

Social Reforms and Customs in India: A Constitutional Perspective

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ABSTRACT

An analysis on the how the laws in India had taken a toll over religious customs in India. It also focuses on the Chooral Mooriyal festival in Kerala in which kids aged 8-12 is being pierced with golden threads in the midribs as a part of the "Kuthiyottam" festival held in Chettikulangara as well as Attukal temple as a devotion to Lord Bhadra kali. This paper also focuses on "Essential Practice test" which determines whether a customary practice is necessary and obligatory practice in a religion. Despite the fact that a religious area might be recognized from a mainstream one and shielded from State intervention, there are prosecutions which are concerned with social liberties that includes religious issues on which common courts may come along the lines have an express obligation to run the show. This paper comments on several milestone judgments in the sphere of religious customs which shows how the relationship between law and religion has evolved in India since 19th century.

1. Introduction

The concept of religion can be closely connected with that of faith in which the stigma of religion is being connected which binds people all around the globe to come together and become a part of same denomination. It has been prevalent in the society for a long time ever since. The concept of religion was made in order to bring control over the people without getting influenced by other factors and to have a social control against them. As in India, there is no proper demarcation of the states it is difficult to bring the spheres of authority and jurisdiction between the law and the religion. Wars have been pursued for the sake of religion or belief, either with the point of forcing upon the vanquished the confidence of the victor or as an appearance for expanding monetary or political mastery.

Furthermore, notwithstanding today, notwithstanding changes in the atmosphere of supposition, equality of treatment isn't guaranteed for all religions and beliefs, or for their adherents, in specific territories of the world. In a country like India, it is a necessary to have an arrangement in matters of State religion as it can be misused and a create a chaos among the citizens. But in order to be a secular country it is necessary to respect each other's religion and be tolerant towards the belief of other religions. But as we live in fast pace world the concept of religion has taken multitude changes as the country is inking more in Western ideologies. But being a country of vivid cultures and religion we must adhere and protect such cultures without being washed away by the stigma of the societal pressure. In the conflict of faiths, a secular state shall act upon wisely without getting influenced by external coercion form trying to reform a religion.

2. The hidden side of Chooral Mooriyal

Chooral Mooriyal is a festival in which boys aged 8-12 years is being bought in the temple premises and is being

pierced with golden/silver string or bamboo threads in their mid portion of their rib as a part of the ritual. Such custom is justified that it may lead to satisfaction of Goddess Bhadra Kali and fulfillment of wishes as a part of the ritual. This custom is usually practiced in Chettikulnagara temple situated in Mavelikara and Attukal temple situated in the capital of Kerala. The Kerala Protection of Child Rights had put a stop to the old tradition. In many case under privileged kids are being adopted for the fulfillment of such customs in exchange of money which even amounts up to one lakh rupee or other benefits which may deem fit. On the other hand the parents often give their own kids as "Nercha" as an act done to the Goddess for the fulfillment of their wishes. This has been prevalent in the Kerala around two hundred years old which has been prevailing over a long period of time. This custom was believed that King shall organize a ritual in satisfaction of the Goddess and in return the perfect male child would be selected as part of the sacrifice.

Last year, the High Court of Kerala also put ban on such customary practice and made it as a non-bailable offence. They were charged under Juvenile Justice and charged under 323 of the Indian Penal Code. Even though the ban has been imposed it is still practiced in some parts of Kerala and there is no sign of backing down by the devotees as well as the temple authorities. Last year an IPS form Kerala Sreelekha R bought up this ritual into light which has been still going on parts of Kerala and showed a sense of dissatisfaction against the ritual and had opposed to visit the temple until and unless legislation is been made until further amendment. The IPS officer had said it amounts to child abuse and is punishable offense under 89, 319, 320, 349, 350, and 351 of Indian Penal Code.

3. Essential Religious Practise Test

The essential religious practice test means a part of the custom which is mere obligatory and mandatory ingredient of

the custom and is essential part of their culture. If we traced down the Constituent Assembly debates this term has been widely used in differentiating what forms an essential part of the religion. It was laid down by the SC in order to put a restriction on the customs which is beyond social norms and against the rules of natural justice. This analysis of the ERP test was first laid down in the Shirur Mutt Case¹ the Essential Religious Practice test had been brought into the picture. In this case the Madras Endowments Act, 1951 was in contravention with Article 26 of the Constitution² and it was struck down as it was stated that it did not interfere with essential element of the religion. There were certain principles that were laid down by the Court in this matter that The State shall not interfere in such matters which is essential in the part of the religion and any matters which is social, economic, political or any other secular activities which is different from that of religion, only on such matters State has the right to interfere. The scope of secularism had been widened by the judiciary to distinguish what is essential and what is not through this test. The State can take in consideration the overall welfare of the community but such acts shall also be monitored by the Court that the State won't act beyond its jurisdiction. In this case B.K. Mukherjee observed that:

