

Constitutional Analysis of regulating secular activities and social reform throwing open of temples with reference to Religious Endowments – A critical appraisal

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Introduction

If one asks, what is religion? The appropriate and more acceptable answer may be that, "Religion is a way of life". However, this simple notion of the meaning of religion has been made and turned out to be a complex concept in many jurisdictions of the world including that of India. The probable reason for making the meaning of religion as a complex concept may be due to more attachment of the significance of God to religion and sometimes place of worship to religion. As a result India is facing the problem of religious conflicts leading to disharmony in the society.

The notion of adventing temple "commonly called as a place of worship", and its affinity or connectivity to religion has also sometimes led to problem of access of citizens to enter into temples.

The above matter narrated is one side of our story, the other side of the story of our country is very peculiar because this type of stories is not heard in most of the jurisdictions of the world. The story is that India has a very peculiar problem of caste system which has again became the reason for friction between caste and religion, especially in the matter of access to temples for the members of the Scheduled castes, Scheduled tribes communities.

Thanks to our great national cultural heritage that inspite of the midst of much diversity there is unity of all in our country and India is known all over as a best model for exhibiting "Unity in Diversity". Coming back to the theme of the article, the author goes to present that India is a multi-religious country. The Constitutional mandate in our country is "Secularism" that simply signify that "all the religions are equal and must be treated equally". When this is the constitutional mandate which is declared as the basic structure of our Indian Constitution, then at any point of time secularism as a basic structure should not be ruptured through the instrument of law or other means especially by means of mixing religion with politics. If the mixture of religion and politics happens then the communal violence are bound to occur leading to disharmony in society.

The other area of contradiction is that the law of the land, which is common and uniform throughout the country across all states and union territories for the religious minorities, is not so for the Hindu majority. This anomaly is clearly evident from the fact that the Hindu Religious and Charitable Endowment States Enactments are not uniform across the country. In a 'secular' country, which is supposed to have equal respect for all the religions, how could a state have control of only Hindu Temples and not other religious worshipping places? How come the HR and CE Act is enacted in some states and not so in some other states? Therefore, it automatically throws a big question, whether the charter of HR and CE Act is Constitutional?

The authors of this article further focus upon the analysis in the matter of regulating secular activities and that of social reforms and throwing of temples as contemplated in Articles 25 (2)(a) and 25(2)(b) of our constitution. Further the authors also would like to look at these topics in a critical way and come forward with some suggestions for reform in laws.

I. Concept of Religious Endowment and Secularism:

1. Meaning and Definition of Religious Endowments:

The definition of endowments recognised by the courts since long includes the properties set apart or dedicated by gift or devise for the worship of some particular deity or for the maintenance of a religious or charitable institution, or for the benefit of the public or some section of the public in the advancement of religion, knowledge, commerce, health, safety or for any other object beneficial to the mankind. According to Raghvachariar¹ an endowment is referred to as the setting apart of property for religious and charitable purposes in which there is a Karta and a specific thing which can be ascertained. A disposition in India to be a public trust must be made with the purpose of advancement of either religion, knowledge, commerce, health, safety or other objects beneficial to the mankind.

'Religious Endowment' or 'Endowment' means all property belonging to or given or endowed for the support of a Hindu religious institution other than an institution which is an inseparable integral part of a composite institution consisting of institutions other than religious institutions also, or given or endowed for the performance of any service or charity of a public nature connected therewith or of any other religious charity, and includes the institution concerned and also the premises thereof but does not include gifts of property made as personal gifts to the archaka, service-holder or other employee of a Hindu religious institution.

2. Kinds of Endowments:

Endowments are of different kinds which can be placed in different categories in the following manner— (a) Public or private; (b) Real or apparent; (c) Absolute or partial; (d) Religious or charitable; (e) Valid or invalid.

Public and Private Endowment²:

In order to ascertain the nature of the endowment as to whether it is public or private the subsequent conduct of the settler and use of the evidence of the property set apart by the

¹Author, Hindu law, Principles and Precedents, 5thedn. (Madras, 1965)
²www.shareyouressays.com

public at large are to be considered. In fact when a temple is thrown open for public at large for worship, a valid inference can be drawn that a public trust has been intended to have been created, where the outsiders along with the members of the family of the settler take part in worship in celebration of festivals in a temple as in public temples, the state of affairs point out to the public nature of the endowment.

