims.<sup>48</sup> All these measures are a way of reverse discrimination which helps to uplift and support minorities.

To ensure religious freedom, the constitution makers went forward to let citizens follow religion-based laws. While criminal laws are equally applicable to all citizens regardless of their religion, some civil laws are different for people of different religions, such as 'personal laws.' Personal laws are laws that are unique to a particular group of people based on their caste, religion, faith, and/or beliefs and are formed after careful research of traditions and religious texts. Personal law in Hinduism and Islam is based on and guided by ancient religious scriptures. Hinduism applies personal laws to cases involving legal matters such as inheritance, adoption, succession, marriage, etc. Personal laws, which have their roots in the Quran, are applicable in Islam regarding inheritance, wills, succession, legacies, marriage, wakfs, dowry, guardianship, divorce, gifts, and pre-emption.<sup>49</sup>

The question which comes up in one's mind is that, to what extent can neutrality be practiced in a country in which some religions allow or even mandate certain practices such as child marriage, untouchability, polygamy, and so on. Do we make all the citizens follow the same laws regardless of their religion? This option can lead to a lack of religious freedom and the possibility of one religion dominating others. Or should we allow different religions to follow their own religion-based laws? This option will ensure religious freedom but it can meddle with the rights and

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<sup>48</sup> S. Viswanathan, *A step forward*, FRONTLINE (Oct. 18, 2022), <https://frontline.thehindu.com/other/article30193437.ece>

<sup>49</sup> Faizan Mustafa, *Legal Pluralism in Personal Law*, THE HINDU (Oct. 21, 2022)

individuality of individuals. With time, the views about religion and religious freedom are changing. Religious freedom is constantly under attack due to rising religious extremism in the world. It is time that freedom of religion is considered to be a human right and efforts are made to protect it.

Eleanor Roosevelt, former First Lady of the United States, once said “At all times, day by day, we have to continue fighting for freedom of religion, freedom of speech, and freedom from want- for these are things that must be gained in peace as well as in war.”<sup>50</sup> So, the fight for religious freedom is still going on and it is high time now that those countries who are considered as secular, must commit to it, keeping in mind the needs of minority groups as well.



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<sup>50</sup> Eleanor Roosevelt, "My Day, April 15, 1943," *The Eleanor Roosevelt Papers Digital Edition* (2017), accessed 6/20/2023, [https://www2.gwu.edu/~erpapers/myday/displaydocedits.cfm?\\_y=1943&\\_f=md056471](https://www2.gwu.edu/~erpapers/myday/displaydocedits.cfm?_y=1943&_f=md056471).