Secular State - Historical Context

It is no easy task to define a secular state, it can, at best, be described or spelt out. The idea of a secular state has been the product of changing relationship between State and Religion. One can trace some broad stages in the evolution of this relationship. In the early stages of human history it was religion which had the predominant influence over the state in view of the fact that lives of men all over the world were under the overpowering influence of religion. It has been contended, on the basis of recent researches, that the 'motivation to religiousness pre-dates human history.'

Religion in ancient times was a sanction stronger than law in as much as early society was ruled with a rod of iron by the absolutism of religious law. Then came a period when the political and religious or ecclesiastical powers were concentrated in the same hands of the king who was also the high priest. Gradually, religion and state developed parallel associations each contending for supremacy over

---

the other resulting in a clash between them. The ultimate result of this conflict was decisively in favour of the state which came to acquire ultimate sovereign power.

During the modern period, both religion and state have recognised and accepted each other's claims regarding the sphere of control over man's life, of the state over the political or temporal and of the religion over the spiritual or ecclesiastical. Gradually both state and religion developed a sense of mutual toleration. Within this framework there emerged three distinct patterns. The first implied the setting up of a particular church to which the ruler belonged as the official church. In such a state, other denominations were, however, permitted some degree of freedom of conscience which differed from state to state. In the second, known as jurisdictionalist state, religion and state were intertwined, all faiths enjoyed equal status as regards freedom of conscience and worship and the state had considerable control over religious denominations. The third pattern generally known as an ideal pattern of the secular state envisaged the creation of the wall of separation between state and religion as in the U.S.A. These three patterns or models, however, do not postulate an antithetical relation between the state and religion. In addition to these three models there was created in this century, one based on the Marxist Communist tradition where state is hostile
to religion and antireligious propaganda is constitutionally permitted.

Is It an Anti-religious State?

Though secularism emerged as a reaction against excessive religiosity, a secular state need not be conceived as an antireligious state. The influence of religion on man’s mind is so pervasive that even highly developed materialist societies in the West have not been able to free themselves completely from it. Nor has the Communist attempt to erase the impact of religion from social life been successful as seen from the revival of the Patriarchate in the Soviet Union in 1944. It may be contended that materialist societies in their effort to escape from theocratic stagnation have consciously or unconsciously created a misplaced theology which is characterised by religious agnosticism, a society devoid of values and bereft of moral virtues. What is needed is not a crusade, obsessive materialism but healthy realistic materialism, what we want is industrialisation but not soul-destroying industrialisation. What we want is individualism but not anti-social individualism.

It is, therefore, not only not possible to create

---


3 A.R. Blackshield, supra n. 1, p. 12.
a completely anti-religious state but even an attempt in this direction is not worth recommending from the point of view of social and moral health of a society. It is, therefore, perfectly possible to advocate both secularism and religion. So long as religion does keep itself to its own sphere, secularism can be conceived as religiously neutral, it neither endorses nor disapproves of religiousness.

Wall of Separation Doctrine

Dr. Luther in his remarkable thesis proceeds on the assumption that the secular state is one which ensures complete separation between state and religion or one that creates a 'wall of separation' between the two. It can be admitted that in an ideal sense a secular state would imply the creation of non-interfering spheres of action for both state and religion. Though the United States can be considered the best approximation of this ideal, it has not been able to separate the two completely. It would be too ambitious, for that matter, to say that any state in the world has been able to create an ideal secular state in this sense. The reason is that though on a theoretical plane it is possible to postulate mutually exclusive spheres of action for state and religion, it would practically be far from easy and even unnecessary.

While 'law and order' is the province of the state,
freedom of conscience is the province of religion. Those religious activities or practices arising out of or linked with freedom of conscience and those which affect adversely law and order cannot be permitted by the state and state intervention in the form of the imposition of restrictions on such behaviour becomes inevitable. Perhaps a more important aspect to be noted is that the state cannot be a passive spectator to social evils including those having religious sanction. Almost every religion carries with itself some ritual, practices, superstitions which gradually become obsolete and even pernicious in the context of changing circumstances. A doctrine of literal or strict separation between state and religion overlooks "the ubiquity of religion, its pervasiveness in social patterns and institutions and its inflexibility seems strangely at odds with accepted canons of constitutional interpretation."4 Such a strict separation would prevent the state from striking down arrangements which are socially harmful or would amount to giving constitutional protection to social injustice, exploitation and cruelty in the name of religion5 and in the ultimate analysis it would even nullify the objectives of secularism.

4 Ibid., pp. 61-62.
To take only one example, the temple-entry legislation which allows all classes and sections of Hindus including untouchables to enter the public temples would not fit in the separatist approach and would mean that the state cannot throw open the religious institutions to persons for whom these institutions are closed according to the tenets of their religion. But this position would be unacceptable from the point of view of social reality, social morality and social justice as understood in modern times - social justice which prevents discrimination between man and man. On one hand the matter of permitting entry in religious institutions like temples is a matter that falls within the realm of religion. On the other hand, the issue of vital social significance namely of providing for social equality to all within the community is a problem of social ordering and in the conflict of these two competing or rival claims of religious freedom on one hand and social ordering on the other, the state will have to intervene and decide the bona fides of the competing claims. It may even be argued that the very fact that 'the legislation regarding temple entry or abolition of untouchability does not fit in the model of rigid separation of powers between state and religion ought to suggest that the model must be wrong.'6 At least

6 A.R. Blackshield, supra n. 1, p. 59.
it may be said that the wall of separation model has meaning only in the historical Western context; it cannot be and need not be made the basis of social construction in India at present. In view of the necessity and inevitability of state intervention in the realm of religious interests, absolute separation between state and religion cannot be realised in practice and, therefore, the secular state cannot be conceived of as one based only on this separation or that such a definition would be too narrow to be of practical application to a country like India. At the most the principle of separation can be considered as one of the determinants of a secular state and the degree of secularism would depend upon the degree of separation or the secular state would be conceived as one which keeps the state intervention in religious matters to the necessary minimum.

Positive Secularism

This means that the neutrality of the secular state in religious matters should not be thought of negatively, because, such a purely negative approach is outmoded in the context of a nation that wants to build up a welfare state and a social democracy. Positively, the secular state should be permitted to enact legislation for realising common national goals and even discriminatory social legislation to meet the demands of social justice. In other words, the secular state would be one which tries to
harmonise the apparently contradictory facets of secularism, namely neutrality or non-interference in matters of religion on one hand and the positive use of law for ensuring progressive secular changes in religious institutions and practices on the other. Any positive definition of a secular state must take into account this consideration.

Another important consideration that matters in this connection is that 'the doctrine of secularism refuses to recognise the relevance or materiality of citizens' religion in the realm of socio-economic matters of public importance'. This implies that on occasions religious practices are likely to have their impact on socio-economic problems or relations. This is particularly true in case of the management of religious institutions and the administration of the properties of these institutions. While a right to establish religious institutions is in conformity with freedom of religion, the problem of administering the properties of such institutions is an economic matter and, therefore, the state has to retain the right of interference in such matters in the interests of public good. Such interference is justifiable on the ground that it is intended to protect the social and secular rights of citizens though it implies a curbing of the freedom of religion.

