

## **“Whether Judiciary losing its Independence Maintaining the Secular Structure of India?”**

*\*Tanya Sharma  
Army Institute of Law,  
Mohali*

*\*\*Fiza Gupta  
Army Institute of Law,  
Mohali*

### **INTRODUCTION**

One of post-independence India’s defining characteristics is that the nation has managed to sustain democratic governance in the face of striking ethnic, linguistic, and religious diversity.<sup>1</sup> The delicate equilibrium of secularism in India can be maintained only if the rule of law prevails and every citizen can feel equal to others, regardless of community. A watchful judiciary is required for that to be true without the taint of religious prejudice or motivation.

Indian secularism is not merely the invention of post-1947 Indian political leaders; the concept has a longer, distinguished place in Indian civilization history. It has been rightly said: “*We are unique in the world that we are enriched by so many cultures, religions. Now they want to squash us into one culture. So it is a dangerous time. We do not want to lose our richness. We do not want to lose anything . . . all that Islam has brought us, what Christianity has brought us, what Sikhism has brought us. Why should we lose all this? We are not all Hindus but we are all Hindustani.*”<sup>2</sup>

### **SECULARISM IN INDIA**

SECULARISM is not a new concept to India. The vision of secularism - 'sarwa dharma sambhava', i.e., tolerance for all religions - has always been there in our country and has its roots in the Yajur Veda, Atharva Veda etc. However, the word 'secularism' was not used in the Indian Constitution until the 42nd Amendment in 1976, which incorporated the word. The concept of secularism is encapsulated in the broader concept of right to equality. The right to freedom of religion is a natural corollary to this concept. The triangle of law, state and religion is such it has become a source of benefits for political parties.<sup>3</sup>

India has no official state religion, and it can not impart religious instructions to state-owned educational institutions. The 7th Indian constitution schedule places religious institutions, charities, and trusts in the so-called Concurrent List. The present scenario of “Secularism in

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<sup>1</sup> Christophe Jafferlot “The Fate of Secularism in India”(June. 10,2020,10:04pm)  
<https://carnegieendowment.org/2019/04/04/fate-of-secularism-in-india-pub-78689>

<sup>2</sup> Nayantara Sahgal

<sup>3</sup> Sumbul Fatima “Secularism in India: A Myth or Reality” (June. 12,2020, 11:00am)  
<http://www.iosrjournals.org/iosr-jhss/papers/Vol.%2022%20Issue7/Version-11/G2207114953.pdf>

India” is indeed a cause of concern. The Hon’ble Supreme Court of India in **Sardar Taheruddin Syedna Saheb v. State of Bombay, AIR 1962 SC 853, 871** for the first time explained the concept of secularism.

In **Kesavananda Bharati v. State of Kerala (1973) 4 SCC 225**, the Constitutional Bench of the Hon’ble Supreme Court reiterated that secularism was a part of the basic structure of the Constitution.

## **INDEPENDENCE OF JUDICIARY**

*“The bedrock of our democracy is the rule of law and that means we have to have an independent judiciary, judges who can make decisions independent of the political winds that are blowing.” ~ Caroline Kennedy*

The forefathers of our great nation gifted us with a democracy which by its very definition assumes a judiciary and an independent one too. Democracy is not functional if there is not an impartial body to review the state’s action. Dr. Babasaheb Ambedkar’s concern and vision to have an independent judiciary is palpable in the following observation in the constituent assembly-

“There can be no difference of opinion in the House that our judiciary must be both independent of the executive and must also be competent in itself. And the question is how these two objects can be secured“.

The doctrine of Separation of Powers provides for a responsibility to the judiciary to act as a watchdog and to check whether the executive and the legislature are functioning within their limits under the constitution. This task given to the judiciary to supervise the doctrine of separation of powers cannot be carried on in true spirit if the judiciary is not independent in itself. An independent judiciary supports the base of doctrine of separation of powers to a large extent.<sup>4</sup>

## **Indira Gandhi Nehru v. Raj Narain<sup>5</sup>**

Where the dispute regarding P.M. election was pending before the Supreme Court, opined that adjudication of a specific dispute is a judicial function which parliament, even under constitutional amending power, cannot exercise i.e. the parliament does not have the jurisdiction to perform a function which the other organ is responsible for otherwise there will be chaos as there will be overlapping of the jurisdictions of the three organs of the state.

