

RULE OF LAW, LEGAL THEORY AND SECULARISM

G. S. Sharma

The idea of secularism has been important in the social and political development of India ever since the national struggle began. Since independence, however, it has acquired a new emphasis and poses many difficult problems because it now needs to be transformed into practical principles and formulations capable of implementation through the value choices of the elites and the planners of the community. There is, therefore, an urgency to identify the concept distinctly and clearly.

This paper seeks to point out that secularism is difficult to define and still more difficult to outline as a programme of action. All that can be done is to create appropriate legal institutions. One must encourage the type of legal and political thinking which is capable of securing generally a relationship between the state and the individuals and the groups of society in which they feel that the state deserves their loyal and affectionate allegiance irrespective of any other parochial considerations. Contemporary thinking in India about secularism is generally divided into three classes :

- (1) The Western negative view which asserts the independence of the state, morals and education from religion.
- (2) The pluralist's view, generally held by Hindus, which accepts all religions and upholds the position that the state should support all religious communities equally subsidizing the religious activities.
- (3) The nationalist or the positivist view which supports the development of a general moral consciousness rising above mere religious considerations and choosing national ideals and goals even in conflict situations.

It is suggested in this paper that law and legal theory in India should make an effort to forge out a new approach which partakes of the second and the third of the above classes. It is possible to build upon the tradition of respect for saintliness and tolerance in the Indian community. On this foundation schemes of training and education can be set up which would guarantee the development of right-minded men of the community to whom the task of social planning and dispensation of justice could be entrusted. Thus social expectations of a non-discriminatory and equalitarian treatment might be ensured. Once such an expectation becomes firm in

the minds of individuals and groups in the community it will be easier for them to transcend religious considerations and subscribe to national ideals and goals. This will result because the national ideals and goals will be worth preserving and maintaining. In consequence of such a reformulation the concept of secularism need not be hostile to religion or even neutral to its basic urges but would draw upon the inexhaustible fund of social and moral thinking contained in the religious literature of the various communities. In a so-called secular society, it is the task of legal theory or jurisprudence to train and shape a few right-minded men who will guide the social process in an impartial manner. It is in this very important sense that legal theory has relevance for a truly secular society.

Legal theory is that branch of knowledge which concerns itself with the examination and evaluation of the fundamental rules and precepts of the law in terms of values and standards borrowed generally from other branches that deal with the life of man in society. It is, therefore, as Professor Julius Stone says, the "lawyer's extraversion" and is a continuing method of relating legal technique to the advancing knowledge in social sciences.

The width and vision of legal theory has depended upon the general predominant emphasis of an age. As an independent and separate discipline (free from mixed thinking with theology, philosophy, economics, and political science) legal theory emerged with the beginning of the nineteenth century as a reaction against the natural law thinking of the late eighteenth century. The reaction emphasized in England an isolation of law from philosophy and ethics; in Germany it took the form of an emphasis upon the historical origins of the rules of law and legal system. After Maine's contribution to the theory of society the beginnings of social science emerged leading to the development of the sociological school. This is a general name given to efforts of legal scholars and philosophers to test the viability of the rules of law in terms of their basic social consequences, assuming in so doing that the function of law is to maintain a social order with the least of friction and a minimum of waste.

The contemporary emphasis to a greater or lesser degree on sociological relativism in almost all countries is a result of a growing recognition that absolute standards of justice cannot be established except upon a religious basis, which being ultimately a matter of revelation and faith is out of fashion since it is inconsistent with the basic scientific spirit of the age. Even the emphasis of philosophers who try to relate justice to intuition falls short of absolute standards of justice because their effort ultimately reduces itself to trusting the wisdom and goodness of man. Sociological legal theory thus has reconciled itself to formulating ideals of justice not in absolute but in relative terms.

It is thus clear that legal theory is unable to find an absolute principle of justice which under the name of the rule of law could be said to be of universal validity. But the very inability of legal theory to find such a principle would emphasize the need of a constant evaluative check upon social and legal institutions and behaviour in the contemporary and a rather amoral world. Its concern would still be to continually examine the shifting basis of the criteria of the resemblances and differences which as Professor H.L.A. Hart says alone give content to justice operating in the socio-economic contexts.

