

GENDER EQUALITY AND RELIGIOUS FREEDOM IN INDIA: A LEGAL STUDY

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Abstract

All human beings are equal before Almighty. They are conferred certain rights to lead life with dignity. These rights are human rights. The situation of human rights in India is a complex one, as a result of rich diversity, tremendous size, rigid social and cultural norms and lack of awareness about human rights. The people in India are divided into various religions and castes. Matters related to religion, marriage, adoption, succession are governed by personal laws and customs of respective religious group. The framers of the Constitution of India have given due acknowledgement to freedom of conscience and free profession, practice and propagation of religion by recognising and protecting them in Part III of the Constitution (Article 25). This right can be exercised without any exception based on gender. In India, inequality prevails when it comes to enforcement of right to freedom of faith and worship. The social norms practised in India preclude women from entering into the temple, mosque or any religious place by reason of physiological factors or alleged tradition of the respective religion. It is in violation of principle of equality (Article 14 of Constitution of India). This issue was recently decided by the Supreme Court in the case of *Indian Young Lawyers Association vs. The State of Kerala and Others* on 29th September 2018 wherein the Court struck down the rule that disallowed girls and women from entering the Sabarimala temple in Kerala affirming the right to equality in matters of religious practices and worship. The matter is pending under review before the larger bench. The cases related to discriminatory practices against women in other religions are also under consideration before various benches of the Supreme Court. This paper focuses on the protection of freedom of faith and worship of women guaranteed by the Constitution through judicial process, Dharma – its meaning, role and application, religious denomination, constitutional morality in terms of determining priority among various fundamental rights.

Keywords: Freedom of faith and worship, Inequality, Constitutional Morality

INTRODUCTION

'All men are equal to enforce their human rights'. This is a well-known philosophy in the arena of human rights. But, in the current setup of Indian society, it appears that women are excluded in the application of an aforesaid principle. The recent Sabarimala Temple case highlights the woes women suffer in following their religious faith. This issue was decided by the Supreme Court in the case of *Indian Young Lawyers Association vs. The State of Kerala and Others* on 29th September 2018 wherein the Court struck down the rule that disallowed girls and women from entering the Sabarimala temple in Kerala. This rule cum custom reflects inequality in terms of understanding the divinity. The quality of spirituality to divinity cannot be determined on the basis of gender. In Hindu religious texts, the goddess holds more significance. They are regarded as repository of power, strength, immense knowledge and wisdom. The dichotomy that prevails in the religion by exalting and idolising women as goddesses on one hand and by imposing severe sanctions on the other hand in matters of devotion has to be challenged and abandoned. Moreover, it is disappointing to find that despite the clear mandate of the Supreme Court on this issue, women are still not allowed to go inside the temple. The facts of the Sabarimala Temple case were the women in the age group of 10 to 50 years were not allowed to access the Sabarimala Temple in Kerala due to 'age-old practice' protected by law. The age-old practice is that women throughout their menstruating age (not necessarily the actual days of menstruation) are considered impure, impure enough to contaminate a place of worship and hence excluded from the holy place. The Petitioners challenged the Constitutional validity of Rule 3(b) of the Kerala Hindu Places of Public Worship (Authorisation of Entry) Rules, 1965, which restricts the entry of women into the Sabarimala Temple on the ground - "Women at such time during which they are not by custom and usage allowed to enter a place of public worship" as being ultra vires Section 3 of the Kerala Hindu Places of Public Worship (Authorisation of Entry) Act, 1965. The administration of Sabarimala Temple is governed by provisions of the foregoing laws. The Sabarimala Temple, dedicated to Lord Ayyappa, is a famous temple in Kerala which is visited by over twenty million pilgrims and devotees every year. This is attributable to the manifestation of the deity at the Sabarimala Temple which is in the form of a 'Naishtik Bramhachari', who practises strict penance, and the severest form of celibacy. It is assumed or believed that women who seek to enter Temple pollute the male

pilgrims and the deity Himself and take away the holiness of the otherwise divine temple. The Supreme Court rejected this irrational tradition and held that the customary practice does not meet the tests of Articles 14, 15 and 21 of the Constitution. It is strikingly arbitrary as it is based on physiological factors alone and it does not meet the test of intelligible differentia and lawful object for a valid classification.