In contrast private endowment is that in which the public has no ingress, as an endowment for the worship of the family deity of the settler. Where the property is kept separate safely for the worship of family deity by family members only, with which the public has nothing to do, it is a private endowment.

In *Venugopalaswamy v. H. R.E. Board*³, it was laid down that where the temple was initially set apart for the use of the family members only and subsequently if some outsiders are allowed ingress therein, it will not automatically alter the private nature to public.

The Madras High Court in *KeshavGounder v. D.C. Rajan*⁴, held that there is very minute difference between the public and private endowment. In public endowment the interest of general public or of a group of persons is protected and involved, wherein in private endowment the interest of the settler of the trust or his family members only is protected and involved. In fact in private trust the interest is to dedicate pleasurly to the family deity something and the public has nothing to do with it.

The Supreme Court in *G.S. Kaha Lakshmi v. Shah Ranchod Das*⁵, said that the temple of Sri GokulnathNadeyad is a public temple and the trust created is of public nature dedicated and created by the Ballabh cult and its supporters of Nadiad. The fact that any individual could enter into the temple only after the worshipping by goswami is over, does not militate in any way the public nature of the temple. Further the fact that temple is having house like appearance does not clearly establish that the temple is not a public temple.

The Supreme Court has delivered an important judgment after a lapse of a decade in *Radha Kant Deo v. The Commissioner, Hindu Religious Charitables*⁶, the Court observed that a religious endowment of private nature cannot be conceived under English law. It can only be thought of in Hindu law. The court laid down the following test to determine the public and private nature of endowment –

1. Where the origin of endowment cannot be ascertained, the question to be determined is as to whether the members of public use it by way of right.
2. Another fact to be determined is that whether it is controlled by a group of persons or by the founder of endowment only.
3. It may be concluded that the endowment is of public nature where the document with respect to its creation is available and it is clear from the language of the deed that the control over the endowment is vested in the founder or in his family and a greater part of the property of the founder has been dedicated in the endowment to that temple.
4. Again in absence of any evidence to show that the founder has given any classification with respect to

the fact that the member of public would contribute any share to it, this itself proves that the endowment is of private nature.

The Allahabad High Court in Suit, *Sarjoo v. Ayodhya Pd.*, founded the view that it is not possible to conclude about the nature of endowment from a single characteristic alone. In fact the entire evidence and circumstances are to be examined under which it was created. Non-appointment of a pujari shows the private nature; but appointment of pujari by members of different families establishes the public nature.

3. Meaning of secularism:

Even after more than seven decades of independence and despite an emphatic proclamation by the constitution that we are secular, still things are not so bright. Before proceeding further, it is necessary to have an idea of the nature and meaning of the term 'secularism'. It is interesting to note that there is no agreed and precise meaning of 'secularism' in our country. As Jawaharlal Nehru wrote in his autobiography... "no word perhaps in any language is more likely to be interpreted in different ways by the people as the word 'religion'. That being the case, 'secularism' which is a concept evolved in relation to religion can also not have the same connotation for all".

In *M.P. Gopalakrishnan Nair and Anr.v. State of Kerala and Others*⁷, the Supreme Court again notices in paras 19 and 21 reading as under:

India is a secular country. Secularism has been inserted in the Preamble by reason of the Constitution 42nd amendment Act, 1976. The object of inserting the said word was to spell out expressly the high ideas of secularism and the integrity of the nation on the ground that these institutions are subjected to considerable stresses and strains and vested interests have been trying to promote their selfish ends to the great detriment of the public good. It is now well-settled:

1. The constitution prohibits the establishment of a theocratic State.
2. The Constitution is not only prohibited to establish any religion of its own but is also prohibited to identify itself with or favouring any particular religion.
3. The secularism under the Indian Constitution does not mean constitution of an atheist society but it merely means equal status of all religions without any preference in favour of or discrimination against any one of them.

4. Background of laws for religious endowments:

In 1840, the then British Government started giving up administration of temples. They asked some of the prominent mutts in Tamil Nadu to look after some of the important temples and endowments. The Heads of Mutts who were happy to take over the administration of these temples for the purpose they can run as they ought to be run, were careful enough to get written documents from the British Government, which assured them that they would not take back the temples from the Mutts.

