RIGHT TO EQUALITY VERSUS RIGHT TO FREEDOM OF RELIGION: AN INDIAN PERSPECTIVE (ARTICLE 14 v. ARTICLE 25 OF INDIAN CONSTITUTION)

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INTRODUCTION:

We cannot learn LAW by learning LAW, the dictum propounded by Lord Radcliffe, equally applies to the concept of understanding rights, in its narrow and broad spectrum. Rights form the key idea in contemporary political, moral and legal philosophy, and in the vast ambit of social engineering. The scope of rights led to moral and analytical sophistication, in their interpretation, to suit the socio-economic-cultural background. Rights have taken the colour of utilitarianism, branching to individual and goal based interpretation and understanding of the concept. In the words of Feinberg "Rights are not mere gifs or favours, but something a man can stand upon and something that can be demanded or insisted upon without embarrassment or shame, and no amount of love or compassion or obedience to the higher authority, can substitute to the value imbedded in rights."

Being so, how much weight should be given to rights, can all rights can be trumped, and what happens when rights conflict, the answer to this lies on the strengths of rights and the urgency and pre-eminence of rights as they are perceived, and such perseverance is an interest recognised and protected by rule of law of the land, to become legally enforceable, an interest to become a legal right, not only require legal protection, but also legal recognition. And an interest to become both protected and recognised right must fulfil certain criteria.

The fundamental rights as envisaged in the Indian Constitution form the corner stone of humanitarian jurisprudence, and stalwarts like Justice Krishna Iyer and the like have given a very broad interpretation to safe guard the rights of an individual, when in conflict with over all social goals. The chapter of fundamental rights as envisaged in the text of the Constitution

can trace it s roots in the American Bill of Rights, which act as a guiding force in its interpretation to suit the needs in the Indian situation.

The concept of fundamental rights in relation to the right to freedom of religion have undergone a sea change due to socio-economic, cultural development, the right to religion as thought about by the framers of the Indian Constitution is quite different from which took shape in the minds of the present generation of Indian population, the reason being that, science is trying to bridge a gap between myths and philosophy, the Indian psyche have grown to an extent of reasoning, and requiring empirical proofs to accept any situational understanding about the various restrictions placed on concerned religious beliefs and practices, and any restrictions placed on different religious practices is gaining attention of psychological reactance which is to be managed and brought under the ambit of legality, else may create a havoc in the given society.

WHAT IS RIGHT TO EQUALITY?

The Constitution of India guarantees the right to equality through articles 14 to 18. Art. 14 outlaws discrimination in a general way and guarantees equality before law to all persons. In view of certain amount of indefiniteness attached to the general principle of equality enunciated in article 14 separate provisions to cover specific discriminatory situations have been made by subsequent articles. Thus Art. 15 prohibits discrimination on such specific grounds as religion, race, caste, sex or place of birth. Art. 16 guarantees to the citizens of India equality of opportunity in matters of public employment. Art. 17 abolishes untouchability, and Art. 18 abolishes titles. In this series of Constitutional provisions, Art. 14 is the most significant. It has been given a highly activist magnitude in recent years and thus it generates large number of court cases. In situations not covered by article 15 to 18, the general principle of equality embodied in Art.14 is attracted whenever discrimination is alleged.

Art. 14:

Article 14 runs as follows: “the state shall not deny to any person equality before the law or the equal protection of law within the territory of India.” This provision corresponds to the equal protection clause of the 14th amendment of the U.S. Constitution which declares “ no state shall deny to any person within its jurisdiction the equal protection of laws .” Two concepts are

