SECULARISM, PRINCIPLES AND APPLICATION. By J.M. Shelat. Judge, Supreme Court of India, N. M. Tripathi Private Ltd., Bombay. 1972. Pp. xiv+144. Rs. 20.

THE BOOK under review has grown out of the three lectures which the author delivered at Lajpat Bhawan, New Delhi in the Lala Lajpat Rai Memorial Lecture series for the year 1972 under the auspices of the Servants of the People Society, New Delhi. The author is at present a Judge of the Supreme Court of India. According to the author, the addition of one more book on the subject of secularism, on which so much has already been written since the advent of the Indian Constitution,[1] is justified because, in course of time, a number of state statutes touching upon the freedom of religion clauses in the Constitution have been enacted, and, consequently, there have arisen quite a large number of court cases in which these clauses have been construed and applied. There has also been a diversity of opinion in the various writings on secularism both on the character and nature of the Indian State and the principles governing it.

The basic theme in the book developed by the learned judge is that secularism in India, like any other institution, is partly the product of India's history and traditions and partly the inevitable answer to the events and developments which engulfed the country at the time of the country's emancipation and constitution-making. The secular character of India has been impugned by several persons. Some persons have maintained that the concept of a secular state is a direct imitation of the western model and owes nothing to Indian history and tradition and to the extent it falls short of the western pattern, it is not a secular state, but only a dubious hybrid variety. The author characterises such criticism as "neither valid nor proper". His plea is that to understand the true nature of Indian secularism, it is necessary to comprehend India's historical setting, the problems confronting the constitution-makers and to study the final outcome in the light of the principles governing the concept of a secular state and their application. The author seeks to fulfil these objectives in the six chapters in the book under review.

In the introductory first chapter, the author underlining the significance of religious freedom states that :

> [A]n individual has the best chance of realising fully his spirit when he is allowed to grow materially and spiritually without interference, so long as he permits the same liberty to his fellow-citizens.[2]

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1. See for example, I.L.I., *Secularism : Its Implications for Law and Life in India* (1966); I.L.I., *Minorities and the Law* (1972).

2. Shelat, *Secularism, Principles and Application* 2 (herinafter cited as *Shelat*).

Such a growth "is best attained in a community where the state and religion keep away from each other", and do not seek to control each other. The author characterises this principle as the "one fundamental circumstance in a democracy properly called".[3] The freedom of religion is an intimate part of the structure of liberty without which a democratic complex can never flourish. Religion and state should thus have separate spheres to operate. The first and foremost characteristic of secularism, therfore, is that an individual enjoys his citizenship in a state irrespective of his religion. Theocracy and democracy cannot go together. Justice Shelat makes two significant points here : first, secularism is not anti-God or atheism, as it is sometimes believed to be and, second, religious freedom is not a gift or a franchise conferred on an individual by the state, but is part of liberty, inherent in him as a member of a free state. Such a liberal concept of liberty has been propounded by the U.S. Supreme Court, through its declaration in 1940 in *Cantwell* v. *Connecticut*[4] that religious liberty was part of "liberty", which according to the Fourteenth Amendment no person could be unreasonably or arbitrarily deprived of by a state.

The second chapter deals with the growth of the concept of secularism in the West. The learned judge is a lawyer as well as a reputed historian being the author of a well-known book *Akbar*, and he brings to bear fully his historical perception in tracing the emergence of the concept of secularism in the western society. The theme of the chapter is beautifully summed up in the opening paragraph which says:

> Secularism, as a movement, was the product of the middle nineteenth century. In its content and character it was ethical, negatively religious, with political and philosophical antecedents.[5]

In its ethical aspect, secularism sought to provide a theory of life, seeking human improvement by meterial means alone, *dehors* the spiritual means. The philosophical roots of secularism lie in the utilitarianism of James Mill and Jeremy Bentham. Politically, secularism sprang from the turmoil which preceded, and still more from that which followed, the Reform Bill of 1832. This chapter makes very interesting and informative reading for those interested in western political thought. Towards the end of the chapter, the learned author traces the growth and emergence of the concept of secularism and religious freedom in the United States. The architects of the U.S. Constitution believed in the "need to enjoy the freedom of belief." This led to the enactment of the First Amendment of the U.S. Constitution in 1791 which lays down that "Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof". A wall of separation was thus sought to be built between the church and the state.

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3. *Id.* at 3.
4. 310 U.S. 296 (1940).
5. *Shelat* at 13.