Thus some temples came under the complete control and ownership of these Mutts and the Mutts ran them efficiently. The primary purposes of worship and utilization of funds meant for the upkeep of temples and conduct of rituals were never lost sight of by the Heads of Mutts or officers. While a few

³ (1952) 1 MLJ 557

⁴ AIR (1976) Mad 102

⁵ www.shareyouressays.com

⁶ Ibid

⁷ AIR 2005 SC 2053

temples were thus brilliantly administered by the Mutts, thousands of other temples in the then Madras Presidency were handed over to the respective trustees with the then Government playing little or no role in supervising

In 1925, the Madras Hindu Religious Endowments Act, 1923 (Act I of 1925) was passed by the local Legislature with the object of providing for better governance and administration of certain religious endowments. The Act divided temples into Excepted and Non-excepted temples. Immediately after the Act came into force, its validity was challenged on the ground that the Act was not validly passed. For this reason, the legislature enacted the Madras Hindu Religious Endowments Act, 1926, Act II of 1927. This Act was amended from time to time and radical changes were introduced. Meanwhile, India after gaining independence from British rule had becoming a Republic on 26 January 1950, with its Constitution guaranteeing certain fundamental rights to its citizens. Special religious and administrative rights were guaranteed to Religious Denominations or sections thereof.

The Board also tried to take over the famous ShriGuruvayurappan Temple in Guruvayur, UdipiShri Krishna Temple under the management of ShriShirur Mutt of Udipi and ShriVenkataramana Temple belonging to the sect of GowdSaraswath Brahmins in Mulkipetta of South Kanara district.

All the above religious institutions challenged the takeover by the HRCE Board. In the meantime, a new Hindu Religious Act was passed by the Madras Government, known as the Hindu Religious and Charitable Endowments Act, 1951.

The cult of religious worship developed and Gifts for religious and Charitable purposes were impelled by the desire to acquire religious merit. So the Hindu temples are founded, endowed and maintained generally for the benefit of general Hindu public.

In earlier period it was a private affair and as an when the temples became inspiring centres of the Social and Cultural life of the Community, Centres of promotion and patronage of art and architecture, and other fine arts, and began to serve as a centres of learning and fostering and growth of the piety and learning and as an effective instrument of poor-relief, it began to become a public affair. Since dedication is the renunciation of ownership, to the deity, and hence began the accumulation assets beyond imagination and slowly mismanagement, discrepancies, and mal administration began to Geep into the temple administration to keep it within the domain of persons with ulterior motive.

As such the object of the legislation of the Madras Hindu Religious & Charitable Endowment Act 1951, as indicated in the preamble is "to amend and consolidate thelaw relating to the administration and governance of Hindu Religious & Charitable Endowment". So the Hindu Religious & Charitable Endowment Act exists for better administration, protection and preservation of temples and the endowed properties attached thereto, and for fulfilment of the objects, with reasonable restrictions, which do not violate the rights of religious freedom guaranteed by the constitution.

II. Constitutional validity of religious endowments laws:

The constitutional validity of religious endowment laws in our country are tested on the grounds of equality which is a touch stone of our constitution as per Article 14 and further the

religious endowment laws constitutionally tested in the event of violation of Art. 26 read with Article 26(d) of the Constitution.

1. Constitutional validity of religious endowment laws under Art. 14

Article 14 prohibits discrimination. It further prohibits an arbitrary, unreasonable Act on the part of the state. Equality and equal protection is available to all citizens of the country. There can never be discrimination by the State. These principles are well settled.

In *MosebKabaChowdhary&Anr.v. State of West Bengal*⁸, dealing with Article 14 of the Constitution of India. The Supreme Court has ruled as under: It is well established by the decisions of Supreme Court that Article 14 condemns discrimination not only by a substantive law but also by a law of procedure.

2. Constitutional validity of religious endowment under Art. 26 read with Art. 26(d):

In *K. MukundarayaShenoy v. The State of Mysore*⁹, the court has considered the right of administration of a religious denomination temple. The Court ruled in that case that a law which takes away the right of administration from the hands of a religious denomination altogether and vests it in any other authority would amount to a violation of the right guaranteed under Article 26 of the Constitution of India.