involved in Art. 14 viz. 'Equality before law' and 'Equal protection of laws.' The first is a negative concept which ensures that there is no special privilege in favour of anyone that all are equally subject to the ordinary law of the land and that no person whatever be his rank or condition, is above the law. The second concept is positive in content. It does not mean that identically the same law should apply to all persons, or that every law must have a universal application within the country irrespective of difference of circumstances. What it postulates is the application of the same laws alike and without discrimination to all persons similarly situated. It denotes equality of treatment in equal circumstances. It implies that among equals the law should be equal and equally administered, that the like should be treated alike without distinction of race religion wealth social status or political influence. All persons are not equal by nature, attainment or circumstances. The varying needs of different classes or sections of people require differential and special treatment. The legislature is required to deal with diverse problems arising out of an infinite variety of human relations. It must therefore necessarily have the power of making laws to attain particular objects and, for that purpose of, distinguishing, selecting and classifying persons and things upon which its laws are to operate. The principle of equality of law thus means not that the same law should apply to everyone but that a law should deal alike with all in one class; that there should be an equality of treatment under equal circumstances the Supreme Court has underlined this principle thus: "Art.14 of the Constitution ensures equality among equals its aim is to protect persons similarly placed against discriminatory treatment." Classification to be reasonable should fulfil the following two tests. (1) It should not be artificial, arbitrary or evasive. It should be based on intelligible differentia, some real and substantial distinction, which distinguishes persons or things grouped together in the class from others left out of it. (2) The differentia adopted as the basis of classification must have a rational or reasonable relationship to the object sought to be achieved by the statute in question. What is however necessary is that there must be a substantial basis for making the classification and that there should be a nexus between the basis of classification and the object of the statute under consideration. Therefore mere differentiation or inequality of treatment does not per se amount to discrimination within the inhibition of the equal protection clause. As the Supreme Court has explained: "The differentia which is the basis of the classification and the act are different things and what is necessary is that there must be a nexus between them." Whether a classification adopted by a law is reasonable or not is a matter for the courts

to decide. The courts, however, show a good deal of deference to legislative judgement and do not lightly hold a classification unreasonable. A study of the cases will show that many different classifications have been upheld as Constitutional. There is no closed category of classification; the extent, range and kind of classification depends on the subject matter of the legislation, the conditions of the country, the economic, social and political factors at work at a particular time. The Supreme Court has explained the rationale as follows: many a time, the challenge is based on the allegation that the impugned provision is discriminatory as it singles out the petitioner for hostile treatment, from amongst persons who, being situated similarly, belong to the same class as the petitioner. Whether there are other persons who are situated similarly as the petitioner is a question of fact. And whether the petitioner is subjected to hostile discrimination is also a question of fact. That is why the burden to establish the existence of these facts rests on the petitioner. Art. 14 can apply only when discrimination results from laws emanating from one single source and not when one law enacted by one legislature is different from a law enacted by another legislature. For some time a new orientation is being given to Art. 14. As has been explained by Bhagwati J. In Bachan singh v. State of Punjab, rule of law which permeates the entire fabric of the Indian Constitution excludes arbitrariness. Art. 14 enacts primarily a guarantee against arbitrariness and inhibits state action, whether legislative or executive which suffers from the vice of arbitrariness.

WHAT IS RIGHT TO FREEDOM OF RELIGION?

Articles 25 to 28 confer certain rights relating to freedom of religion not only on citizens but on all persons in India. These Constitutional provisions guarantee religious freedom not only to individuals but also to religious groups. India being a secular state, there is no state or preferred religion as such and all religious groups enjoy the same Constitutional protection without any favour or discrimination. Secularism in India does not mean irreligion, it means respect for all faiths and religions. Religion has been a very volatile subject in India; the Constitution thus seeks to ensure state neutrality in this area.

Article 25: Freedom to Profess or Practise Religion

Article 25 confer to every person and not only to citizens, the freedom of conscience and the right to freely profess, practise and propagate religion." This however is subject to public order, health, morality, and other provisions relating to fundamental rights. The state is not, however

prevented from making any law regulating or restricting any economic, financial, political or other secular activity which may be associated with religious practice or any law providing for social welfare and reform, or for throwing open of Hindu religious institutions of a public character to all classes and sections.

What is religion?

The term 'religion' has not been defined in the Constitution but the Supreme Court has given it an expansive content. The guarantee under article 25 subject to the exceptions mentioned, confers a fundamental right on every person not merely to entertain such religious beliefs as are allowed by one's judgement or conscience, but also to exhibit his beliefs and ideas in such overt or outward acts and practices as are sanctioned or enjoined by his religion and further to propagate and disseminate his religious beliefs, ideas and views for the benefit and edification of others. Religion is a matter of faith. A religion undoubtedly has its basis in a system of beliefs and doctrines which are regarded by those who profess that religion as conducive to their spiritual well being, but it is also something more than merely a doctrine of belief. A religion may not only lay down a codes of ethical rules for its followers to accept but may also prescribe rituals and observances, ceremonies and modes of worship which are regarded as an integral part of that religion. Therefore the Constitutional guarantee regarding freedom of religion contained in article 25(1) extends even to rites and ceremonies associated with a religion. In order however that a practice should be treated as a part of a religion it is necessary that it be regarded by the said religion as its *essential* and *integral* part. Certain practices even though regarded as religious may have sprung from superstitious beliefs and may in that sense be only extraneous to a religion. Therefore the norm that only such practices are essential and integral part of a religion need to be protected. It therefore falls upon the courts to decide, on the basis of the tenets of the religion concerned whether a practice for which protection is claimed is an essential and integral part of the said religion or is merely 'secular' or 'superstitious'.