RIGHT TO FREEDOM OF FAITH AND WORSHIP - A CONSTITUTIONAL RIGHT

The Constitution of India by Article 25(1) guarantees to every citizen liberty of thought, expression, belief, faith and worship without any discrimination on any grounds of religion, race, caste, sex, place of birth or any of them. The essence of the right to freedom of faith and worship is that it does not matter whether the religion or the religious practises are cogent or rational. In *Bijoe Emmanuel & Ors. v. State of Kerala & Ors.*, the Supreme Court held that the government circular having no legal sanction violates Article 25(1), if it compels each and every pupil to join in the singing of the National Anthem. The ruling recognised his genuine, conscientious religious objection. The freedom of religion is protected under Article 25 to 28 of the Indian Constitution. The right to profess, practice, and propagate religion will include all acts, religious practices done in furtherance of thought, belief, faith, and worship. The bone of contention is that it is not possible to define religion precisely and universally. Additionally, what constitutes religion cannot be ascertained. However, it can be explained as a matter of faith of individuals or communities, based on a system of beliefs or doctrines including practices which conduce to spiritual well-being. Individuals or communities need not be theistic for the purpose of enforcing this right but persons who are agnostics or atheists can also enforce the right to freedom of faith and belief. Religious practices also enjoy protection under Article 25 of the Constitution. However, religious practices followed in the name of any religion includes superstitious beliefs which are extraneous, sometimes illogical and unnecessary accretions to religion that cannot be prudently considered as essential parts of religion. Therefore, the right to freedom of faith and worship is subject to reasonable restrictions that can be placed on grounds of public order, morality and health, and to the other provisions of Part III of the Constitution. Public order is to be distinguished from —law and order. Public disorder includes disturbance, nuisance affecting the public at large as opposed to certain individuals. In *Acharaya Jagdishwaranand Avdhoot V. Commissioner of Police, Calcutta* the question was whether Tandav dance to be performed with the Human skull, Damroo and Trident and its performance at a public place is a fundamental right and whether it constitutes essential religious practices of Anand Margi denomination. The Apex Court rejected the claim of performing Tandav dance at the public place observing that no credible evidence was furnished that Tandav dance was an essential part of their belief. This decision was challenged again when Tandav dance was officially declared as an essential part of religion by Anand Margi denomination in the case of *Jagdishwaranand Avdhoot v. Commissioner of Police, Calcutta*. The Supreme Court declared that religious practices do not change from time to time. The term “morality” is difficult to define. It refers to that which is considered abhorrent, unacceptable to social norms of civilized society. Health would include something that is unhygienic, noise pollution and the control of diseases. Article 25(2) of the Constitution enables the government to make laws which may regulate or restrict secular activity, which includes economic, financial or political activity, which may be associated with religious practice. The ban on Cow slaughter was challenged on the ground that it violated the religious freedom of Muslims. It was argued that sacrifice of a cow on Bakri-Id was an essential practice and an integral part of the religion. The court held that the practice of cow sacrifice was not an essential part and hence it can be regulated. In *Sardar Syedna Taher Saifuddin Saheb v. State of Bombay*, Bombay Prevention of Excommunication Act, 1949 was challenged which prohibited excommunication of all kinds including on religious grounds. It was contended that the power to ex-communication from the community given to religious head cannot be curtailed. The Constitutional Bench of the Supreme Court by a majority of 4:1 held that the said provision was violative of Articles 25 & 26. It was held that power to expel on religious grounds was a part of religion. In *Srimad Perarulala Ehiraja Ramanuja Jeeyar Swami v. State of Tamil Nadu*, the Supreme Court of India reiterated that protection of Articles 25 and 26 extend to religious practices and therefore, they guarantee rituals, observances, modes of worship and ceremonies which are an essential part of the religion. However, as to what constitutes an integral part of a religion, the court held that it has to be determined by the court with reference to the doctrines of that particular religion. Article 26 of the Constitution gives rights to individuals to —(a) to establish and maintain institutions for religious and charitable purposes;(b) to manage its own affairs in matters of religion;(c) to own and acquire movable and immovable property; and (d) to administer such property in accordance with law.

