RELIGIOUS FREEDOM AND DOMINANT COMMUNITY DOCTRINE

Written by ***Ajitha Nair L***

Associate Professor, Kerala Law Academy Law College, Peroorkada, Trivandrum, Kerala, India

INTRODUCTION

Article 25 to 28 of the Constitution are specially blossomed for the ornamentation of right to freedom of religion to citizens, that constitutes freedom conscience and free profession of religion under Article 25, freedom to manage religious affairs under Article 26, freedom from payment of taxes for promotion of any particular religion under Article 27 and freedom to attend religious instructions under Article 28. The word ‘religion’ used in articles 25 and 26 of the Constitution is personal to the person having faith and belief in the religion. The religion is that which binds a man with his cosmos, his Creator or super force. Fundamentally, religion is a matter of secluded faith and belief or intimate relations of an individual with what he regards as cosmos, his Maker or his Creator which, his beliefs, regulates the existence of insentient beings and the forces of the universe. Religion cannot be spell out in the context of articles 25 and 26 in its strict and etymological sense. The approach to construe the protection of religion or matters of religion or religious practices guaranteed by articles 25 and 26 must be viewed with big-headedness since by the very nature of things, it would be extremely difficult, if not way out, to define the expression religion or matters of religion or religious belief or practice, this proposition was affirmed in A.S Narayana Deekshitulu v State of Andhra Pradesh[i] . A religion may not only lay down a code of ethical rules for its followers to welcome, it might prescribe rituals and observations, ceremonies and modes of worship which are considered as integral parts of religion, and these forms and observances might extend even to subjects of food and dress.

LEAVES FROM CONSTITUTION OF INDIA

It is for the Courts to decide whether a practice for which protection is claimed as an essential or integral part of the religion or is secular in nature, but here comes the difference that, the instance of court interference must satisfy the 'imminent danger test or public interest test', this was absent in our Constitution, in a nation of various religious flowers are there, the adoption of this doctrine is necessary, as because , it can serve equality concept or secular state concept in the nation.[ii] Though performance of the ritual ceremonies is an integral part of the religion, the person who performs it or associates himself with performance of ritual ceremonies, is not. There is a distinction between religious service and the person who performs the service, performance of the religious service according to the facets of a particular sect, Agamas, customs and usages prevalent in the temple and so on, is an intrinsic part of the religious faith and belief and to that extent the legislature cannot intervene to regulate. But the service of the priest is a secular part. The appointment of arachakas being a secular act, the legislature can by law abolish their hereditary right to appointment and such a law would not be violative of article 25(1) or 26 (b) that was so held in T M A Pai Foundation v State of Karnataka[iii]. In Ratilal Panchand Gandhi v State of Bombay[iv] , the Supreme Court stated that Article 25 guarantees every person the freedom of conscience and right to freely profess, practise and propagate religion imposed with certain restrictions by the State also it not merely to entertain such religious belief as may be approved of by his judgement or conscience but to exhibit his belief and ideas in such overt acts as are enjoined or sanctioned by his religion and further to propagate his religious views for the edification of others. These ball and chains are:

1. The yardsticks are, Public order, morality and health and other provisions of the Constitution.[v]
2. Laws relating to or restricting any economic, financial, political, or other secular activities associated with religious practices. (Clause 2(a) of Article 25), which means management of temple, appointment of priest
3. Social welfare and reform that might interfere with religious practices.

The religious freedom under Article 25 is not absolute, it can be exercised subject to public order, morality and health and to other fundamental rights, that is the freedom of conscience and the right to freely profess, practice and propagate religion. The window words of article 25(1) make this right subject to the aforementioned limiting lime stones, this would mean that the right given to a person under article 25(1) can be boil down or supervised if the exercise of that right would violate other provisions of Part III of the Constitution, or if the exercise thereof is not in consonance with public order, morality and health. The provisions of law relating to public order, morality and health would have to be complied with, and cannot be violated by any person in exercise of his freedom conscience or his freedom to profess, practice and propagate religion.[vi] *Religious practises and religious beliefs are different, the Court can't interfere on non-secular matters, here the difference is that , judicial review is permitted only on religious practice excluding 'essential religious practise' and on the other side, interference with 'religious belief' is unreasonable, the court can't impose morality or rationality with the form of worship of a deity. Doing so would negate the freedom to practise one's religion according to one's faith and beliefs. It would amount to rationalising religion, faith and beliefs, which is outside the castle of Courts. So here the interference must satisfy 'imminent danger or public interest test'.*