7 Chief Justice Gajendragadkar in his speech before the Supreme Court to mourn the death of Pandit Jawaharlal Nehru, quoted A.I.R. 1964 S.C. pp. 89-90.
An important determinant of a secular state is freedom of religion, individual as well as denominational or institutional, but freedom as qualified above and not an unrestricted one. In addition to this, another equally important determinant is equality. This implies that in a secular state all religions are equal before the state, no citizen is discriminated against on the ground only of religion and that the citizenship is unrelated to religion. In other words, the religion of a citizen is an irrelevant consideration in the context of the enjoyment of fundamental rights and conferment on him of social benefits. This equality is also not absolute or unqualified in the sense of adoption of uniform legislation for all. Social justice demands that reasonably discriminatory legislation, which would enable the downtrodden to have a reasonable opportunity for development, has to be permitted.

A concept intimately related to equality and freedom is tolerance. It implies that everyone is entitled to the same treatment that he expects for himself from others. Tolerance is the basic value of a universalist social morality or social conscience. Every society that needs cohesion has to nurture this virtue of tolerance and the need for it is all the more in case of a community which is characterised by heterogeneity, and multiplicity of beliefs, outlooks and convictions and one which desires to create a society based on equality and justice. Tolerance,
therefore, will have to be conceived as an equally important component or determinant of secular state.

In brief, a secular state will have to be judged from the point of view of the three components listed above, namely qualified freedom of religion, qualified religious equality or non-discrimination and religious tolerance. The role of the judiciary in building up secular forces in the country will have to be appraised in the context of this definition and in view of the constitutional provisions related thereto.

Indian Context

So far as India is concerned, the tradition of religious tolerance is well entrenched in its historical past. Hinduism, the religion of the majority in India today, has been one of the most tolerant religions in the world and throughout the period of its recorded history of over four thousand years it assimilated in itself manifold faiths and reformed itself time and again as need arose. The ancient Hindu state was tolerant of divergent faiths, though it actively protected and promoted the Hindu religious institutions. The medieval state in India, characterised by Muslim invasions, later on, developing into an empire, was, by and large, hostile towards the religion of the majority. Even then, cases of Hindu officials being appointed in high offices were not quite unknown. Though some fanatical iconoclasts tried to suppress the
faith of the majority by following various devices, some tolerant Muslim rulers continued the practice of protecting Hindu religious institutions and in some cases even helped them positively by granting them endowed properties.

The British Government, both under the Company rule and later under the Crown, followed, on the whole, the policy of religious neutrality and permitted substantial freedom of conscience and practice of religion to various communities. Occasionally, the Government followed the policy of aiding religious institutions and took care to prevent religious clashes. It also enacted legislation to abolish invidious practices such as Sati, infanticide, etc. in the name of religion.

The Indian National Congress, the leaders of which were inspired by Western liberal tradition was, from its very inception, a secular organisation and included within its fold prominent leaders belonging to different religions. It consistently adopted a secular approach in conducting the Indian national struggle for freedom. Independence came with partition. The holocaust of a mad blood-bath which came in the wake of the partition of 1947 awakened

---

8 Liberal religious grants were given by the rulers as well as people belonging to both the communities, Hindus and Muslims to bring about a rapprochement between these major communities, to ensure cordial social relations. For examples see: A. R. Kulkarni, "Social Relations in the Maratha Country" (Medieval Period), Presidential Address, Medieval India Section 32nd Session of the Indian History Congress, Jabalpur, December 1970 (Author) Poona, 1970, pp. 11-13.
the minds of the framers of the Constitution to the need for a secular base for the Constitution of India. It was natural, therefore, that ‘religion which was a deep sore on the body-politic and resulted in its amputation has been kept under the Constitution at a safe distance from activities of all forms.’

Constitutional Philosophy of Secularism

The Constitution of India has guaranteed freedom of conscience, practice, profession and propagation of religion, freedom to establish religious institutions and manage and administer their affairs, to hold, acquire and administer properties, etc. This does not mean, however, that this freedom is an unconditional or unregulated one. Freedom is not merely negative in the sense of implying absence of restrictions. It positively implies reasonable limitations on one's freedom in such a manner that others may enjoy theirs. These rights, therefore, are to be exercised in such a way as not to impair, peace, order and social morality. The state has been allowed to curb, restrict or regulate those religious activities which annihilate social peace and morality. The Constitution has further laid down that these rights will not prevent the state from reforming Hindu religious institutions. It

is in this connection that the state has tried to abolish invidious practices such as untouchability and has left open Hindu religious institutions to all sections of the Hindus.

These provisions of the Constitution would indicate that the Constitution has tried to build up in India the philosophy of secularism which is founded on the three arch-pillars of a secular state namely, freedom, equality and tolerance in the field of religion. Two important facts would indicate that the Indian Constitution embodies a positively secular state rather than one based on a negative approach implying the doctrine of separation between state and religion. In the first place the Constitution has inoculated the spirit of social reform intended to eliminate social injustices and oppression and has tried to replace social backwardness, superstition and cruelty by rational enlightened liberalism. The Constitution expects the state to take initiative in this direction rather than be indifferent as implied in the separation doctrine. In the second place, the primacy given to the principle of equality in the Constitution reflects the attitude of neutrality of the state in matters of religion, and the positive protection given by the state to religion will not violate the provision of equality in as much as the state adheres to the principles of equality in granting this protection and thus the Constitution tries to build up
a secular state without importing the wall of separation doctrine of the United States.

These provisions are incorporated in the form of justiciable fundamental rights in Chapter III of the Constitution. The Constitution contains provisions for safeguarding these rights when they are encroached upon by other individuals and corporate bodies. Every citizen in the country is authorised by the Constitution to move the Supreme Court of India when his freedom is threatened from any quarter and the Court has been empowered to issue appropriate orders or writs for the enforcement of the rights conferred by the Constitution. It is in this connection that the judiciary has assumed the role of interpreter of the Constitution and the protector of freedom of religion. Judicial review of constitutional provisions regarding freedom of religion has, therefore, become an inevitable concomitant of a healthy secular state. The judiciary as the guardian of the Constitution has, thus, assumed an important function of determining the amplitude of freedom of religion and thereby protecting the forces of secularism in the country.

Religious Freedom - Basic Approach

Though the Constitution of India has guaranteed freedom of religion in categorical terms, it has not defined the term 'Religion' and the very first task of the judiciary was to define the same. The Supreme Court
of India rejected the definition given by the Supreme Court of the U.S.A.\textsuperscript{10} where an attempt was made to relate religion to one's views of his relation to his creator or God and pointed out that this definition would be too narrow and exclude some religions which do not predicate religion on Creator and God. It maintained -

"Religion is certainly a matter of faith with individuals or communities and it is not necessarily theistic. ... A religion undoubtedly has its basis in a system of beliefs or doctrines which are regarded by those that religion as conducive to their spiritual well-being, but it would not be correct to say that religion is nothing else but (sic) a doctrine or belief."\textsuperscript{11}

This definition is sufficiently comprehensive and liberal and suits the heterogeneous multi-religious community in India and gives enough latitude to various faiths and their denominations reasonable opportunity to exercise basic freedom granted in Articles 25 and 26 of the Constitution of India.