DHARMA AND RELIGIOUS DENOMINATION

The four Vedas of Hindu religion: Rig Veda, Sama Veda, Yajur Veda, and Atharva Veda, are the foremost sacred texts in Hinduism. They stipulated human rights and human duties. They become the important source for interpreting the objects of Hindu religion. The Supreme Court of India came across a number of cases wherein it explained the meaning of Dharma, its role and application. The Supreme Court construed verses cited in these religious texts to identify the true role of religion in our life. In the case of *A.S. Narayana Dicitulu vs. State*

of Andhra Pradesh, the Supreme Court held that the role of Dharma is to uphold, nourish, support that which upholds, supports, promotes the stability of the society, maintaining social order and general wellbeing and progress of mankind. Whatever conduces to the fulfillment of this object is Dharma? Dharma includes every activity that gives individuals freedom from fear, want, desire, disease and evil qualities. It promotes valuing good feelings and sense of brotherhood. It promotes to secure liberty, equality and dignity of an individual without any discrimination on the ground of caste, class and gender. No religion promotes inequality and inhumane treatment. It discourages narrow mindedness, sectarianism, blind faith and dogma. Dharma embraces all and excludes none. Religion prescribes set of human rights which king or ruling authority is bound to protect and defend. These human rights include right to live, right to achieve success, right to happiness, right to social and cultural participation, right to perform work, etc. The right to freedom of faith and worship is one of those fundamental human rights recognised widely and categorically in ancient Hindu religious texts. Women are not precluded from enjoying the right to freedom of faith and worship owing to their gender.

Establishment of a religious institution or religious denomination, in pursuance of practising any religion, is a part and parcel of the right to freedom of faith and worship. The word religious denomination, its function has not been defined in the Constitution of India. The word denomination has been defined in the Oxford Dictionary to mean – a collection of individuals classed together under the same name: a religious sect or body having a common faith and organisation and designated by a distinctive name. In the Commissioner Hindu Religious Endowments, Madras v. Shri Lakshmindra Thritha Swaminar of Sri Shirur Mutt - the question whether Math can be considered as religious denomination was decided. It has laid down the test to determine the character of any denomination as a religious institution. Article 26 of the Indian Constitution contemplates not merely a religious denomination but also a section thereof, the Math or the spiritual fraternity represented by it can legitimately come within the purview of this article. By virtue of being present in Part III of the Constitution, the exercise of denominational rights cannot override and render meaningless constitutional protections which are informed by the predominant values of a liberal Constitution. Religious denominations have the right to manage its affairs and the same can be regulated by law, but it cannot come up with any religious practice which does not form part of the essential practices of religion.

The Sabarimala Temple could not be considered as a separate religious denomination, for it did not fulfil the criteria laid down in Sri Shirur Matt case. Religious practices performed in Sabarimala Temple at the time of “Puja” and other religious ceremonies are similar to any other practice performed in any Hindu Temple. It does not have its separate administration, but is administered by or through a statutory body constituted under the “Travancore - Cochin Hindu Religious Institutions Act, 1950” and further, as per Section 29(3A) of the said Act, the Devaswom Commissioner is required to submit reports to the government, once in three months, with respect to the working of the Board.

BALANCING CONSTITUTIONAL MORALITY AND FREEDOM OF FAITH AND WORSHIP

The Constitution of India recognises and enforces equal participation of women in exercising their right to religious freedom. In protecting religious freedom, the framers subjected the right to religious freedom to the overriding constitutional postulates of equality, liberty and personal freedom in Part III of the Constitution. The dignity of women cannot be disassociated from the exercise of religious freedom. In the constitutional order of priorities, the right to religious freedom is to be exercised in harmony with the vision underlying the provisions of Part III.