Later, the Supreme Court interpreted the Fourteenth Amendment as including religious liberty and thus, brought the states as well within the fold of the secular concept. There have been in practice some deviations from the wall of separation theory, *e.g.*, the Declaration of Independence contains references to God, certain churches involve themselves in political activities *etc.* But despite these inroads on the principle of separation between the church and the state, the history of the United States during the last 175 years shows that the principle has, on the whole, been substantially observed. Religious freedom has been ensured to the people consistently with the duties and functions of the state to maintain public order, morality and public health.

In the third chapter, "Secular State: Its operation in the West", the author discusses the operation of the concept of secularism in some western countries such as England, Canada, U.S.A., *etc.* In England, at present, though the Church of England enjoys a unique and dominant position as compared to other faiths, there is no question that all citizens, irrespecitve of the religious doctrines and beliefs they hold, enjoy practically full freedom of religion. There exists a close connection between the state and the church and although, in the strict sense, England cannot be said to be a secular state, "it is not as if the spirit of secularism does not pervade the life of the people". The constitutional position of the right of religious liberty in Canada is different both from that in England and the United States. Neither there is an established church nor any constitutionally guaranteed civil rights. In 1960, the Canadian Parliament passed an Act for the Recognition and Protection of Human Rights and Fundamental Freedoms (popularly known as the Canadian Bill of Rights). The preamble to the Act indicates, like the preamble to the Indian Constitution, an impartial sympathy towards all religions. In Australia, section 116 of the Constitution prohibits the Commonwealth from making any law "for establishing any religion or from imposing any religious observance, or for prohibiting the free exercise of any religion" and declares that no religious test shall be required as a qualification for any office or public trust under the commonwealth. Though in verbal terms, section 116 differs only slightly from the First Amendment of the U.S. Constitution, the application of the two provisions in the two countries reveals fundamentally different concepts. For example, the American principle prohibiting aid to educational bodies is not generally found acceptable in Australia. Barring some differences in the attitude towards a total prohibition against the state, religious freedom is as comprehensive in Australia as it is in the United States.

The debate over religious liberty going on in the United States, for nearly 200 years has projected three leading points of view: (1) The Roman Catholic hierarchy while abstaining from opposing religious liberty, rejects the principle of separation and advocates the principle of the cooperation between the church and the state. (2) Then, there is the separation theory. (3) In between lies the theory which whittles down the rigidity of the separation theory and advocates, instead, the theory of cooperative separation. As

such, the theory almost becomes a rule of reason, while judiciary, to start with, took the position that the First Amendment of the U.S. Constitution raises a wall of separation between the church and the state, the judicial view is now veering round to the position that the First Amendment is not an absolute prohibition against every conceivable situation where church and state may work together.[6] This means that while the state must be neutral when it comes to competition between the various sects, it does not have to be neutral to religion itself.[7]

The fourth chapter is devoted to the historical setting of secularism in India. Here the author sets out to establish that the concept of secularism has entered into the Indian constitutionalism not merely because of the influences of western thought but also because of various developments in her history during the pre-Independence era. Again, in this chapter, the Judge applies his historical perception in tracing the evolution of the concept of secularism in the historical development of India from the Vedic Age through the British Period down to the Post-British period. The state in Ancient India was committed "not only to protect Hindu religion but to actively promote it. There was in any case no institutional separation between the state and religion."[8] Nevertheless, even during this period, the Hindu society exhibited remarkable tolerance towards heterodox opinions and latitude in respect of speculation over even subjects generally conceived as fundamental to Hinduism and this was a factor favourable to the emergence of the concept of a secular state. Things changed somewhat with the advent of the Islam. While Hinduism was never a militant religion, Islam "came as a militant proselytising force with theological and metaphysical dogmas".[9] Even such a liberal ruler as Akbar who did make a conscious effort to formulate a policy of religious tolerance could, at best, take recourse to only a negative policy. "It only made possible an uneasy co-existence of the two faiths and is not to be confounded with any separation of secular and religious activities."[10] In such an atmosphere, there could hardly emerge any elements, capable of generating a secularised legal philosophy much less the concept of a secular state. The penetrating remarks made by the author regarding the nature of Islam as a religion, and that of the Islamic state in particular, reveal, incidentally, the travails and the difficulties of

6. The author refers to the following cases : *Everson* v. *Board of Education*, 330 U.S. 1 (1947); *McCollum* v. *Board of Education*, 333 U.S. 203 (1948); *Gideons International* v. *Tudor*, 348 U.S. 16 (1954); *Anderson* v. *Swart*, 366 U.S. 925 (1961). *Torcaso* v. *Watkins*, 367 U.S. 488 (1961); *McGowan* v. *Maryland*, 366 U.S. 420 (1961); *School District of Abington* v. *Schempp*, 374 U.S. 203 (1963) ; *Engel* v. *Vitale*, 370 U.S. 421 (1962); *Flast* v. *Cohen*, 392 U.S. 83 (1968); *Epperson* v. *Arkansas*, 393 U.S. 97 (1968) ; *Snyder* v. *Newton*, 365 U.S. 299 (1961); *Board of Education* v. *Allen*, 392 U.S. 236 (1968); *Presbytarian Church in U.S.* v. *Mary Elizabeth Blue Hull Memorial Presbytarian Church*, 393 U.S. 470 (1969).