Social reform and throwing open of temples: Art. 25(2) (b) contains two ideas: (i) Measures of social reform are permissible and would not be void on the ground of interfering with freedom of religion. Art. 25 thus involves a separation between religious activities on one hand and secular and social activities on the other. While the former are protected the latter are not.

(ii) The state can throw open Hindu religious institutions of a public character to all sections of Hindus. Art. 25(2) (b) enables the state to take steps to remove the scourge of untouchability from amongst the Hindus. The word public here includes any section of the public. Public institutions would thus mean not merely temples dedicated to the public as a whole, but even those which are founded for the benefit of sections thereof and denominational temples would thus fall within the scope of this clause. Art. 25 (2) (b) protects the right to enter into a temple for the purpose of worship. This however is not an unlimited right.

The above interpretation throws light on what is guaranteed to the citizens. This interpretation also shows the conflict and contradiction within the Constitutional rights guaranteed. Neither the Constitutional makers nor the interpreters could decipher the conflict. So it can only be evident from the past the judgements and the legal history in this scenario is arbitrary and never gave a proper explanation as to whether article 14 prevails over article 25 or vice versa.

RIFT:

Many previous judgements show the rift between right to equality and right to freedom of religion. These judgements throw light on the long lasting debate on Right to equality from a 'Gendered' perspective in India. Not only throwing open of temples but also many religious practices which pose a threat to the concept of gendered equality are questioned and some of the judgements which show the rift as well as what is essentially "the essential practice" are discussed. The Triple Talaq case decided by the Supreme Court has won it a lot of appreciation in the last couple of months. A catena of similar judgments has been delivered by constitutional Courts in India in the recent and not-so-recent past. Although each of these individual cases seemingly stems from a completely different subject area, the common strain that ties all of them in one long chaotic web is the consistent application of the inconsistent principle called the Essential Religious Practices test. This doctrine gives birth to an unstable system that gives judges the discretion to decide each invocation of Article 25 on its own merits, depending on which religion the petitioner belongs to. Even an elementary reading of this doctrine will immediately expose how flawed it is and that it is blatantly violative of Article 14. That fundamental rights must be read harmoniously is trite law. That despite it, a doctrine such as the essential religious practices test has been coined by the Supreme Court is what is appalling. The essential religious practices test baldly ignores the phrases "Subject to…. the other

provisions of this Part" and "equally entitled to", hence further cementing the intention of the Article to be in perfect consonance with Article 14. In the Sabarimala case, the Temple Board had argued and the Kerala High Court also *upheld* that young women should not offer worship as the temple deity is a *Brahmachari* (a celibate). In Goolrukh's case, a Parsi woman was excommunicated from her faith and disallowed entry into the Fire Temple on a self-assumed premise that women ought to take on the religion of their husband, implying that women cannot have their own religious stance. An astonishing thought remains that in both the cited cases, both High Courts gave precedence to the consideration of a religious institution's rights and a religious custom's "essential character" over the right to equality and non-discrimination – the rights of women to be treated with dignity and with equal participation in society. Justice Chandrachud's take in Sabarimala case was that if a practice is essential to a religion, then it rules out testing that practice on benchmarks of the Constitution or Constitutional morality. Thus, it could help perpetuate an immoral or outdated or unconstitutional practice in the name of religious freedom. However, the interesting point is that it is the judges themselves who have been deciding what constitutes an essential practice and what does not, on a case to case basis. Justice Chandrachud also recognised this completely when he stated, *"Due to this essentiality doctrine, Judges including Supreme Court judges are now assuming a theological mantle which we are not expected to do."* And what is his solution? Constitutional morality irrespective of whether a practice is essential or not. *"The test should be whether a practice subscribes to the Constitution irrespective of whether it is essential or not".* This could be a significant step in that it could have a major impact on various practices and customs of all religions including on personal laws.