The next important controversial question before the judiciary in India has been to decide what matters constitute religious practices. It may be noted that the

\begin{itemize}
\item\textsuperscript{10} Davis V. Beason, 133 U.S. 333 at 342 (1889).
\end{itemize}
interpretation of 'matters of religion' has, however, undergone changes from time to time.

Earlier it was thought that 'religion is a matter of man's faith and belief and has nothing to do with the manner in which a practice is accepted or adopted as forming part of a particular religion or faith'. This implied that the Court made a distinction between freedom of conscience and freedom of religious practices and considered freedom of conscience as an absolute right and viewed freedom of religious practices as subject to restrictions mentioned in the Constitution. The Supreme Court of India, however, rejected this view of confining the interpretation of religion to religious beliefs and not religious practices. In the Swamiar case, the Supreme Court laid down a very important rule in the matter when it pointed out that the Constitution secures to every person freedom not only to entertain religious beliefs approved by his judgment and conscience but also to exhibit his belief through appropriate practices. Religion is not merely a doctrine or belief. A religion not only lays down a code of ethical rules for its followers but might also prescribe rituals and observances, ceremonies and modes of worship which are integral parts of the religion.13

13 S.C.J. 1954 at 349.
The Constitution protects not only freedom of religious opinion but it also protects religious practices. The Court also maintained that what constitutes the essential part of religion is primarily to be ascertained with reference to the doctrines of that religion itself. According to the Court, the Constitution makes a clear distinction between religious practices and secular activities associated with the said practices. While religious practices are left to the exclusive province of the individual, secular practices associated with the religion are made amenable to the interference by the state.

In the Sarup Singh Case, the Court held that under Article 26, a religious denomination or organisation enjoys complete autonomy in the matter of deciding as to what rites and ceremonies are essential according to the religion they hold. The emphasis placed by the Court on the word essential later on created a controversy over essential and non-essential practices. In the Durga Committee case, the Supreme Court struck a note of caution and observed that in order that practices in question should be treated as a part of religion they must be regarded by the said religion as its essential and integral

part; otherwise even purely secular practices which are not an essential or integral part of religion are apt to be clothed with a religious form and may claim protection as religious practices. The Court further points out that 'some superstitious beliefs' which are extraneous and unessential accretions to religion may claim protection but this claim will have to be carefully scrutinised by finding out whether such practices constitute an essential and integral part of religion. This logic was further clarified by the Court in the Tilkayat case\(^\text{16}\) where the Court protested against the blind application of the formula of leaving to the community to decide what practice constituted an integral part of religion and argued that 'such a question will always have to be decided by the Court and in doing so, the Court may have to enquire whether the practice in question is religious in character and, if it is, whether it can be regarded as an essential and integral part of religion, and the finding of the court on such an issue will always depend upon the evidence adduced before it as to the conscience of the community and the tenets of its religion'.

This shows that in the Swamier, the Ratile and the Revaru cases the Supreme Court adopted the doctrine of autogenesis of denominational powers which implied

whether a particular matter or practice is a 'matter of religion' or not would be primarily decided by the religion itself. This approach did not leave the judiciary any voice in the determination of what are matters of religion comprising the zone of denominational autonomy. This doctrine, however, was considerably restricted by the Court in the Tilkayat case where 'the issue of deciding whether a particular practice is a matter of religion or not' was considered a justiciable one. This departure in the basic approach adopted by the Court has, however, provoked mixed reaction. Those who are in favour of the doctrine of autogenesis of denominational power believe that this doctrine helps certainly in preserving freedom of religion from interference from police-power or state power and also ensures the protection of the freedom of religion of one community against that of the other while the abandonment of this doctrine might lead to considerable restriction of the freedom of religion unwarranted in a secular state.

It may, on the other hand, be pointed out that the autogenesis doctrine offers little help in solving the conflicts in a multi-religious community like the one in India. Though all religions basically preach love and brotherhood, the followers of these religions have developed practices which have, time and again, created tensions, express or otherwise, and have disturbed social
harmony. It has always happened that the basic teachings of the prophets or scriptures are unconsciously forgotten or deliberately neglected and religion has been associated more with rituals and ceremonies adopted with superstitious ignorance. It is true that no religion can be thought of in isolation from the practices and observances adopted by that religion. But in numerous cases it becomes extremely difficult, if not impossible, to know what are the original, essential and integral practices which have been adopted in later years and which, perhaps, deviate from the basic tenets of the religion. Under the circumstances, it is reasonable to expect that essential practices which form an integral part of that religion should be safeguarded and those which are non-essential or the non-observance of which does not amount to the very negation of that religion and which are in conflict with the essential practices of some other religion should not enjoy such protection. This necessarily means that the Courts should perform the function of deciding whether a particular practice forms an essential and an integral part of that religion and this they have to do with reference to the basic scriptures of that religion. This, in fact, is the essence of the approach adopted by the Court in the Tilkayat case.

In this connection, it may be submitted that the Courts of law are, by and large, guided by precedents and
this is a safe course to follow; but on occasion excessive reliance on precedents fails to serve the ends of justice. The temptation to follow a precedent or 'verbal echoes of dicta' is so overwhelming that the Courts fail to seek a new degree of concrete and accurate focus on factual social issues that would be necessary to serve the cause of realizing socio-economic justice through law. 'The value of precedents cannot be denied but the precedent sometimes tend to hold the judicial mind in bondage and that shows an approach which is not strictly rational and as such is inconsistent with the philosophy of secularism.' 17 In some quarters it has been rightly contended that the early experiments of the Supreme Court regarding autodetermination by religious institutions of what matters are 'religious' do seem inconsistent with secularism, 18 in view of the fact that these experiments helped the establishment of autonomous and inviolable government of the heads of religious institutions even at the cost of the liberty of the worshippers. 19 The new approach adopted by the Supreme Court in the Tilkayat case, however, suggests that the Court has tried to reject the shackles

18 A. R. Blackshield, supra n. 1, p. 61. Footnote comment.
19 P. K. Tripathi, supra n. 5, p. 193.
of earlier dicta and precedents and has tried to give this
country a jurisprudence in conformity with the secular
ideals of the founding fathers of the Constitution.\textsuperscript{20}

It is in the light of this basic approach that the
various cases brought before the judiciary are to be
evaluated.