Dominant community doctrine

In the case of Om Prakash v State of UP[vii], here the facts are , a petition was filed in the Allahabad High Court challenging the government notification prohibiting the sale of eggs within the municipal limits of Rishikesh on the ground that the notifications imposed unreasonable restrictions affecting the rights of parties under Article 19 (1) (g) of the Constitution. The High Court upheld the notification even though it was pointed out that the eggs sold contained no chicks, on the ground that ;the welfare of the people was paramount', the High Court's dismissal of the case was appealed to the apex court.[viii]In this case, the court again used the 'dominant community preference doctrine' as the reference the court held that Haridwar and Rishikesh were pilgrim centres and a major section of the society in the three

cities considers it desirable that vegetarian atmosphere is maintained in the three towns for the inhabitants and the pilgrims; . With no factual basis, the court went on to say that 'it is a matter of common knowledge that members of several communities in India are strictly vegetarian and shun meat, fish and eggs. In the three cities people mostly assemble for spiritual attainment and religious practices. Maintenance of clean and congenial atmosphere in all the religious places is in common interest. Peculiar culture of the three cities justifies complete restriction on trade dealing in non-vegetarian items including eggs within the municipal limits. The court's drawing doubtful conclusions without any factual basis regarding vegetarianism being widespread in the city of Rishikesh is especially ironic in the light of recent studies indicating that the majority of Indians are, in fact, non-vegetarians and that the notion of Indian society being vegetarian is largely a myth.

The larger bench was constituted in order to get over the findings of the Supreme Court in Mohd. Hanif Qureshi v. State of Bihar [ix]which had concluded as follows. First, the maintenance of useless cattle involves a wasteful drain on the nation's cattle feed. Second, the total ban on cattle slaughter would seriously dislocate though not completely stop the business of a considerable section of butchers and hide merchants. Third, the ban would deprive a large section of the people of their staple food and protein diet. And fourth, the preservation of useless cattle by establishment of gosadan is not a practical proposition "as they are like concentration camps where cattle are left to die a slow death."

As per the opinion of the seven judge bench, the findings of the Supreme Court delivered in 1958 was no longer valid as "constitutional jurisprudence has indeed changed from what it was in 1958. Our socio-economic scenario has progressed from being gloomy to a shining one, full of hopes and expectations." Then, in an unbelievable waste of time and public money, seven erudite Justices began to look into data relating to the shortage of fodder, the production of cow-dung and urine and other factual matters of grave constitutional and national importance. They concluded that the main source of staple food is vegetables and that the poor would not suffer on account of a ban on slaughter. They disagreed with the findings of the Supreme Court in Mohd. Hanif Qureshi's case relating to the conditions of the gosadans and concluded without

any actual data or other evidence that the "gosadans and goshalas are being maintained." This is again a conclusion of doubtful truth value. Aged cattle are generally left to rot and the conditions of the gosadans are truly pathetic even today.

Taking a specific interest is the emphatic dissent of Justice A.K. Mathur who held that there was no need to overrule the earlier decisions of the Supreme Court that have held the field from 1958 because the ground realities have not materially changed. He held that "the unanimous opinion of the experts is that after the age of 15, bulls, bullocks and buffaloes are no longer useful for breeding, draught and other purposes and whatever little use they may have is greatly offset by the economic disadvantage of feeding and maintaining unserviceable cattle." The data produced before the Supreme Court according to Justice Mathur showed that after 16 years, urine, cowdung and draught ability is substantially reduced. The data produced before the Court was not such as to justify the reversal of the earlier decisions of the Court. The Judge could not understand as to how the interests of the public at large would be advanced by depriving butchers of their profession. Relying on the principle of *stare decisis* he protested that the law should "not be so fickle that it changes with change of guard. If the courts start changing their views frequently, then there will be a lack of certainty in the law and it is not good for the health of the nation."

In Haji Usmanbhai Hasanbhai Qureshi v. State of Gujarat [x] a ban on the slaughter of bulls and bullocks below the age of 16 years was challenged. The Supreme Court held on facts that with the improvement of scientific methods of cattle-breeding, cattle remain useful even above the age of 16 and hence the cut-off period of 16 years was held to be reasonable restriction and the prohibition on slaughter of bulls and bullocks below the age of 16 years was upheld.In State of Gujarat v. Mirzapur Moti Kureshi Kassab Jamat [xi]was an astonishing case relating to cow slaughter. The State of Bombay had enacted the Bombay Animal Preservation Act, 1948, prohibiting the slaughter of animals which were useful for milch, breeding or agricultural purposes. This Act was extended to the State of Gujarat by the Bombay Animal Preservation (Gujarat Extension and Amendment) Act, 1961. This Act was amended in 1994 by the Bombay Animal Preservation (Gujarat Amendment) Act, 1994. This statute was challenged by the

representative bodies of Kureshis. The Akhil Bharat Krishi Goseva Sangh, the Hinsa Virodhak Sangh, the Jeevan Jagriti Trust and the Gujarat Prantiya Arya Pratinidhi Sabha were impleaded as party respondents. The High Court allowed the writ petition and struck down the impugned legislation as ultra-vires the Constitution holding that the statute imposed an unreasonable restriction on fundamental rights.