The protection of Article 26 is available when the religious practice in question is proved to be an essential and integral part of religion. It is quite possible that secular practices which are otherwise not part of religion may make claim for being treated as religious practices. These practices might have sprung from superstitious beliefs and may in that sense be superfluous and unessential accretions to religion itself. This view was confirmed in the Constitution Bench of five-Judges in Sahara India Real Estate Corporation Limited & Others. v. Securities and Exchange Board of India & Others. that highlighted the role of the Supreme Court as an institution tasked with balancing the various Fundamental Rights, guaranteed under Part III. Constitutional morality or values demand harmonisation or balancing of all such rights to ensure that the religious beliefs of none are rendered nugatory or inefficacious. The Constitutional necessity of balancing various Fundamental Rights has also been emphasised in the decision of this Court in Subramaniam Swamy v. Union of India, Ministry of Law & Others.. In Acharya Maharajshri Narendra Prasadji Anandprasadji Maharaj & Others. v. The State of Gujarat & Others., a Constitution Bench, in the context of Article 26, noted that it is a duty of this Court to strike a balance, and ensure that Fundamental Rights of one person co-exist in harmony with the exercise of Fundamental Rights of others. The duty of the constitutional court is to adjudge the validity of law on well-established principles namely, legislative competence or violations of fundamental rights or of any other constitutional provisions. At the same time, it is expected from the courts as the final arbiter of the Constitution to uphold the cherished principles of the Constitution and not to be remotely guided by majoritarian view or popular perception. The Court has to be guided by the conception of constitutional morality and not by the societal morality. In this regard, we have to telescopically analyse social morality vis-à-

vis constitutional morality. It needs no special emphasis to state that whenever the constitutional courts come across a situation of transgression or dereliction in the sphere of fundamental rights, which are also the basic human rights of a section, then it is for the constitutional courts to ensure, with the aid of judicial engagement and creativity, that constitutional morality prevails over social morality.

CONCLUSION

The law is one of the effective instruments to bring social justice in the society. The law should focus on social reforms and not on reforms of religion. Laws enacted to eradicate 'sati' and 'devdasi' fall in this category. Simultaneously, laws must not sanction, validate those practices which are performed in exercise of right to freedom of faith and worship, but violating principle of equality and liberty. Justice Chandrachud in his constitutional wisdom held, any practice that excludes women from public spaces on the notions of purity and pollution, violates her fundamental right to dignity and privacy, and amounts to untouchability. Practices, customs which legitimize, approves menstrual taboos due to notions of "purity and pollution", restrict the ability of menstruating women to attain the freedom of faith and worship. This practice is blatant violation of principle of equality. Equality and non-discrimination are certainly featuring of Constitutional ethos and principles. However, the concept of equality and non-discrimination in matters related to religion cannot be viewed or applied in isolation. The Constitutional scheme requires balance to be struck between the principles of equality, non-discrimination and the protection of the precious freedoms of thought, expression, faith, belief, and worship conferred by Part III of Constitution and also recognised in the Preamble to the Constitution.

The primacy of an individual has to be given priority and recognition. The Constitution seeks to achieve a transformed society based on equality and justice to those who are victims of traditional belief systems founded in graded inequality. It secures a guarantee to protect the dignity of all individuals who have faced systematic discrimination, prejudice and social exclusion. Construed in this context, the prohibition against untouchability marks a powerful guarantee to remedy the stigmatization and exclusion of individuals and groups based on hierarchies of the social structure. Discriminatory practices in violation of principle of equality have no place in a constitutional order. They reflect patriarchal mindset which fails to meet the test of dignity and equality of women. The need of the hour is to enact comprehensive, effective and uniform law to eliminate all forms of discrimination faced by women in following their religion. Such law should be applicable to all women irrespective of the religion they follow and practice. It must remedy all evils faced by women and protect their freedom of faith and worship in true letter and spirit.

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