\textbf{Religious and Charitable Endowments:}
\textbf{Hindu Religious and Charitable Endowments}

\textbf{Definition of Hindu}

Hinduism, in its characteristic mobility and adaptability, has undergone changes as a result of changing times
and under the impact of foreign influences, religious or
otherwise, it has swallowed, digested and assimilated new
customs, new ideas, new observances. In its youthful
vigour it has reformed itself abandoning corrupt and
superstitious practices and in this process of reformation
dissenting sects were born. During the British regime
some of its invidious practices such as Sati, infanticide,
human sacrifice etc. were abolished by statutory legisla-
tion. In spite of occasional attempts to abolish them
Hinduism continued some traditional practices which were
obsolete and were contrary to the notion of equality which
forms the very basis of democratic secular society. These
practices were caste distinctions and untouchability and

\textsuperscript{20} \textit{Ibid.}, p. 194.
Hindu religious institutions were not left open for all sections of Hindus. These could be conceived as barriers within the major religious community. The objective of the secular state could not be realised in practice unless these barriers could be removed. The Constitution of India has attempted to do this by providing for the abolition of untouchability and making the practice of untouchability an offence punishable by law and also by throwing open all Hindu religious institutions of a public character to all classes and sections of Hindus, including untouchables. As a result of this constitutional mandate, statutory legislation has been enacted to abolish untouchability and to keep the temple-entry free for all sections of Hindus. In relation to the temple-entry provision the Constitution has conceived the term Hindu as including a reference to persons professing the Sikh, Jain or Buddhist religions. In one very important case\(^{21}\) the Supreme Court has attempted to define the term Hindu. The Satsangis in Gujarat claimed that they were not Hindus and therefore the temple entry legislation was not applicable to them. The Court could have disposed of the case even by referring to some historical evidence regarding the Hindu origin and character of the Satsangi sect. In this connection the Court refers to legislative precedent but only in a

---

glancing manner and relies mostly on established authorities like Lokmanya Tilak, Dr. Radhakrishnan, Max Muller, etc. who have presented modern and enlightened interpretation of Hinduism. It may be pointed out that the easiest course for the Judge is to follow a precedent. The Judge is bound to follow precedent and the Supreme Court has done this often enough. But only when the precedents are not in harmony or are in confusion, does the judge make a personal contribution. The Judgement of the Supreme Court in the Satsang case is a good case in point.

**Distinction between Public and Private Endowments**

Distinction can be made between public endowments and private endowments. The social reform clause of Article 25(2)(b) which intends 'to throw open Hindu religious institutions of a public character to all classes and sections of Hindus' is applicable to institutions of a public character only, and private institutions do not fall within the scope of this clause. In order to escape the province of this clause an attempt is usually made to argue a particular endowment as a private one and the courts had to find out whether these claims were true. The

---

22 In a very recent case Commissioner of Wealth Tax, West Bengal v. Smt. Champa Kumari Singhi (S.C.J. 1972 II) p. 163 decided in 1972 the Supreme Court has dealt with this issue of definition of Hindu. See Appendix II of this thesis.
Supreme Court has pointed out that in such cases, whether or not a particular temple is a public temple must necessarily be considered in the light of relevant facts relating to it. The facts which have been taken into account have been the will of the founder, user of the temple by the public, ceremonies relating to the temple, character of the temple, nature of dedication, etc. While considering these factors the judiciary has relied upon the basic documents, historical facts, practices followed and, wherever necessary, the basic shastric texts have also been interpreted. This has been by no means an easy task and the judiciary has taken into account the claims of both the parties.

Office-bearers of Religious Endowments

The Shebait, Pujari, Archaka, Panda are some significant religious offices which claim certain rights and responsibilities in relation to the temple. The Courts have held that in the conception of Shebait, both the elements of office and property, of duties and personal interest are mixed up and blended together and one of the elements cannot be detached from the other. Shebaitship

---

carries with itself certain spiritual as well as temporal duties regarding the image of which Shebait is a custodian or guardian. In this capacity he enjoys important powers with a view to protecting the interests of the endowment. The courts have considered it their duty to see that in case of public trusts, their interests and the interests of those for whose benefit they exist are properly safeguarded and that they have possessed the power to sustain proper proceedings in appropriate cases to grant relief in the interests of the endowment. A Shebait who is guilty of misconduct or breach of trust and who fails to perform his functions faithfully can justifiably be removed by instituting proper proceedings. This is equally true in case of Pujari, Arohaka, etc. In an important decision the courts have recognised the right of a female to succeed to priestly office provided the religious duties prohibited for a female by Shastras are performed by a competent substitute.

As regards the right of entry in temples, the Court has pointed out that the right of entrance into the temple for purposes of Darshan or worship is a right which flows from the nature of the public institution itself but

the Court further asserts that the right of entry into a public temple is, however, not an unregulated or unrestricted right. It is open to the trustees of a public temple to regulate the time of public visits and fix certain hours of worship during which alone people would be allowed access to the shrine. The public may be denied access to certain particular sacred parts of the temple e.g. the inner sanctuary or 'Holy of the Holies' where the deity is actually located.

In a recent judgment Justice T. Ram Prasad Rao of the Madras High Court has prohibited the non-Hindus from entering the precincts of the Hindu Temples and thus declared that part of Tamil Nadu Temple Entry Authorisation Act (1947) which allowed such entry as unconstitutional.

In an important decision the Supreme Court recognised the right of the Pandas to accompany the Yajmans inside the temple but at the same time the Court has justified the power of the state to make laws regarding the behaviour of the Pandas with a view to maintaining order and decorum in the temples and ensure order, decency and reverent behaviour on the part of those who enter into the temples.

---

29 Kesari (Marathi), 26th July 1972. The details of the judgment were not available at the time of writing this and hence the writer has refrained from commenting any further on the matter.

Worshippers

The judiciary has been equally careful in protecting the religious rights of the worshippers who according to the Supreme Court are 'true beneficiaries of religious endowments and that the purpose of endowment is the maintenance of that worship for the benefit of the worshippers.' It has been held that the worshippers can represent the image and recover the properties of the institution when the Shebait has acted adversely to the interest of the image and has failed to safeguard its interests.

Takmg out religious processions has always been a matter of bitter conflict among citizens of different communities, especially Hindus and Muslims. The Supreme Court has recognised the right of the worshippers to take out religious processions provided such processions do not violate the normal rules of public order, health and morality.

Math and Mohant

Maths occupy a very important position in the religious system of the Hindus. These maths have been the

centres of theological learning, especially for the study, practice and propagation of the cult of each system of philosophy for which it stands. The judiciary has considered math and the spiritual fraternity represented by it as a religious denomination entitled to enjoy freedoms specified in Article 26 of the Constitution. The legal position of Mahant or Mathadhipathi has been clarified by the judiciary, time and again. He is not merely the manager of the temporal affairs of the Math but is a head of a spiritual fraternity with a duty to foster and encourage spiritual teachings. He has personal interest of a beneficial character and has large powers of management over the property of the institution.34 The courts have justified the placement of reasonable restrictions upon the rights of the Mahant but those restrictions which are unreasonable or are calculated to make him unfit to discharge his duties or which reduce the dignity of the office and make him merely a servant in the state department are considered invalid.35 The legislation enacted by the state governments imposed various restrictions on the powers of the Mahant and the judiciary was called upon to decide the reasonableness or otherwise of these restrictions. The judiciary has held that a Math is a public

34 Supra n. 11, p. 345.
institution and as such some control over the administration of the endowments and due appropriation of their funds is certainly necessary in the interests of the public.\textsuperscript{36}

In this connection legal restrictions placed on the Mahant such as registration of the endowment, sanction of alienation, expenditure of surplus funds of the institution, supervision of trust properties, preparation of the budget of the trust institution, keeping of the accounts of the receipts and expenditure, borrowing under conditions, etc. have been considered by the Court as secular affairs connected with the administration of religious institutions. On the other hand the appointment of a Charity Commissioner as a superior of a Math or allowing the Charity Commissioner to function as Shebait of a temple or superior of a math is held by the court as interference with the religious affairs of the institution.\textsuperscript{37} Similarly, the provision which enabled the state officials to enter the premises of religious institutions or places of public worship was held by the court as invalid maintaining that there cannot be a right of unregulated and unrestricted right of entry in religious institutions for persons who are not connected with spiritual functions.\textsuperscript{38} The amended provision takes due note of this judgment and provides for entry of

\textsuperscript{36} Ibid., p. 352.
\textsuperscript{38} Supra n. 11, p. 353.
such officials with due regard to the religious practice or usage of the institution. The power of the Commissioner to appoint a manager for the administration of secular affairs of the institution under normal circumstances has been held by the judiciary as invalid on the ground that it would cripple the authority of the Mahant.\(^{39}\) On the other hand, the Court justified the disciplinary action against a Commissioner who acted in gross recklessness in the discharge of his duties and misused the temple funds.\(^{40}\) Similarly, the Courts have justified the removal of the spiritual head of religious institution for misconduct or immorality.