As a working principle in democratic societies, however, the rule of law can be identified largely as a principle of equality before the law. As Professor W. Friedmann says, "it excludes the autocratic and totalitarian principle which in the name of divine right or of inspired leadership or of power pure and simple exempts individuals and groups from the law of the land." This principle originated in the famous English constitutional law theory that the law of the land is applicable to everybody and that if all are subjected equally to the system a certain guarantee of freedom inevitably results. It represented the kind of social organization typical of the nineteenth century England wherein the rising middle class needed exactly that kind of freedom of action and absence of controls. Needless to say the situation has changed considerably and in a modern complex society, irrespective of whether it is an arrived society or a developing society, this picture of the rule of law cannot hold good. The problems of planning in a welfare state have made the democratic concept of the rule of law difficult of realization.

All that the rule of law can stand for today, at best, is that a legal system ensures to some degree that treatment by government agencies of citizens will not be arbitrary or discriminatory. The guarantee of non-discriminatory treatment cannot be secured through the negative attitude which holds moral conduct to be a mere matter of rule-following and moral relationships to consist of duties and rights determined by rules. It requires a more humane impartiality, a kind of a *caritas sapientis*. The philosophy behind this view of the rule of law as a guarantee against discrimination is basically a philosophy of tolerance resulting from a diverse organization of society. It, therefore, represents a valuable component upon which the concept of a modern social and scientific secularism could be built.

Rationally conceived and divested of its historical origins, secularism should stand for a universalist view of morality based upon a realization that everyone is entitled to the same treatment that he expects from others. This expectation must take into account the heterogeneous society which includes divergent outlooks and differing convictions. The

core of all religions divested of their trappings, rituals and ceremonies would seem to embody this basically tolerant outlook upon which the secular morality or social conscience could be based.

It is because of the non-existence of such an outlook at the general social level in India today that the basic problem of secularism arises. While a rigid and unthinking adherence to ritualistic religion would lead to bigotry and intolerance, a spiritually denuded secularism building itself upon pure materialism, technology and science would lead to a depersonalization and dehumanization of individuals treating them as mere units of a big machine performing a particular classified function and nothing more. It is not possible to conceive of an individual as a mere unit or a tool of a gigantic machine. Apart from the rational motivations of human conduct there is a good deal in it that is irrational and needs to be understood, classified and trained if man is to be made a useful member of any society. It is these basic urgencies of personality development which will prevent a secular outlook built purely upon science and technology from being the type of secularism upon which a good society can be constituted.

The secularism that would sustain an equalitarian society has to be based upon the values of tolerance, compassion and fellow-feeling which, as modern European history reveals, cannot be built upon the logic and approach of the natural sciences alone. This outlook can only emerge through hard and continuous training based upon ideals of human behaviour and visions of humanity which can be gleaned through histories and mythologies of world religions. It is, therefore, necessary that while a society maintains to the best of its capacity non-discriminatory institutions of law and order, it also takes care to see that the men who man them have subordinated their prejudices through hard and basic training and become capable of taking impartial but compassionate decisions.

Contemporary legal theory should not make an effort to separate law and morals but regard them both as a continuum of legalistic ethics and political institutions. Then perhaps legal theory and one of its principles for democratic societies, the rule of law, will become more realistic and meaningful. At least the basic impact of values involved would then appear more defined. Viewed in this light the whole structure of law would become not a basic answer to politics but would in itself be treated as a form of political action open to clear and avowed assessment in terms of national goals as any other principle and doctrine of politics.

If law is seen as one of the methods of social control in the hands of the political power it is clear that it must stand in need of social and moral justification in the same way as the political power itself. In this view rule of law and legal theory could not be used as mere justifications of political power which is what often happens today.

Secularism in its origin in the West developed as a philosophy in reaction to a strong hold of religion on the state, and the necessity of setting up a more elastic set of moral values for the immediate needs of the developing mercantilist society in Europe. As a concept it was then equated with rationality, positivism, materialism, and utilitarianism.