Equal rights and dignity of women are subverted in upholding the right of religious institutions, on account of the fact that much importance is given by Courts to the identification of 'essential practices of religion'. Instead, what is necessary is an effort to identify the customs that are discriminatory and derogatory towards women and hold them in violation of the rights mentioned in our Constitution. This may be done by recognizing customs within the definition of 'law' as per Article 13(3)(a) of the Constitution and hence be declared void as per Article 13(1), when found in derogation of Fundamental Rights (hereinafter referred to as 'the test for laws in force'). There are two judgments that are relevant to the discussion of a 'test for laws in force'. In the case of *Noorjehan v. State of Maharashtra*, the Bombay High Court, adjudicating

a challenge to the ban on women's entry into the sanctum sanctorum of the Haji Ali Dargah, held that women be allowed unhindered entry into the famous shrine. The Bombay High Court held that Articles 14,15 and 25 of the Constitution would come into play once a public character is attached to a place of worship, on which account a religious trust cannot discriminate on the entry of women under the guise of 'managing the affairs of religion' under Article 26. However, the Bombay High Court did not decide on customs having force of law under Article 13(3)(a), for the simple reason that the respondent itself did not plead the existence of any custom on the basis of which women were denied entry. Even the Supreme Court in the recent Triple Talaq judgment, failed to apply the 'test for laws' in force so as to hold that the practice of triple talaq falls under Article 13(3)(a), which must be voided under Article 13(1), Justice Nariman and Justice U.U. Lalit did indeed apply the test for laws in force to recognize the custom of Triple Talaq as falling within Article 13(3)(a), they held it unconstitutional on the narrower ground of it being "manifestly arbitrary" as against Article 14.

The legal challenge to the exclusion of women in the 10-50 age group from the Sabarimala temple in Kerala represented a conflict between the group rights of the temple authorities in enforcing the presiding deity's strict celibate status and the individual rights of women to offer worship there. The Supreme Court's ruling, by a 4:1 majority, that the exclusionary practice violates the rights of women devotees establishes the legal principle that individual freedom prevails over purported group rights, even in matters of religion. To Chief Justice Dipak Misra, any rule based on segregation of women pertaining to biological characteristics is indefensible and unconstitutional. Devotion cannot be subjected to the stereotypes of gender. Justice D.Y. Chandrachud said stigma built around traditional notions of impurity has no place in the Constitutional order, and exclusion based on the notion of impurity is a form of untouchability. Justice Rohinton F. Nariman said the fundamental rights claimed by worshippers based on 'custom and usage' must yield to the fundamental right of women to practise religion. The decision reaffirms the Constitution's transformative character and derives strength from the centrality it accords to fundamental rights.

Women's religious rights have seen slow reforms, yet there is no strong, cohesive effort by courts to declare discriminatory religious customs as unconstitutional. For instance, while there is a growing awareness of the role of women priestesses, there is only an old Supreme Court

judgment that recognizes a Hindu female's hereditary right to succeed to the priestly office of a pujari, which does so, only in the narrow context of the administrative responsibilities of such office. There is no recognition of her equal right or ability to perform sacred rituals as a pujari.

CONCLUSION:

In lieu of conclusion it is imperative that courts lay down uniform standards that leave no doubt about the unconstitutionality of discriminatory and regressive religious customs. The stress on Article 26(2) and even Article 25 may be misplaced – Article 13(3)(a) is widely worded to include ordinance, order, bye-law, rule, regulations, notification, *custom or usage...* within the definition of laws in force. The recognition of religious customs and usages as laws in force will ensure that those in derogation of Fundamental Rights are struck down as per Article 13(1) of the Constitution. These matters should be seen as an opportunity to uniformly apply the 'test for laws' in force: declare religious customs as laws in force under Article 13(3)(a) and clean the country of customs that are discriminatory and derogatory towards women and in violation of their Fundamental Rights. On the whole let us strive towards a truly secular and irreligious state where right to equality is upheld over religious prejudice like the recent judgements of Sabarimala and Triple Talaq, but then a state without religion would not be suitable for vote bank politics. Hopefully any further conflict reaching the courts, the judges should be wise enough to follow the precedents which pave way to reformation and uphold the constitutionality of fundamental rights.

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