**Administration of Trusts**

One of the important controversial issues before the Courts has been regarding the settlement of schemes for better administration of religious trusts. Most of the legislative enactments make a provision for such settlement. The view adopted by the courts in this connection, by and large, has been in favour of the power of the state to intervene in the event of gross mismanagement or misuse of funds. But this mandate is also not unconditional. The Courts expect that there should be provided adequate opportunities of appeal to the appropriate bodies.

---


such as judicial tribunals against the schemes prepared by purely executive officers like Commissioner or administrator. The idea behind this has been to give maximum protection to the claims of the disputing parties who are likely to suffer injustice. The legislative provisions which did not contain such additional judicial safeguards were negatived by the Supreme Court while those which contained such safeguards were declared as valid contending that they do not impose unreasonable restrictions on the rights of the religious institutions. On some occasions the Supreme Court was not satisfied by the schemes already prepared by the executive officials or subordinate level judicial magistrates (even the High Court for that matter) and, therefore, has itself modified the schemes having due regard of the interests of the disputing parties as well as the general interest of the religious institution and people at large. In one interesting case, where both Hindus and Muslims presented their claims of management of a Durga and, thus created communal tensions, the Supreme Court itself gave directions regarding the management of the Durga and distribu-

In India there are some exceptional temples such as Nathdwara Temple in Rajasthan and Jagannath Temple in Orissa which enjoy a unique position from the standpoint of the number of devotees attracted, huge assets possessed, nature of nitis and seva-puja performed and the religious susceptibilities of millions of people regarding the same. When such temples were mismanaged or false claims were presented regarding ownership or management, the state governments, where these temples are located, made special laws regarding their management. The judiciary has justified the enactment of such special laws treating the temple as a class by itself on account of some special circumstances or reasons connected with the same. In such cases the administration is vested in the Temple Managing Committee representing various interests involved. The administrator, who is the secretary of the committee, acts as the chief executive officer subject to the control of the committee. The Seva-Puja is to be conducted in accordance with the record of rights and the committee has to see that the Sevaks and others perform their religious duties properly. Such provisions, in so far as they do not

---

interferes with the religious duties, have been held by the judiciary as valid and the appointment of administrator to look after the secular administration has been consequently justified.

**Cy pres Doctrine**

In most faiths, religion and charity go together and therefore religious and charitable endowments are inter-related. On many occasions these charitable endowments have vast funds at their disposal. Recent legislative enactments have incorporated the doctrine of Cy pres application to the funds of charitable trusts. On numerous occasions the courts have been called upon to interpret the general charitable intention implied in the trust-deed and to give directions regarding the Cy pres application of trust funds. By and large, the Courts in India have given liberal interpretation of this principle and have justified the use of funds for charitable purposes such as the establishment of educational institutions, hospitals and provision for welfare facilities. In this connection it may be noted that when the law empowers Charity Commissioners to apply the Cy pres doctrine without providing for appeal to the Courts, such provision has been declared by the Supreme Court as invalid but when the statute provides for proper judicial review over and above the

---

authority of the Executive Commissioner, the same has been justified. It may be submitted that the courts in India have played a positive role in diverting funds of charitable trusts in a better manner by adopting liberal interpretation of general charitable intention implied in the application of Cy pres principle.

**Muslim Religious Endowments**

So far as Muslim endowments are concerned, the position is substantially the same in relation to the law enacted and the interpretation of the said law by the courts. It has been held that there exists a well-marked distinction in Muslim law of Waqfs between an endowment, strictly religious and charitable in its nature e.g. one made for the maintenance of places of religious worship where the beneficiaries must be members of a Muslim community alone and one that is purely secular in character, that is, established for public utility like school or hospital. In case of the latter, the Non-Muslims can also be beneficiaries. The Supreme Court has pointed out that under the Muslim law, Muslims are not precluded from creating a public religious or charitable trust which does not conform to the conventional notion of a Waqf and which creates a public religious charity in a non-religious

---


secular sense where non-Muslims can also be the beneficiaries. By holding that the Muslim Waqf Act 1954 covers only those Waqfs where the beneficiaries are Muslims alone, the Courts have encouraged the establishment of secular trusts because a Muslim Waquif who would not like interference in the management of his Waqf property by the Waqf Board established under the Act of 1954, may prefer to bequeath his property for the benefit of the non-Muslims also.49

The Mutawalli enjoys an important position in the administration of Waqfs. The courts have considered him a manager or custodian of Waqf property and some control or supervision over him by the appropriate body like Majlis, with respect to the due administration of the Waqf property and due appropriation of the funds, is considered certainly necessary. In this connection restrictions such as preparation and submission of the budget for the approval of the Majlis have been held by the courts as reasonable restrictions on the exercise of his duties as a Mutawalli and hence perfectly constitutional.50 Similarly, the removal of the Mutawalli in the event of gross mismanagement and misconduct has also been justified by the Court.51

49 Kassimiah Charities v. Secretary M. S. W. Board, A.I.R. 1964 Mad. 18.
So far as the application of Section 92 of the Civil Procedure Code to Muslim trusts is concerned, the judiciary has adopted the same position as is done in case of Hindu Endowments. The right of the appropriate authorities to settle schemes for better management of trust properties is recognised by the Supreme Court, pointing out that a scheme in regard to public trust once framed should not be altered light-heartedly unless there are substantial reasons to do so. Following this logic the Court has permitted the revision of a scheme when it was categorically proved that the scheme framed earlier was based on erroneous assumptions.52

The foregoing analysis regarding religious and charitable endowments points out that the problems relating to secular administration of endowments of all communities, Hindus and Muslims are alike. The general principles as regards their management are also, more or less, the same. The approach adopted by the Courts in interpreting legislation regarding these endowments is also the same. There seems, therefore, "no insuperable difficulty or complication in enacting a uniform type of legislation dealing with the religious endowments of all communities in India. ... Such legislation should of course incorporate such special provisions as may be considered necessary

for the endowments of individual religions or communities.\textsuperscript{53}

It is, here, submitted that it is high time for the state to enact such uniform legislation which would certainly be in conformity with the directive principles of State policy\textsuperscript{54} enshrined in the Constitution of India.