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<sup>4</sup> ATIN KUMAR DAS LL.M 1<sup>st</sup> YEAR.NATIONAL LAW INSTITUTE UNIVERSITY, BHOPAL

<sup>5</sup> 1975 supp SCC

**EFFECT OF RELIGION ON INDEPENDENCE OF JUDICIARY**

Contrary to India's political and territorial notion of secularism, Hindu nationalist philosophy was first codified in Hindutva: "Who is a Hindu?" by V. D. Savarkar in the 1920s – Culturally describes India as a Hindu nation and plans to transform it into a Hindu rashtra.. Hindu nationalists view India as a Hindu nation-state not only because Hindus make up about 80 percent of the population but also because they see themselves as the true sons of the soil, whereas they view Muslims and Christians as products of bloody foreign invasions or denationalizing influences.<sup>6</sup>

Today, the secular character of the Indian democracy is considered to be under threat. The razing of the Babri Mosque in Ayodhya (Uttar Pradesh) led to riots and killings by Muslims and by Hindus. The massacres of innocent Hindus in Godhra (Gujarat), presumably ignited by smoldering Muslim resentments against the Hindutva proponents over Ayodhya, touched off a larger massacre of equally innocent Muslims in tit-for-tat killings that undermined yet further the amity under which these religious communities had lived earlier in Gujarat State in an atmosphere of secularism. Apart from these, the unspeakable atrocities of 1984 against the Sikhs in Delhi after the assassination of Prime Minister Indira Gandhi; and an occasional slaying of proselytizing Christian missionaries clearly presents a grim picture of "Indian Secularism".

The Supreme Court of India is the custodian of the Constitution. By its dynamic interpretation, court keeps it lively. The best example under this is of "**Ayodhya Dispute.**" The Indian government had appointed a one-man commission led by former Supreme Court Justice Manmohan Singh Liberhan after the Babri Masjid was destroyed in 1992. The subsequent report delegated responsibility to specifically identified Hindu nationalist figures for the demolition of the mosque. In Allahabad High Court, one of the three dissenting judges tried to give all the disputed land to the Hindu parties in the case. The majority ruling accepted the premise that the demolished mosque was on Ram 's birthplace, where a Ram temple once existed, but the authors admitted that no archeological evidence had ever been submitted to support this. Allahabad judges tried to divide the land between the Muslim (one-third) and its Hindu (two-thirds) parties. Finally, on November 9, 2019, the Supreme Court declared its verdict ; it overturned the previous decision and ruled that the property belonged to the government on the basis of tax records. The Supreme Court also ordered that the property be handed over to a trust to create the Hindu temple. In its ruling the court granted Muslims five acres of land where a new mosque could be built. The temple ruling is a dilution of India's cornerstone secularism principle.

Another example can be of **S. Mahendran vs. the Secretary, Travancore**<sup>7</sup> (Sabarimala Temple Case) - A three-judge had said that denying entry to women based on traditions are completely

<sup>6</sup> "Population Census 2011," Census Organization of India, 2011, (June.14,2020,09:00pm)  
<https://www.census2011.co.in/>.

<sup>7</sup> AIR 1993 Ker 42

against the principles of the Constitution. The Sabarimala temple administration defended the ban. Supporting the temple administration, the Kerala Government told the court that beliefs and customs of devotees cannot be modified through a judicial process. In 2018, by a majority 4:1 verdict, the Supreme Court ordered women of all ages to be allowed into shrine. The Travancore Devaswom Board (TDB) argued that the court could not intervene in a centuries-old belief. The verdict had sparked a series of protests.<sup>8</sup> Therefore, the order was reserved by the apex court in February 2019. On 15th November 2019, supreme court said restrictions on women in religious places was not confined to Sabarimala alone and were also prevalent in other religions. There is no clarity whether women can enter the shrine.

## CONCLUSION

The Constitution of India provides justice for all. Members of the Judiciary are the administrators of justice. The judges strive to ensure free and impartial administration of justice in order to provide its citizens fairness in application of law. The duty of judges is considered to be very pious, therefore the constitution has provided for independence of judiciary so that they can remain impartial to serve the constitutional goals, act fairly, reasonably, free of any fear or favor. The problem starts when the other organs, i.e. the legislature and the executive start to interfere with them. The external interference not only erodes the piousness of the profession, but curtails individuals of their rights. In the recent past it has been seen that retired judges takes public office within a very short span of time after their retirement. Amazingly, it was found that they were involved in many decisions important to the government in their tenure and more surprisingly they ruled in favor of the government. These early-retirement appointments are a real issue to worry about. The decision of the court of hearing a useless political petition urgently and refusing to consider an urgent petition, involving real problems of needy people is not understandable.

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<sup>8</sup> “Sabarimala Review Petition Verdict LIVE Updates: Earlier Verdict Upheld By Supreme Court” (June.14,2020,11:00pm) <https://www.ndtv.com/india-news/sabarimala-review-petition-live-updates-supreme-court-to-announce-verdict-on-petition-2132200>