



INDIAN COURTS ON DISCRIMINATIONS BASED ON RELIGIOUS AND TRADITIONAL PRACTICES

1. INTRODUCTION

India is religiously diverse. It is home to the people who follow religious and traditional practices which are centuries old. These practices usually believed to be an important part of the religion and people often are seen to have deep sentimental connections with them.

After independence, India has tried its best to emerge as a secular country, where every religion has a right to freedom to follow their religion with very little state intervention. Every religion has its own sets of personal laws which allows the people to continue to preserve their religion and follow it as per the traditional rules. Every citizen has been given religious freedom which provides the religious groups with certain autonomy allowing them to come up with their own rules and practices. Even the constitutional courts of the country try their best not to intervene.

Since most of the practices that are being followed are old their relevance in the modern world often becomes a matter of debate. These religious and traditional practices are many times observed to clash with the fundamental rights of the people. They are seen to be discriminatory and sometimes even harm public health.

In recent years there has been a constant conflict between the exercise of religious freedom and constitutional rights. The constitutional courts of the country are often seen deciding upon the validity of these practices. But as they are a part of the religious practice, judgement regarding these are often seen as a threat to the religious group and usually leads to social and political instability.

Religious freedom as per the constitution is not an individual right. It is a collective right. But, the right has been limited in matters concerning public order, morality and health. In an attempt to integrate the lower sections of the society the state often gives more priority to matters regarding the economic and social growth of the country above the right to religion. Therefore, in the Constitution of India separate

provision was added which outlawed the practice of untouchability and prescribes equality among the people of different castes.

The courts are always in a dilemma when it comes to specifying the scope of judicial intervention in the matters like this. The judges are seen using various jurisprudential tests to conclude the constitutionality of this religious practice. The role of the courts has become very important over the years especially in cases where religious practices are seen to conflict with constitutional rights.

In India, social inequalities run deep and are evident in day to day practices. Discrimination persists among the different levels of society and people of the same religion. Such for centuries have burdened the people with the responsibility to continue with the practices to ensure the continuation of the legacy of the religion while they are the victims of these unfair treatments. These discriminatory practices violate the fundamental rights given to every citizen of this country. Religious freedom should not be an excuse for the violation of basic human rights. Due to these discriminatory practices, socio-economic inequalities are still present in Indian society. This is a hurdle for society, stopping it from being a harmonious state where every social, economic and gender groups are equal.

In this modern world, every human being has the right to equality which often is not implemented in a religious group as efficiently as the state might want it to be. Encountered with the challenge of harmonizing constitutional protections to religious freedom with the quest of effectuating incremental social transformation the Supreme Court of India has repeatedly walked on a wily lane to come to a decision that reflects the common-sense view.

The court has not shied away from making some bold decisions in the past. It tried to put limitations to some of the discriminatory practices. Still, the role of the court in deciding upon the constitutionality of the religious and traditional practices has remained a matter of dispute.

The court while deciding upon these matters always have to think about the upliftment of society as a whole. The Constitution of India rejects the practices of discrimination. Discrimination often hinders the development of a society. It is always the responsibility of the state to set up and take appropriate actions to abolish any practice which unfairly discriminates among its people. Therefore, judicial intervention sometimes becomes a necessity, even if it is not widely favoured.

2. RELIGIOUS FREEDOM IN INDIAN CONSTITUTION

The Constitution of India aims to reflect the essence of the right to freedom of religion that is vested upon all the citizens of this country. But the responsibility of providing religious freedom to the citizens of India has immediate relevance to the association of the secular state and the modernization of the nation.

Often the exercise of freedom of religion gives rise to the conflict between the exercise of age-old beliefs and traditions and the maturing basic civil rights of an individual.

The responsibility to solve these kinds of conflicts lies upon the Constitutional courts of the country. The Constitution of India does recognize the need for a society where the people of varied religions live harmoniously, where the state respects the old traditions and customs that are still being practised. Therefore, it purposes establishing a secular social order that permits the freedom to exercise religion within the framework of the country's constitution.

The Fundamental Right to freedom to religion is guaranteed under Article 25 to Article 28 of Part III of the Indian Constitution. As Indian society has been home to various religions for centuries, the freedom of religion is one of the essential rights that is granted to the citizens by its constitution. These articles ensure religious liberty in society. To understand the religious freedom awarded by the Indian Constitution in brief, the focus of the paper will mainly be on Article 25 and 26 of the Constitution.