**Religious Endowments and Taxation**

Article 27 of the Constitution of India has prohibited levying of taxes the proceeds of which are specifically appropriated in payment of expenses for the promotion or maintenance of any particular religion or religious denomination. In most of the laws regarding endowments are contained provisions for charging certain levies as annual contributions to be paid by the religious institutions. The authorities of the endowments have challenged these levies arguing that they violate Article 27 of the Constitution. The State, on the other hand, contended that these payments are not taxes but fees in as much as they are intended to cover the expenses incurred by the government in rendering certain important and inevitable services for the religious institution itself such as accounting and auditing, transportation and health


\textsuperscript{54} Article 44 directs that 'the State shall endeavour to secure for the citizens a uniform civil code throughout the territory of India'.
services, etc. The Supreme Court has admitted that under our secular Constitution, no public funds can be paid out for the promotion of any particular religion but when the levies are charged to ensure better and proper administration of the institutions and to ensure due appropriation of their incomes for the purposes for which they are founded, these levies cannot be treated as those favouring any particular religion and hence perfectly justifiable.

The determination of this was by no means an easy task and much depended on finding out whether a particular charge was a tax or a fee. The Court was very careful in analysing such a technical, complicated issue and tried successfully to strike a balance between the necessary financial demands of the State on one hand and the claims of religious institutions for freedom from unwarranted taxation, on the other.

Is This State Intervention Defensible?

It may be noted at this stage that during the medieval period, Christianity developed a well-knit organisation of the Church which functioned like a state. It not only promoted unity in Christian society but established uniformity in Church law which the people had to obey and the Church had its own courts through which this law was administered. As a result of this comprehensive network of law and administration the Church could function as a competing organisation with the state and could
settle its internal disputes, and occasions for state intervention in ecclesiastical organisation did not arise. Major religions in India, Hinduism and Islam, on the other hand, could not develop their counterparts of church organisation and therefore these religions are more vulnerable to state intervention. In the absence of religious organisation like the Church, religious autonomy of these denominational institutions would have crippled their institutional framework and in the absence of state intervention these institutions would have established autocratic and occasionally profligate empires. State intervention in one form or other, therefore, was not only necessary but inevitable in the interest of the health of the institution as well as in the interests of social welfare in general. Such regulation of religious institutions at the hands of the state was not an uncommon practice in India. Ancient Hindu kings had extensive authority over religious institutions and they did interfere in their administration in the event of mismanagement. During the British period, both under the Company and the Crown, this practice was continued and numerous laws were enacted to prevent mismanagement and misappropriation of funds of public endowments by their authorities. In exceptional circumstances, heads of the institutions were removed and schemes were prepared for ensuring better administration of these institutions. Here arises an important issue. The state
has to bear the overall responsibility of maintaining law, order and social health and it is in this context that the intervention by the state in the affairs of religious institutions can be justified. Religious institutions on the other hand are likely to resist this intervention with all their might, contending that it violates their freedom of religion guaranteed by the Constitution. Under the circumstances, it is to be seen that state intervention is kept within reasonable limits. Otherwise, radical legislation by the state in this connection would impair the very essence of freedom of religion and would shatter the foundations of the secular state. In the case of such a delicate controversy the judiciary has to act as a stabilizer between the orthodoxy of religion on one hand and the radicalism of the law makers and executors on the other. The judiciary has to decide the reasonableness of state intervention and prescribe the legitimate spheres of action of both the religion and the State. By making matters of religion a justiciable issue the judiciary has rightly taken upon itself this delicate, difficult task which it alone can perform rightly and successfully.

It has been observed that suits relating to images and to Maths are very common since a good deal of property is involved and under the guise of a concern for religion, parties are really disputing over their financial, social and even political aspirations. On some occasions the
office-bearers of religious institutions have presented their personal claims of vested property rights under the pretext of denominational freedom and the judiciary has to clear away fake veils and find out what is what. As rightly pointed out by Dr. Derrett, the Supreme Court has had to maintain a balance between the public tendency to bring all religious endowments under some kind of rational control and the legal conservatism which would retain the ancient doctrines however inconvenient.55

Luthera has argued that the performance of such functions by the state cuts at the very root of the concept of the secular state.56 Against this contention it may be argued that the Western models of religious institutionalisation can simply have no relevance to the Indian situation in view of the fact that the whole of Indian society provides itself with religious organisation, the entire Indian subcontinent teeming with microscopic religious institutions.57 It may also be pointed out that it is Luthera’s narrow definition of secular state which makes him feel that this state intervention is the greatest obstacle in the creation of a secular state in India. If


56 V. P. Luthera, The Concept of Secular State and India, pp. 147-48.

on the other hand one approaches the problem from the standpoint of the broader definition noted above such intervention cannot be escaped and so discredited.

Religious Non-discrimination

Basic Approach

One of the important conditions of a secular state would be to ensure to citizens belonging to different religious equality before the law and equal protection of the laws. Articles 14 of the Constitution of India provides this. Positively, it would mean that the state should follow the policy of non-discrimination when it grants positive protection to different religions or when it grants positive benefits to the people belonging to different religions. This principle of non-discrimination is subject to varied interpretations. One interpretation would be that there should be provided absolute equality of treatment for all irrespective of caste, creed, religion etc., and that there should be uniform legislation for all concerned. This would be an ideal condition of equality on the theoretical plane. In practice, the principle of equality does not postulate absolute equality; perfect equality cannot be ensured in a society of unequals by nature, attainment and circumstances. The judiciary has interpreted this principle to mean that in a society of unequal social structure where the state has to deal with a variety of problems arising out of the infinite variety
of human relations, wide latitude be permitted to the discretion and wisdom of the state to legislate. The limits of this discretion are that the state has the power of classification for legitimate purposes. Such classification is permissible only if it is reasonable and not arbitrary and that the classification must be founded on an intelligible differentia. This classification or differentiation must have a rational nexus with the object of the statute in question or that there should be reasonable differentiation and that there is a nexus between that differentiation and the object of the legislation. Such legislation is open to judicial review. In brief, equality implies parity or equal treatment of equals in equal circumstances and permits differentiation in certain specified circumstances. It was on the basis of this fundamental approach that the judiciary interpreted other constitutional provisions relating to the religious non-discrimination.