7. See Milton R. Konvitz. *Fundamental Liberties of a Free people* 56 (1957).

8. *Shelat* at 69.

9. *Id.* at 72.

10. *Id.* at 73.

Pakistan in ever getting transformed from a theocratic state into a secular democratic state.

The British rule, by and large, adopted a non-interventionist and a neutral policy in matters of religion.[11] Some reformative steps were taken now and then but only when backed by a substantial public opinion in the concerned religious group. The two codes—the Indian Penal Code and the Code of Criminal Procedure—made a substantial contribution towards secularising the state. The policy of neutrality and non-interference, however, came in the way of achieving uniformity and equality in the area of personal laws. In spite of the policy of religious neutrality of the company's administration, certain factors did lead the company into getting involved in some non-secular activities specially that of spreading Christianity in India. Then starts the era of Nationalism and religion begins to be exploited by the rulers to divide the Indian people. In 1909, separate electorates were provided for the Muslims. This was done to set up the Muslim community as a counterpoise to the rising nationalism. The Government of India Act, 1919, took this process a step further and extended the principle of separate electorates to Sikhs, Europeans, Anglo-Indians and Indian Christians. Reserved seats were also granted to non-Brahmans in Madras and to the Mahrathas in Bombay. The system was perpetuated by the Government of India Act, 1935, and the "political organisation of India looked like a mosaic of separate and incompatible compartments, each reserved for a group or minority."[12] Separate electorates, instead of bringing harmony, stimulated the further growth of communalism. It drove the minorities to remain minorities for ever. Pressed by the Muslim League's two nations theory, the Congress party had to assure the minorities, in order to win their support, of an adequate voice in the administration and gave them a guarantee of religious freedom. The Congress thus started insisting upon fundamental rights to allay the fears of the minorities. Paradoxical though it might seem, the Muslim League indirectly contributed to the Congress commitment to secularism.

In chapter V, the author discusses the "Secular State under the Constitution". For the constitution-makers, a secular state with diverse faiths co-existing within it, founded on the principle of equality, was the inevitable and the only alternative. As the author points out:

> Denial of Secular principles would have not only jeopardised the territorial integrity and sovereignty of the new state but would have disrupted democratic structure that was about to be set up after a long and arduous struggle. A neutral state was thus not only integral to such a democratic structure but its very foundation.[13]

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11. *Id.* at 82.
12. *Ibid.*
13. *Id.* at 90.

The constitutional provisions guaranteeing religious freedom do not seem to raise a wall of seperation between the state and religion, despite the experience of the United States in this respect. The state had to keep for itself the role of a regulatory agency in respect of all non-religious affairs because of absence of adequate internal machinery for regulation and reform of religious institutions, and also because of the traditional outlook of the vast bulk of people in India. Without assuming such a role, the state, for example, could not get rid of the scourge of untouchability which had come to be regarded as a part of the Hindu religion. Despite the state's regulatory power, the Constitution does bring about a secular state insofar as religious liberty is secured to the people, and citizenship is not based on religion, race or creed of an individual.

Unlike a theocratic state, there is no ban against citizenship on the ground of faith or religion. The provision for universal adult franchise, irrespective of race, cread, religion, or sex, makes the secularity of citizenship potent and purposeful. Various provisions in the Constitution, *viz.*, articles 14, 15, 16, 19 *etc.* secure neutrality of the state towards all religions.

Freedom of conscience and the right of freely to profess a religious belief impliedly mean a prohibition against the state setting up or accepting any official religion, although there is no express constitutional provision for this purpose. Such a prohibition is also borne out by the inhibition against compelling payment of taxes for the promotion or maintenance of any particular religion and against provision for religious instruction in any educational institution maintained out of state funds.

The author briefly states the propositions which the judiciary in India has laid down while interpreting the constitutional provisions relating to religious freedom."[14] At first, the Supreme Court took a liberal view and held that matters of religion include practices which a religious denomination regards as part of its religion and, as such, are protected by the freedom of religion clauses.[15] Then there occurred a significant change in the judicial attitude and the currently held view is that a practice to be protected as a "religion" or a "matter of religion" must be regarded by the "concerned" religious group as "an essential or an integral part of that religion." The justification for this proposition is that otherwise purely secular practices or even superstitious practices of later day accretions might be improperly regarded as part of religion and thus claim constitutional protection.[16] This proposition, no doubt, somewhat restricts the scope of the concept of 'religion' which can claim constitutional protection. It throws on the courts the burden of deciding what is "essential" and what is "non-essential". The author regards this as an 'undue' burden on the courts which can

14. For detailed discussion, see M.P. Jain, *Indian Constitutional Law* 609-623 (1970).

15. *Ratilal Gandhi* v. *State of Bombay*, A.I.R. 1954 S.C. 388 ; *Commer., H.R.E.* v. *Lakshmindra*, A.I.R 1954 S.C. 282.