In the subsequent Judgment reported in *AngappaGoundan v. Kuppammal*¹⁰, the Court considered the question of Hindu public temples. The Court noticed MukundaryaShenoy's case and after noticing, a Division Bench of this Court has ruled that the Hindus in the larger sense, including all sections of Hindus constitute a religious denomination within the meaning of Articles 25 and 26 of the Constitution of India. This Judgment would show that in the matter of temple administration, the state cannot discriminate between Hindu Religious denomination Visa-vis, the Hindu temple. The inapplicability to the Hindu religious institution by Hindu Religious denomination is also hit by Article 14 of the constitution of India. State has failed in its duty to justify its exclusion on the facts of this case.

The Supreme Court has ruled in *BalPatil and Anr. v. Union of India*¹¹ that the State has no religion and State has to treat all religions and religious people equally and with equal respect without in any manner interfering with their Individual rights of religion, faith and worship.

In *Ratilal v. State of Bombay*¹², the supreme Court has ruled as under in para 11:

The language of this two Clause (b) and (d) of Article 26 would at once bring out the difference between the two. In regard to affairs in matters of religion, the right of management given to a religious body, is a guaranteed fundamental right which no legislation can take away, on the other hand, as regards administration of property which a religious denomination is entitled to own and acquire. A law, which takes away the right of administration altogether from the religious

⁸ AIR 1958 SC 536

⁹ 1959 Mys LJ 709

¹⁰ (1970) 1 MLJ 170

¹¹ AIR 2005 SC 3172

¹² AIR 1954 SC 388

denomination and vests it in any other or secular authority, would amount to violation of the right which is guaranteed by Article 26(d) of the Constitution.

In the *Shirur Mutt Case*, the SC has given its ruling as under: The judgment of the Constitution Bench of the Supreme Court in the appeal related to the Shirur Mutt and the judgment by another Constitution Bench in the *Venkataramana Devaru vs. State of Mysore*¹³ are landmark judgments that Courts in India are expected to follow regarding Article 26 of the Indian Constitution and Denomination rights. The Hon'ble Supreme Court agreed with the Hon'ble Madras High Court that many of the sections of the 1951 HR & CE Act were ultra vires the Constitution. It also clearly observed that while the legislature could seek to regulate the administration, it must always leave the administration to the denomination. The Advocate General of Madras agreed with the Court and said he could not defend those sections.

3. Analysis of Article 25(2)(a) and (b) r/w Article 26:

The aforementioned topic is very relevant and interesting for the purpose of this research article for mainly one reason i.e., the Constitution of India had originally mentioned the word 'Secular activity' found in Article 25(2)(a) which reads as under:

"Regulating or restricting any economic, financial, political or other secular activity which may be associated with religious practice"¹⁴.

This signifies to show that our Constitution was Secular in character before inserting the word 'Secular' in the Preamble by way of 42nd Amendment to the Constitution.

Article 26(2)(b) reads as under:

"Providing for social welfare and reform or throwing open of Hindu religious institutions of a public character to all classes and sections of Hindus".

The authors of this article now proceed to analyse the aforesaid Article especially provision sub clause 2 (a) & (b) r/w Article 26.

By verbal reading of Article 26 providing for freedom for religious affairs, it may be submitted that sub clause (a) provide for establishment and maintenance of institutions for religious and charitable purposes, whereas sub clause (b) provides for managing the own affairs of matters of religion by the aforesaid institutions and charities. Sub clause (c) own and acquire movable and immovable properties and sub clause (d) provides for administering such property in accordance with Law belonging to religious institutions and charitable trusts.

The combined reading of Article 25(2)(a) & (b) and that of Article 26(b) & (d), it may be submitted that the power is not vested in the State to interfere with the administration of properties of religious institutions and charitable institutions through a law made by the Parliament or State Legislature, whereas the power is conferred upon the state to interfere with the managing of the affairs of religious institutions and charitable Trusts since managing of the affairs of the said institutions is a Secular activity.

Reference could be seen from the judgment of the Supreme Court in the case of *Sardar Sarup Singh v. State of Punjab*¹⁵, held that the administration of the property by religious denomination is placed on a different footing from the

right to manage its own affairs in the matter of religion which is a fundamental right which no legislature can take away.