Social Non-discrimination

Article 15 prohibits social discrimination that is likely to take place in case of people on the basis of distinction such as religion, race, caste, etc., while Article 16 guarantees equality of opportunity in case of public employment. In this context one comes across the

doctrine of protective discrimination which was incorporated in the Constitution by the first amendment. The logic behind the application of this principle has been that for centuries some sections of Indian society have suffered injustice and have been denied any chances of development with the result that they have remained considerably backward and unless they are given an opportunity to bring themselves on par with other comparatively developed or advanced sections of society, real equality cannot be ensured. This can be done by giving them preferential treatment in case of educational and employment facilities. In other words, this discrimination, which normally goes against the principle of equality, has to be made with a view to provide protection to the weaker sections of society and free them from social injustice and all forms of exploitation. While interpreting this principle of protective discrimination the Courts themselves have enhanced the field of judicial review. Under the mandate of protective discrimination the executors and the legislators were empowered to make provision for backward classes by deciding the scheme of preferences or reservations. In one case\(^59\) the scheme decided upon was so palpably unjust that about 90 per cent of the population of the state was regarded as backward and 'this fraud upon

the Constitution was exposed by the Supreme Court in its judicial reasoning. This scheme would have been held valid by the Court had it applied the traditional formula of intelligible differentia and rational relation between the differentia and the object. The Court, instead, took upon itself the task of deciding the reasonableness rather than the rationality of the differentia and thus subjected the scheme of preferences to searching enquiry as to its reasonableness and conformity with the Constitution. Thus the power of the legislators and administrators to determine who the backward are is subjected to judicial review to the extent to which the courts scrutinize the said designation and find out whether the government has exercised its discretion within the constitutional limits. The judiciary does not stop merely at deciding the constitutional validity of the schemes prepared by government but gives positive directions regarding considerations to be followed by the law-makers in making the law for protecting the interests of backward classes by asking the State to approach its task objectively and in a rational manner. It states that 'the Government has to take reasonable and even generous steps to help the advancement of weaker elements; the extent of the problem must be weighed, the requirements of the

community at large must be borne in mind and a formula must be evolved which would strike a reasonable balance between the several relevant considerations. 61

An important question that arises in this connection is regarding the criteria to determine backwardness. The Courts have admitted that caste can be considered as one of the determinants in view of the social relationship prevailing among the majority community on the basis of caste. It was natural under the circumstances to identify backward classes with backward castes. The judiciary has considered caste and religion as some of the criteria of determining backwardness but it has not treated caste as the ultimate and sole criterion. 62 In view of the scarcity of information regarding social and economic conditions of various sections of Indian society, the judiciary has been reluctant to lay down definite criteria for defining backwardness; nevertheless, some important ones such as literacy, occupation, income, etc. have been listed. It has further been pointed out that though the state is allowed to use caste and religion as the intelligible differentiae for classification, the law-makers will have to show rational relation between the differentiae used and the eradication of backwardness.

---

61 Supra n. 59.
The courts have, in this connection, sounded a note of caution to the law-makers stating that the validity of law which apparently infringes the fundamental rights of citizens cannot be upheld merely because the law-makers were satisfied regarding its constitutional consistency. The test of the validity of a law alleged to infringe the fundamental rights of a citizen lies in the demonstration by evidence and argument before the courts that the guaranteed right is not infringed. Mere argument that the authorities acted in good faith in determining socially and educationally backward classes of citizens would not be enough to sustain the validity of a law but that the validity will have to be proved on the basis of evidence placed before the courts. This assertion of the power of judicial review is in line with the need that the court should assume an evaluating function in the process of balancing the claims of different classes, backward or otherwise. As rightly said by the Court itself 'whatever method is adopted for giving protection to the backward classes, it must strike a reasonable balance between the claims of the backward employees and the claims of other employees as well,' if not, injustice will be perpetrated on some while justifying the preferential claims of the others.

Untouchability

The idea of untouchability is entirely repugnant to the structure, spirit and the provisions of a secular constitution. Though this practice derived religious sanctity or validation from ancient texts of traditional Hinduism, it could not be continued in the context of changing times. Untouchables were not only prohibited from entering the religious institutions but were even denied the basic benefits of common social living. Untouchability has been the worst expression of social stratification implied in the caste system and as such has resulted in creating deep rifts of disunity in Hindu society and has acted as the greatest hurdle in creating socially equalitarian society as a basic condition of the secular state. Some fragmentary attempts were made during the pre-independence period to remove some social disabilities arising out of untouchability and the courts upheld the legislation. The Constitution of India made freedom from discriminatory practices like untouchability a fundamental right and consequently was enacted the Untouchability Offences Act, 1955, which outlawed the enforcement of various disabilities and prescribed serious penalties for the practice of untouchability in one form or the other. This Act is made applicable to people belonging to all religions and not Hindus alone. This constitutional and statutory provision is an illustration
of the operation of the doctrine that fundamental right prevails over religion. Constitutional provision and statutory legislation thus created the legal framework to meet the challenge posed by the gigantic problem of untouchability. It is admitted that 'Untouchability' is a deep seated malady and legal remedy can touch only the fringe of the problem. The problem needs to be tackled more on the social and moral plane, nevertheless, the significance of strong legal support and judicial safeguards could never be ignored.

Religious Tolerance

Religious Minorities

What is true of the under-privileged is equally true of the religious minorities. Both require some additional safeguards with a view to protecting their interests. While the economically and socially backward classes desire protective discrimination for bringing them on par with the other classes in society, the religious minorities need clear constitutional assurances for the preservation of their script, language, culture, etc. This need is all the more felt in democracy where the majorities, by virtue of their mere numerical strength are likely to carry out the legislation which might disregard the minorities or perhaps even go against their interests. True democracy is not merely the government of majorities but is one where the interests of minorities are well safeguarded. Similarly
true secular democracy is one where the religious minorities are free from fear of oppression at the hands of religious majorities. Majorities may rule but minorities must be heard. It may be pointed out that in a democracy the legislative and executive organs, by virtue of the operation of the electoral process are usually the spokesmen of the majority communities. Under the circumstances, the only ray of real hope for protection for the minorities is an independent and impartial judiciary.

The Constitution of India has provided for these assurances by specific justiciable fundamental rights whereby (by Articles 29 and 30) they can conserve their distinct language and culture and can establish and administer educational institutions of their choice and these institutions are entitled to equal positive benefits in the form of financial aid from the State. On the negative side, they cannot be denied admission into educational institutions maintained by the State or receiving aid out of state funds on grounds only of religion, race, caste, language or any of them.

The judiciary has admitted its duty to uphold the fundamental rights of minorities and thereby honour our sacred obligation to the minority communities who have been part and parcel of India to this day in as much as all progressive societies must respect the religious beliefs

of their minorities. The Court has categorically stated that the attempts to whittle down protection cannot be allowed. The Court need not enlarge the protection but the Court may not reduce a protection naturally flowing from the words of the Constitution.\(^6^6\)

While deciding the cases pertaining to minority rights the Supreme Court of India has clarified certain points. It has laid down that a particular community is to be judged a minority only on the basis of the entire population of the area to which the particular Act applies. The right to establish and maintain educational institutions of the choice of the minority is a necessary concomitant to its right to conserve its distinctive culture. The educational institutions which are established by the minorities can claim State assistance in the form of financial aid and the state cannot deny the same on the ground that it is a minority institution. But at the same time the institutions which receive the state aid, either minority institutions or otherwise, cannot deny admission on the ground of religion, race or caste. A citizen who has requisite academic qualifications cannot be denied admission in educational institution on grounds of religion, caste, etc.\(^6^7\)


Institutions established by the minorities and which receive state aid cannot restrict admission to minority communities only because doing so would mean granting double protection to the minorities unintended by the Constitution. A protection need not be stretched to the stage of a privilege. It is true that rights of minorities should be duly protected but this does not mean that minorities should be allowed to establish their separate enclaves and thus perpetuate the sectarian fragmentation of society. Minorities must be permitted to retain their separate cultural identity but at the same time it must be seen that they learn not to live in isolation but in co-operative harmony with the other sections of society. They should not perpetuate the evils of minority thinking or minority mindedness. That is why minority institutions cannot be restricted to minorities alone.