"A religion may be undoubtedly has its own belief system in which doctrines shall be regarded as religion beneficial to their own spiritual well-being, but it would be wrong to say religion is nothing but just a belief or a doctrine. A religion cannot generate such rule which are ethically correct to its followers to sink in, it might have observe some rituals and ceremonies which may be regarded as a vital part of their religion, even matters relating to dress or food."³

4. Secularism in Indian perspective

Secularism has been a topic which had stirred up a lot of skepticism in the matters of religion. It has been both praised and criticized as the people who praised had found it to be the solution of State and religion whereas the people on the other side found it are erroneous and non-religious. The concept was first brought by G.L Holyoake and later gave wide meaning to the term. In his book Holyoake focused on the relationship between religion and secularism as mutual exclusiveness rather than being antagonistic. In terms of utilitarianism he concludes that the concept of secular morality was independent of religion.⁴ In a democratic country like India the a person has the freedom of religion under Article 25⁵ and to

¹ 1954 AIR 282, 1954 SCR 1005

² Freedom to manage religious affairs Subject to public order, morality and health, every religious denomination or any section thereof shall have the right

(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

³ (1954) SCR 1005, pp. 1023-1024.

⁴ J.M. Shelat, Secularism: Principles and Application (Bombay: Tripathi, 1972) Ch. 2.

⁵ 25. Freedom of conscience and free profession, practice and propagation of religion

(1) Subject to public order, morality and health and to the other provisions of this Part, all persons are equally entitled to freedom of

practice any such religion which he may seem proper, the State shall not interfere with the faith of any person's personal belief or disbelief.

The State cannot favour one religion and disfavour another because awareness is more important than reality. The Sanskrit term Sarv Dharm Sam Bhav means providing equal aids to all the religion and treated with fairness. Donald Smith in his book⁶ stated that in order to be state to be secular it should have religious freedom and there shall be non-sectarian common citizenship. He also emphasized that there shall be no mixture of functions of the State with that of religion. If we look upon the concept of secularism as a Hindu political theory it never believed in theocracy and the powers was not vested only on one domain. The King at past was the guardian of the religion in the ancient times.. Though the system have changed a lot and it would be unfair to compare the ancient norms with that of the modern concept of secularism and it was of the notion that the religious customs shall not be mixed up with political domain and shall be kept apart.

5. Relevant Case Laws relating to Article 25

Another important facet which relates to religion is the breach of public order and creating a sense of disharmony among its people. In instance like where a religious procession whether the use of large speakers by a religious community in the name of a ceremony creates a sense of disturbance to the people who do not follow or practicing that particular culture. So in this case the Court brings down the ERP test to determine whether such ceremony is necessary in their ceremonial procession. There are some milestone cases by the Court in drawing a thin line between what is essential and what is not essential part of the custom.

Acharya Avdhoot v. Commissioner of Police, Calcutta⁷

In this case, the petitioner was a follower of the religious group known as Anand Marg. So a part of their custom TANDAV dance was followed in which a person engaging in the dance shall use a human skull, a trident, stick and a damroo, and such dance was performed in the public roads on special occasions by the followers of the Margis. So the Police Commissioner of Calcutta did not allow the followers to conduct it on the roads as it was causing obstruction and disturbance to the public. So a petition was filed against the

conscience and the right freely to profess, practice and propagate religion

(2) Nothing in this article shall affect the operation of any existing law or prevent the State from making any law

(a) regulating or restricting any economic, financial, political or other secular activity which may be associated with religious practice;

(b) providing for social welfare and reform or the throwing open of

Hindu religious institutions of a public character to all classes and

sections of Hindus Explanation I The wearing and carrying of kirpans

shall be deemed to be included in the profession of the Sikh religion

Explanation II In sub clause (b) of clause reference to Hindus shall be

construed as including a reference to persons professing the Sikh, Jain

or Buddhist religion, and the reference to Hindu religious institutions

shall be construed accordingly

⁶ Donald Smith, India As A Secular State, 1967.

⁷ (1983) 4 SCC 522; AIR 1984 SC 51.

action of the officer who obstructed their ceremonial dance. The High Court of Calcutta held that Margis is not only a religious denomination and it cannot claim protection under Article 25(1). Secondly, the Court emphasized that performing Tandav dance in the public could create a sense of chaos and shall endanger the public order. Thus the followers of Margis were unsuccessful to prove that Tandav dance was an essential part of their religion. Later on the matter was brought down to the Apex Court in which three judge bench by a majority of 2:1 held that Tandav dance do not form an essential part of their practice.

Church of God v. KKR Welfare Association⁸

In this case the use of loudspeakers by the Christian community in the processions by the use of drum sets and other such instruments in very high volume created disturbance in the locality. So a petition was filed before the Madras high court and in the judgment the Court held that the sound shall be brought to minimal level as it affected the peace and harmony of other people who were not part of that religion and emphasize it was violating Environmental Protection rule of 1986. So aggrieved by the decision of the Court the respondents appealed to the Apex Court and contended that being a part of a minority religious character the right to profess religion is being violative under the norms of our Indian Constitution.