There is no inference in Article 25(2)(a) as to what are secular activities and what are not. This is evident when we look at the judgments as narrated below:

In *Tilakayat Shri Govindlalji Maharaj v. State of Rajasthan*¹⁶, the Supreme Court ruled that the right to manage the properties of temples was a purely secular matter and could not be regarded as a religious practice under Article 25(1), or as amounting to 'matters of religion' under Article 26(b). Slaughtering of animals is considered with economic activity and law can regulate the same. Earlier, the Supreme Court had upheld a law restricting slaughter of animals, but permitting slaughter of an animal other than a cow, and a bull over 15 years, for bonafide religious purposes. There was no violation of Art. 25 because of Art. 25(2)(a). Subsequently, overruling 5 earlier decisions to the contrary, a total prohibition of the slaughter of progeny of cows has been held to be ultra vires the Constitution. So also conducting of examinations and fixing of schedules is considered as a secular activity but cannot be protected under Art. 25.

Now the authors of this article go on to analyse the provision sub clause (2)(b) of Art. 25. When analysed it may be submitted that there exists two models of secularism which are possible in India. The first model is the state should be away and separated from religion. The second model of Secularism is the state should treat all the religions equally and must have equidistance from all religions. In the first model the state will not interfere in the religious matter, whereas in the second model the state interferes with the religious affairs on the grounds of public order, morality and religion. In this regard reference could be made with the judgement of the Supreme Court in *Krishna Singh v. Mathura Ahir*¹⁷, held that the fundamental rights do not touch upon the personal laws of the parties. Art. 25 thus involve a separation between 'religious activities on one hand and secular and social activities on the other hand.

Now, the authors precede to analyse the other part of Art. 25(2)(b) which says that 'the state can throw open Hindu Religious institutions of a public character to all section of the Hindus'. To substantiate the above narration it is submitted that Art. 25(2)(b) is divided into two parts namely:

1. Measures of social reform and
2. Throwing open of Hindu religious institutions of public character for the members of Hindu religion.

In regard to the first part "Measures of social reform are permissible and would not be void on the ground of interfering with freedom of religion. Thus, Hindu marriage Act which introduces the principle of monogamy for the Hindus is undoubtedly a law providing for social welfare and social reform. It is a legislation intended for the benefit of the class of persons to whom the Act applies¹⁸. Thus, legislative interference with law of marriage does not constitute an infringement of Hindu religion. Succession like marriage, is a secular matter and is not within the guarantee contained in Art. 25¹⁹.

¹⁶ AIR 1963 SC 1638 : (1964) I SCR 561

¹⁷ AIR 1980 SC 707

¹⁸ State of Bombay v. Narasu, AIR 1952 Bom. 84

¹⁹ John Vallamattom v. Union of India (2003) 6 SCC 611 page 627

¹³ 1958 SCR 895

¹⁴ M.P. Jain, Indian Constitutional Law, Lexis Nexis, 7th Edn,

¹⁵ AIR 1959 SC 860 : 1959 Supp(2) SCR 499

Whereas the second part reflect due to the fact of existence of practice of untouchability in society in the matter of entry into temples/ religious institutions which are of public character to the members of SC/ST who also constitute part and parcel of Hindu Religion. Therefore the state can interfere and enact suitable legislations for providing access to temples to the members belonging to SC/ST and women of Hindu religion.

Reference could be made to the judgment of the case of *Sri Venkataramana Devaru v. State of Mysore*, where the court held that Public institutions mean not merely temples dedicated to the public as a whole, but even those which are founded for the benefit of the sections thereof.

It is further submitted that throwing open of Hindu religious institutions of public character to Hindus is not an absolute right since there may be restrictions for access on the basis of time, and on the basis of performance of pooja by a particular group of Hindus.

However by all means any temple which is public in character cannot deny the entry of any individual since the temple is for the purpose of satisfying the desire of the devotees for their prayers and performance of pooja.

The Hon'ble Supreme Court delivered a landmark judgement in the case of *Indian Young Lawyers Association and Ors. V. State of Kerala*²⁰ W.P. (C) No. 373 of 2006, (Judgement delivered on 28th September 2018), holding that women within the age of 10 years to 50 years have every right to enter Ayyappa Swamy temple in Sabarimala. However it is very unfortunate that women till today are not allowed to enter into the aforesaid temple. The government of Kerala and its police administration has not made satisfactory attempt for implementing the aforesaid Supreme Court judgement.

Conclusion:

The authors of this article respectfully conclude that the interpretation of law should understand the intent and content of Article 26(2)(b) to do justice for all the Hindus irrespective of caste, religion, colour, sex and gender.

²⁰ AIR SC 2018