Articles 25 and 26 embody the principles of religious tolerance that has been the characteristic feature of Indian civilization from its very inception. Besides, they serve to emphasize the secular behaviour of Indian democracy i.e. equal respect to all religions.

Article 25(1) of the constitution of India guarantees every person, citizen or non-citizen, the "freedom of conscience" and right to freely "profess, practice and propagate religion". The term conscience emphasis on the celestial and spiritual practices of a religion whose effect is said to be way beyond the powers of the sovereign. This article gives the freedom to openly declare their faiths, beliefs and adherence to a religion. In this article, the word 'propagate' means the right to promote without any coercion or intervention. These rights are not absolute. They are made subjected to public order, health, morality and other provisions of Part III.

While Article 25 only confers the specific rights of every citizen of India. Article 26 on the other hand gives special protection to religious denominations. Article 26(b) states that every religious denomination has the right to govern its affairs which are related to the specific religious groups. Article 26 is a collective right whereas Article 25 is an individual right.

There is no specific interpretation of the word "religion" is given in the Constitution. The Supreme Court many times have widely interpreted the term as required.

3. DISCRIMINATION BASED ON RELIGIOUS AND TRADITIONAL PRACTICES

The people of India have a strong belief and faith when it comes to matters of religion structuring and regulating the society. This has often played a great role in shaping the conduct of the people part of the

Indian society. These practices have affected society in various ways. Many of them resulted in the positive functioning of the communities and some had extremely negative effects. The obedience to certain practices has to lead to public hazards, violence and even infringement of people's rights.

Some of these practices are biased. They discriminate against the people belonging to the same community based on ridiculous beliefs.

Most of the religions that are followed around the world have a discriminatory bias against women. For centuries they have been treated as the 'second gender'. They are always burdened with the responsibilities of maintaining the traditions inherited in their religions. For years the women have been doing so, with minimal rights available to them in comparison to all the male counterparts, who always had more freedom and liberty available to them. Modern nations around the world have certainly made enough policies to introduce the wider scope of rights to women but still, the discriminatory practices are seen to be persistent in society haunting women in every sphere of their life.

Assessing the communal diversity present in India, the Indian Constitution possesses a provision of distinct religious laws which was brought in force in deference to the fundamental right to freedom of religion. This ensures minimal interference of the state in any of the religious matters. This inadvertently paved the way for externalizing the unequal status of women in Indian society. The numerous patriarchal interpretations and performances of religious practices have created a platform for prejudice against women.

In India, the discrimination against women in the name of religious and traditional practices run very deep in the society and has been noticed in every turn of their life. For years, women had a shorter hand towards inheritance rights, rights after marriage, the right to enter religious places, etc. In many cases, these traditional practices affect the life and liberty of the women like the practice of genital mutilation of women or of not letting them enter the place of worship, restricting their right to practice the religion.

The interpretation of religious scriptures over the years have somehow led to increased exploitation and trouble for women. Religious freedom in the country has shown no cooperation with the rights of gender equality. Sometimes some practices even violate the freedom of religion that women are privileged to.

Over the years the Indian legal system has tried to bring in adequate provisions to ensure equality in all these spheres but the practices that have been followed for centuries now are much difficult to uproot than by just introducing new laws. Any intervention done by the government has always been seen as a threat to the right to follow their religion and has sparked various controversies nationwide. In recent years same can be witnessed in the *Sabarimala case*¹, where the court decided upon the abolition of the

¹ Indian Young Lawyers Association & Ors. V. The State of Kerala & Ors., (2018) SCC OnLine SC 1690

age-old practice of not allowing women of menstruating age in the premise of the temple of Lord Ayyappa in the state of Kerala. And, in the *Triple Talaq case*² where the court decided to put an end to the vague practice which was extremely prejudiced against Muslim women.

In India, many other practices are followed which discriminate against people based on their castes. Rituals like 'Made Snana', in which the Dalits were made to roll on the leftovers of the people belonging to the upper caste, or restriction on the entry of people belonging to the lower caste into certain parts of a village occupied by people of the upper caste, were followed even in modern India. In some places of India, it is a traditional practice of not letting the people belonging to the lower caste enter the premise of their homes or temples.