The SC held that India is a nation with numerous religious convictions and confidence, various networks or organizations of individuals live in a similar zone and region. Each live it could be said of agreement and harmony. The Constitution has given religious establishment's key directly to rehearse, proclaim and propagate. But the Court held that 'undisputedly no religion recommended that supplications ought to be performed by aggravating the tranquillity of other nor does it lecture that they ought to be through large speaker or even drums. In our view, in an enlightened society for the sake of religion, exercises which exasperate old, decrepit people, understudies or youngsters having their rest in the early hours or amid day time or different people carrying on different exercises can't be allowed.

Md. Hanif Qureshi v. State of Bihar⁹

In this slaughtering of cows was put up in question during the festive season of Eid where cows were slaughtered as part of their religious custom. This matter was brought before the Court in which the Court stated that cow being a backbone of Indian agriculture is a great element in adding to the economy of the State. It was also stated that nowhere in the Quran it was mentioned that butchering of cows during the festive of Eid is an essential part of the religion. Moreover, Article 48 of the Directive principle of State Policy¹⁰ has also brought with

the sense the duty of the State to protect the animals and show compassionate towards animals.

Animal Welfare Board of India v. A. Nagaraja & Ors¹¹

In this case the use of cattle as a commodity or part of the game in festive seasons in the states of Tamil Nadu and Maharashtra was brought down in the limelight as there were subject to physical and mental abuse and pain for the sake of human contentment and satisfaction. The petitioner took the case before the Apex Court questioning the customary practice where the poor animals are being ill-treated by the humans. The most anticipated festive which was brought under this was the Jallikattu festival which is being held in Tamil Nadu where men tossed themselves before the Bulls as a part of their culture. The Court took the matter and stated the cruelty towards animals cannot be bearable in any mean and such sports which has been made for the satisfaction of human pleasure shall be banned and imposed certain stringent conditions against such sports. The Court has brought down the ambit of Article 51-A (g)¹² which is the duty of the person to protect the flora and fauna of the country.

A Close Look On the Sabarimala Case¹³

A writ petition has been filed before the Apex Court challenging the discriminatory nature of the temple against woman into entry of temples in the Sabarimala temple in the State of Kerala by group of lawyers in Delhi. The matter was brought down challenging the Rule 3(b) of Kerala Hindu Place of Public Worship (Authorisation of Entry) Rules, 1965 and discriminatory custom of the temples where woman are not allowed. Eventually the SC by majority of 4:1 lifted the ban of entry of woman in the temple as it founded violative of Article 14, 21 and 25 of the Constitution.

Now the main question which arises whether such practice of the occult temple like Sabarimala where woman is not allowed is an essential practice of the religion. The contention between established rights and age old social traditions isn't new in our Constitutional history. In the of mid of political games, the main blows through established rights allowing fairness and opportunities and statutory laws restricting untouchability and other social shades of malice and the legal executive, where there is restriction by political or populist impulses has helped take forward social change. For a situation like Sabarimala where the directly to equality clashes with the directly of religious establishments there is a need to balance and where the choice of the individuals must come first. There is likewise a solid varying perspective as upheld by Justice Indu Malhotra, who stated that the equality doctrine revered under Article 14 does not abrogate religious opportunities that are as per the principles of a religion.

6. Suggestions and conclusions

⁸ (2000) 7 SCC 282.

⁹ 1958 AIR 731, 1959 SCR 629.

¹⁰ Organisation of agriculture and animal husbandry The State shall endeavour to organise agriculture and animal husbandry on modern and scientific lines and shall, in particular, take steps for preserving and improving the breeds, and prohibiting the slaughter, of cows and calves and other milch and draught cattle.

¹¹ CIVIL APPEAL NO. 5387 OF 2014.

¹² to protect and improve the natural environment including forests, lakes, rivers and wild life, and to have compassion for living creatures.

¹³ WRIT PETITION (CIVIL) NO. 373 OF 2006.

Now regarding the Chooral Mooriyal issue, this is an age old practice prevailing in the society by a way of offering to please the deity by piercing the skin of child shall amount to child abuse even if the consent has been given willingly or unwillingly. In view of that matter the piercing of the child for pleasing the deity can be compared to Sunnat prevailing in the Muslim society. In a country where there is uniform civil code is being followed the laws shall be equal to each and every citizens of the country and not only subjected to only particular sect of the society. Hence any such ceremonies or rituals which directly or indirectly corrupts or hurts the sentiments and creates an emotional turmoil shall be under strict scrutiny.

In a place like India there is more than 3 crore gods in the Hindu mythology. Also if we consider the case of Sabarimala, questioning the celibacy of the deity should be erroneous if we consider in that instance. If we bring rationality and logic into religion half of the custom will have to be struck down. India being a place of diversity and culture the Courts should take utmost care in dealing with the matters of religion and pass such judgment which stay remain neutral between the statute and the devotees. The judgment of the Court shall open up a Pandora box and shall have far reaching consequences, because of the fact that there are other religions also which imposes restriction on women on many aspects. Thus, I conclude with the words of W. Somerset Maugham – “Tradition is a guide and not a jailer”.

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