The shatter to the constitutional validity of the legislation was founded on three grounds. That the total ban offended the religion of the Muslims as the sacrifice of a cow on a particular day is sanctioned by Islam. Secondly, that such a ban offended the fundamental rights of the Kasais (butchers) under Art. 19(1)(g) and was not a reasonable and valid restriction on their right. Thirdly, that a total ban was not in the interest of the general public. Chief Justice S.R. Das speaking for the constitutional bench held that the total ban on the slaughter of cows and calves of cows and she-buffaloes was valid. The constitutional bench further held that the total ban on the slaughter of she or female-buffaloes or breeding calves or working bullocks so long as they are capable of being used as milch or draught cattle was also valid. However, the constitutional bench held that a total ban on the slaughter of she or female-buffaloes, calves and bullocks after they cease to be incapable of yielding milk or breeding or working could not be supported as reasonable and in the interests of the general public and was invalid.

It appears that in the case in hand, the first ground of challenge namely, that the sacrifice of a cow sanctioned by Islam was turned down by the court due to the meagre material placed before the court. It appears that no one eminently competent to expound the religious tenets of Islam filed an affidavit making reference to any particular Surah of the Holy Quran which requires the sacrifice of a cow. The Constitutional Bench, in this case, concluded that the cow progeny ceased to be useful as a draught cattle after a certain age.

In yet another case, State of Gujarat v. Mirzapur Moti Kureshi Kassab Jamat [xii], a Constitutional Bench of five judges in 2005 felt that the issue of cow slaughter was sufficiently important an issue to justify the constitution of a bench of seven Justices. Reference was made to Art. 48 of the Constitution of India requiring the State to take steps towards prohibiting slaughter of cattle. Special attention was made to Art. 51-A requiring the State to have heart

wetting for living creatures. It was then said in paragraph 50 that cow dung would enable the farmers to avoid the use of chemicals. In a country where human beings are neglected by the State when they grow old and they die of hunger in thousands, the Supreme Court displayed rare compassion for the aged cattle. "A cattle which has served human beings is entitled to compassion in its old age. It will be an act of reprehensible ingratitude to condemn cattle in its old age as useless. We have to remember: the meek and weak need more protection and compassion." How ironic that while petitions relating to people rotting in prisons on drummed-up charges, cases of extreme exploitation of labour, and reams of other petitions relating to the poor remain pending for years in the Supreme Court, this utterly frivolous issue of cow-slaughter took several weeks and the valuable time of seven highly skilled justices of the Supreme Court.

CONCLUSION

What is protected under articles 25(1) and 26(b) respectively are the religious practices and the right to manage affairs in matters of religion. If the practice in question is purely secular or the affair which is controlled by the Statute is essentially and absolutely secular in character, it cannot be urged that article 25 (1) or article 26 (b) has been contravened. The protection is given to the practice of religion and to the denomination's right to manage its own affairs in matters of religion. Hence, whenever a claim is made on behalf of an individual person that the impugned statute contravenes his fundamental right to practise religion or a claim is made on behalf of the denomination that the fundamental right guaranteed to it to manage its own affairs in matters of religion is contravened, it is important to consider whether the practice in question or dispute is religious or the affairs in respect of which the right of management is alleged to have been contravened are affairs in matters of religion, then, of course, the rights guaranteed by article 25 (1) and 26(b) cannot be contravened that was so opined in Tilakayat Shri Govindlaji Maharaj v State of Rajasthan.[xiii] The safeguards guaranteed under article 25 and 26 of the Constitution is not restricted to matters of doctrine or belief but extends to acts done in pursuance of religion and, therefore, contains a guarantee for rituals, observations, ceremonies

and modes of worship which are integral and essential part of religion. The judiciary adopted the 'doctrine of essential practice', but prima facie it can be said that a vague doctrine in the hands of State simply to interfere with religious matters, The judiciary or state can interfere with the religious matters if so it violates, 'health, public interest or morality or order', but interfering on the basis it comes out of essential practice is not match to secularism.

ENDNOTES

[i] AIR 1996 SC 1765
[ii] The examples can be quote from Shirur mutt case and S P Mittal case.
[iii] AIR 2003 SC 355
[iv] (1954) SCR 1055
[v] (Clause 1 of Article 25)
[vi] See Faizan Mustafa and Jagteshwar Singh Sohi, *Freedom of Religion in India: Current Issues and Supreme Court Acting as Clergy,* 2017 BYU L. Rev. 915 (2018). Available at https://digitalcommons.law.byu.edu/lawreview/vol2017/iss4/9 (accessed on November 9,2019)
[vii] (2004) 3 SCC 402.
[viii] Here reference can be made to another decision in State of Maharashtra v H N Rao, here s.385 of the Bombay Municpal Corporation Act was challenged because it affected Dalits by imposing restrictions on dealing with the skin and carcasses of animals within the municipal limits. The Supreme Court dismissed the challenge, relying almost exclusively on the customs and traditions of the dominant community with no regard to the livelihood of the Dalits.
[ix] (1959) SCR 629
[x] (1986) 3 SCC
[xi] (2005) 8 SCC 534
[xii] (2005) 8 SCC 534
[xiii] AIR 1963 SC 1638.