The Constitution of India does not use the word "secular" but the picture of the Indian society which emerges from it visualizes a basic secular society. This is clear because the Constitution maintains a sympathetic neutrality towards all religions and guarantees freedom of basically religious practices and recognizes citizenship on a basis other than religion. The broad outlines of the future of society are contained in the directive principles of state policy which can be classified into three broad categories :

- (1) Clear and avowed borrowings from the liberal humanitarian traditions of the West. These relate to a broad and still undefined brand of humanitarian secularism. [Article 38 (welfare), article 39 (means of livelihood), article 41 (public assistance in cases of undeserved want), article 43 (living wage, etc.) and article 45 (free and compulsory education).]
- (2) Values arising out of the special and peculiar Indian problems. [Article 40 (village panchayats), article 47 (prohibition), article 48 (cow slaughter) and article 46 (scheduled castes and scheduled tribes).]
- (3) Values representing an attempt to fuse the traditional and the modern modes of life and thought. [Article 40 (village panchayats), article 43 (cottage industries) article 44 (uniform society) and article 50 (separation of executive and judiciary).]

These three categories would disclose that in India the problem of secularism has to be understood not only from its Western meaning of independence of state from religion and advocacy of a worldly outlook, sometimes understood as hostile to religion, but also in relation to other implications which arise out of peculiarly Indian problems relating to village panchayats, scheduled castes and scheduled tribes, prohibition and cow slaughter mentioned in the directive principles of state policy.

Moreover, the understandable hesitancy of the political party in power to extend to the minority religions its indirect efforts to secularize Hindu society affects the achievement of secularism of this variety. The built-in tensions particularly in view of the relationship with Pakistan, a theocracy, would also imply a cautious and hesitant approach of the

dominant party towards introducing changes towards a social and scientific secularism covering all communities.

In view of these essentially Indian problems that raise obstacles to implementation of the Western concept of secularism as a complete division between religious motivations and social organization it is necessary to examine whether such a separation is possible. Dr. Ved Prakash Lutheria in his book *The Concept of Secular State and India* (1963) feels that it is not possible to have a secular state in India because a complete separation of state and religion in India would be almost impossible in view of the disorganized state of Hindu religion. Dr. Lutheria does not agree with Dr. Donald Eugene Smith who in his book *India as a Secular State* (1963) gives a three-fold break-up of a secular state. Dr. Smith's three elements are: (a) separation of state and religion, (b) religious freedom, and (c) citizenship unrelated to religion. On the basis of this three-fold division and on the assumption that the Hindu religion will become organized Dr. Smith distinctly visualizes India as developing into a secular state in future. Dr. Lutheria does not admit this three-fold division and suggests that the second and the third categories are covered by the first and as there does not seem to be any likelihood of the Hindu religion getting organized the chances of India becoming a secular state are remote.

The antagonism of state and religion has meaning only in the historical European context and need not be made the basis of social reconstruction in India. In the contemporary world depending more and more upon the use of scientific data and knowledge to understand human problems and standing in greater and greater need of a sympathetic and compassionate outlook because of the increased conflict situations of a complex society, it is necessary to develop a philosophy which, while being rational in outlook, is also based upon certain widely-held spiritual values which recognize the universal dignity of man. The problem of modern secularism is one of creating a moral social conscience. Therefore, it is a problem of education of the young. It is possible perhaps to organize education in such a way that in his formative years an individual is brought into contact with fundamental ideals of human civilization resting upon the spiritual thought of various religions. These might be communicated through stories and interesting biographies.

The utilitarian and scientific training needed for modernization and technological development could be given at a later stage after this basic moral education is imparted during the formative years. The compulsory primary education of future India should draw largely upon the many popular Indian themes of saintliness and religious tolerance. It may thus be possible to prevent the increasing depersonalization brought about by rapid industrialization.

Legal theory and the rule of law as embodying a secular principle of seeking functional justice through non-religious institutions must be explained and communicated in India through an emphasis on Indian problems. They should no longer be allowed to stand as abstract foreign doctrines referred to only as distant slogans without any serious thought of implementing them in daily life through suitable adaptations. The view of secularism advocated here, combining the Hindu pluralist outlook with the positivistic approach willing to choose national ideals and goals against all religious considerations, will make these adaptations more meaningful and the search for functional justice more real.