16. *Durgah Committee, Ajmer* v. *Syed Hussain Ali*, A.I.R. 1962 S.C. 383 ; *Tilkayat Shri Govindlalji Maharaj* v. *State of Rajasthan*, A.I.R. 1963 S.C. 1638.

"hardly be satisfactory in the light of the broad language in which the freedom is cast in articles 25 and 26".[17] The reviewer, however, does not share this view of the learned author. Some such selective process was absolutely essential in India for, in course of time, every religion has gathered a lot of moss and all this need not be protected. After all, the courts have to make a selection between "religious" and "secular" matters or have also to decide whether a religious practice can be regulated in the interest of public order, morality or health. Justifying the observations of Justice Gajendragadkar in the *Durgah Committee* case, a commentator has this to say:

> It is not difficult to see...that Gajendragadkar, J., was apprehensive of the doctrine perfected in the *Devaru* case which would leave the court no voice in the determination of what are 'matters of religion' comprising the Zone of denominational autonomy. The thought that such a complete surrender to denominational aspirations would consecrate as religion almost anything that a religious head would choose must have worried his lordship with the grim prospect of a reversal with the aid of the Constitution and the court at that, of the entire process of social renaissance in this country in which the state and the elite of the socio-religious communities in India had collaborated for over a century... [18]

The author supports the constitutional provisions [articles 15(4), 16(4)] which provide for protective discrimination in favour of the depressed and backward people. Such protective discrimination was necessary to bring these sections of people to the minimum social condition necessary for a life of dignity and freedom. But the present system of implementation of these clauses is far from satisfactory. Instead of helping these sections of peoople, it has accentuated the caste distinctions, created vested interests in their perpetuation and hindered the process of integration with the rest of the society.[19]

In the sixth and final chapter, summing up his views, the author maintains, and very rightly so, that, notwithstanding the constitutional guarantees, we have failed in India to resolve the socio-religious contradictions between the various sections of the society and to achieve the unity and fraternity based on equality proclaimed in the preamble to the Constitution. Communal riots take place on the least provocation; untouchability survives even to this day despite the constitutional provision abolishing the same. The author's

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17. *Shelat* at 109. The essential—non-essential dichotomy has also been criticised by other writers. See for example Mohd. Ghouse, Freedom of Religion and Judical Review: A critique of the canon of Interpretation, *Minorities and the Law*, *supra note* 1 at 278-292.

18. P.K. Tripathi, Secularism: Constitutional Provision and Judicial Review, in I.L.I., *Secularism*, *supra* note 1 at 184.

19. *Shelat* at 96. For details see Jain, *Indian Constitutional Law*, 510-512, 518-520 (1970).

diagnosis of the malady is that though the Constitution provides for a secular state, the bulk of the people, particularly in the non-urban areas, are still non-secular, still living in tradition-bound atmosphere and in a traditionally hierarchical social structure. Such a state of affairs can be transformed only by the process of educating the masses in the secular way of life. This can, however, be only a slow and gradual process. The author, however, lays great emphasis on the enactment of a uniform civil code as directed by article 44. In a secular state, it is not only incongruous but even denial of equality to apply different personal laws to different individuals and to determine their rights in vital fields like marriage, divorce, inheritance *etc.* on the basis of their belonging to one or the other religion. The enactment of such a code, however, is a stupendous task[20] and the author appears to be aware of this.

The book is a valuable addition to the literature on secularism and religious freedom in India which has made its appearance since Independence. It describes the emergence of the concept of secularism in its historical setting both in India and abroad, and the imperative necessity of adopting the same as a part of Indian constitutionalism in the context of the minority problem existing at the time of constitution-making. The book is a study of the concept of secularism more from a historical perspective and is not as such a legalistic study of the concept through an analysis of court cases and constitutional provisions. The book is most welcome as it puts the concept of secularism in its wider perspective through time and space. It underlines the significance of secularism for the success of the democratic experiment in India and points out some of the lacunae in the way the concept has been practised so far in India.

*M.P. Jain**

20. For a detailed discussion of the concept of a Uniform Civil Code for India, see *Minorities and the Law, supra note* 1 at 385-476.

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