The Courts have further pointed out that so far as the claim of minorities for administering any particular educational institution is concerned, they must be able to prove that the said institution is established by them and not otherwise.68 It has also been held by the Courts that the protection implied in educational and cultural rights of the minorities cannot be restricted to those minority institutions established after the inauguration of the

Constitution but it is available also in case of those institutions established prior to the commencement of the same. It may be contended, on the whole, that the judiciary has prevented any attempt made by the state or by the majorities to whittle down the protection granted to the minorities by the Constitution and at the same time it has foiled the minority ventures to obstruct the legitimate and reasonable claims of the majority and the minorities are expected to enter into the mainstream of national life and move forward along with the rest of the people.

Concluding Evaluation

If one tries to estimate the performance of the judiciary in relation to its interpretation of freedom of religion in India in the context of constitutional provisions, one finds the judiciary, by and large, to be conscious of its positive role. The judiciary has itself admitted the inadequacy of the negative approach based on the separation doctrine and has understood the spirit of constitutional philosophy of positive secularism. The Constitution has tried to build up the secular state on the foundations of religious freedom, religious non-discrimination and religious tolerance by defining the areas of state intervention in the matters of religion in positive categorical terms. The Constitution has left every person

free in the matter of conscience, freedom of conscience being guaranteed to every citizen so that he holds any belief he likes, his actions, however, in pursuance of these beliefs are subject to restrictions in the interest of the community at large, in the interest of public order, morality and health as viewed by common consent. The Constitution has envisaged the regulation of religious freedom through the sanction of organic law and has subordinated the freedom of religion to the needs of social order, social justice, social morality. In view of this constitutional mandate the state has undertaken progressive and radical programme of socio-economic reforms even at the cost of many religious traditions sanctified by history and the scriptures.

It may be observed that in recent years, the judiciary has, by and large, shown its appreciation of the felt necessities of the times and has through its progressive and liberal interpretation supported the social reform legislation in the context of religion. The courts have gradually evolved a progressive, constructive, forward looking philosophy of constitutional law designed to assist the forces of positive secularism and have thus worked for social regeneration of the country. While performing this task, it has, on occasions, set aside the precedents which reflected the traditional legalistic mechanistic approach. Even though the judiciary has shown progressive adaptive
insight in its interpretation of constitutional provisions, it has exercised this power with caution and restraint. It has not questioned the policy or wisdom of the law-making bodies but has judged the constitutional validity of the legislation enacted by these bodies from its characteristic independent impartiality of the judicial mind. The judiciary has scrupulously considered every safeguard that such legislation has provided in favour of citizen’s right to freedom of religion and has given effect to every such safeguard. In its power of exercising judicial review the judiciary has assumed an evaluating and balancing function and has successfully tried to strike a balance between the conflicting claims of freedom of religion and social justice by protecting reasonable freedom on the one hand and permitting state intervention only where and when such intervention has become inevitable in the larger interest of social justice. This cautious, compromising approach characterised, at the same time, by liberal and positive interpretation has necessarily been more in the interest of secular democracy than the radical rashness of popular legislatures or the reactionary conservatism of dogmatic religion would ever be. It is submitted that the Constitution has constituted the judiciary as the custodian or guardian of the freedom of religion embodied in the fundamental rights and the judiciary has performed this sacred task by its unceasing vigilance faithfully and fearlessly.
This is the encouraging performance of the Indian judiciary in the context of functional jurisprudence as applied to the philosophy of positive secularism.

This performance of the judiciary is significant not only from the point of view of evolving a secular state in India but has far reaching significance in as much as India can give a lead in similar circumstances elsewhere. India can be a test case in the matter. The majority of countries in the world are, today, experiencing the stress and strain of under-developed economy; their social structure is characterised by heterogeneity and multiplicity of religion, language, race, etc. and are on the doorstep of socio-cultural progress. The political process in these countries is expected to perform a gigantic task of initiating and streamlining socio-economic regeneration. So far as the Western countries are concerned, they have realised this regeneration through the agonising process of historical change stretching over a very long period and the countries which have been free recently from colonial imperialism and which are breaking through the shackles of feudalism are undergoing this process at present. India is a leading characteristic example of such countries and as she has provided for them a model for political democracy she can do so even in the context of social secular democracy.

Political Process and Judicial Process

Political process implies the process of making law
and executing the same. Judicial process, on the other hand, implies the determination of facts involved in particular controversies relating to the law evolved as a result of the political process. There is usually some discrepancy between these two processes in a country. The reason being that 'the legislative and executive branches yield too much to the pressures of the hour, to the polls professionally or individually taken to the beckonings of expediency and seek too seldom within their own modes of operation the "moment of truth" that comes from the concentration of the capacity for thought and leadership on the part of elected representatives.' Such pressures of political expediency are less conspicuously present in the context of judicial process. Political process, therefore, is characterised by haste and impatience while the judicial process is by caution and restraint. If this discrepancy or 'orientation gap' is wide, there are likely to be created constitutional deadlocks or constitutional crises.


71 As has resulted from the judgment of the Supreme Court of India in Golak Nath case. The entire nation awaits to see how the Supreme Court of India deals with the recent challenge given to the 24th Amendment of the Constitution which was made with a view to overriding this judgment.
resulting from the judicial decisions. The judiciary itself can avoid such conflicts and the judicial process can keep pace with the political, provided it adopts progressive liberal interpretation of constitutional and legal provisions but with due caution.

It cannot be forgotten that judges are more than judges who merely settle controversies in terms of the law. They, more or less, incidentally make new law through the cumulative process of decision making or that they participate in the process of making 'interstitial law', and so long as the judiciary operates within its 'safety zone', with due caution, they cannot be deprived of this rightful function. The performance of judiciary would very much depend upon those who man the judiciary because 'justice in the end depends upon the personality of the judge'. Their orientation would depend upon the nature of the legal education that they obtain. One would not hesitate to remark that unless the system of legal education is characterised by a broad base consistent with the spirit of the times, the need for necessary social dynamism cannot be realised in practice. The politician is always impatient

\[72\] Supra n. 69, p. 885.

\[73\] Ibid.

to initiate a radical change and a judge can inspire him with confidence and can reasonably restrain his undue impatience only when the judge adopts reasonably progres­sive orientation in his task by understanding the implic­tions of ‘social engineering’\(^\text{75}\) of which he is himself no mean part.

The political and judicial processes cannot and should not run counter to each other. The successful work­ing of any democracy demands proper harmonisation of these two basic processes. This harmonisation can be achieved in practice only when the architects of these two processes realise that they exist not merely to fulfil the destiny of the institutional framework to which they belong, but only to serve the people. The ultimate ends of society are more important than the pattern of any institution. It is the realisation of these ends of society by both the politician and the judge that will enable the people to enjoy the fruits of secular democracy implied in the spirit of the Constitution.

---

\(^{75}\) Social engineering implies giving the most complete security and effect to the whole scheme of human demands or expectations, which have pressed or are pressing for rec­ognition and securing with the least sacrifice of the scheme as a whole, the least friction and the least waste. Roscoe Pound, Jurisprudence (St. Paul, Minn.: West Publishing Co., 1959), Vol. 1, p. 347.