The origin of these practices are still unknown and are often suspected to be made only to create social dominance and hardly have to do anything with the religion and tradition.

These discriminatory practices often violate the fundamental rights of individuals.

Fundamental Rights like Article 14, 15, 17, 21 and 25 often get violated and it is the responsibility of the constitutional courts to protect these rights of the victims.

Article 14 of the Indian Constitution ensures the Right to Equality. According to this, the state shall not refuse any individual equality before the law or equal protection before the law within the territory of the country. Equality before law prescribes that all persons may it be poor or rich; male, female or transgender; belongs to lower or upper castes; etc., will be treated equally. Discrimination in any form is a violation of this right. Therefore, women not being allowed to go to school or lower caste are being barred from getting proper medical assistance are the example of the practices that violate Article 14. Article 15 prohibits discrimination with emphasis on religion, caste, race, sex and place of birth. In India, many practices are followed which violates the condition as given in Article 15. All those practices are unconstitutional and the government can exercise its powers to put restrictions on that practice.

Article 17 forbids the practice of untouchability. The practise of untouchability has been a part of Indian society for quite a long time. This Article ensures that untouchability is prohibited in all forms. According to Article 21 of the Indian Constitution, no person (citizen and non-citizen, both) shall be deprived of their life and personal liberty (except, according to procedure established by law). The Supreme Court has given various interpretations of the Article to widen its scope. Article 25 gives the freedom of conscience and the freedom to exercise profession, practice and propagation of religion (except when it is a matter of public order, morality and health). Restricting women or people belonging to lower caste to enter the place of worship is a violation of fundamental rights. Article 25 gives enough autonomy to any religious groups to decide upon the regulations of their religion but only to a limit.

² Shayara Bano vs Union of India And Ors., (2017) 9 SCC 1.

Many of these age-old practices are known to be violative of fundamental rights and the Constitutional Courts have often tried to intervene and come to a proper solution. But most of the time the intervention has not been welcomed by the ones who believe that their practices are sacred and must continue just the way they have, irrespective of the discriminatory nature and the violation of rights of individuals, even if they are directly associated with the religion.

The scope of judicial intervention has always been a debate when it comes to deciding upon an old practice. Yet the court does intervene when it comes to the matter to the general good. In the contemporary world, the practice of this discriminatory practise is a hurdle to a developed society that is socially and morally just. It is the judiciary that has to examine the validity of these unfair and prejudiced practices through various tests and outlaw them to ensure that right to equality is properly implemented around India.

In one of the recent cases named *Indian Young Lawyers Association v. the State of Kerala*³, the constitutionality of the restriction on women to enter the temple arose. In 1991, the issue was viewed by the Kerala High Court. At that time the High Court upheld the restriction claiming that it was by the customs which has been prevalent for years. In 2018, the Constitutional Bench at the Supreme Court by a majority of 4:2, declared the restriction unconstitutional.

For the bench to come to such a decision several questions were considered regarding the nature of the practices and those who follow them.

In the case of the Sabarimala, the judges had to place critical attention on the questions where the believers of the practice were impelled to demonstrate their denominational signification along with the essentiality of the practice. The Sabarimala case affirms the advancement of the contentious juristic techniques, the religious denomination test and the essential practices test. Also, the public response to the case ascertains the bearing of religious freedom adjudication in India. It clarifies the interrelationship between various diverse realms: the religious, the public, and the judiciary.

There are certainly other factors which help the judiciary to decide upon the constitutionality of a practice but the two test that certainly add some significant weight are the religious domination test and the essential practice test.

The first test, i.e. the religious domination test, the court applies to limit the beneficiaries of legal protection given to the specific group whose practice is in question under Article 26. The court applying the guiding principle of common faith, common organization, and distinctive name to determine whether

³ Indian Young Lawyers Association & Ors. V. The State of Kerala & Ors., (2018) SCC OnLine SC 1690

the particular group qualifies as a religious denomination. The test of religious denomination serves as a prerequisite condition for providing the practice protection under Article 26.

The second test, the essential practice test is also one very important test that the court applies to understand the essentiality and importance of the practice to the religion or the tradition. To get any legal protection, the practice in question should have to qualify for this test. This test has a wider spectrum of components to consider. To determine the practice's essentiality the components to be considered include prevalence, effectiveness, obligatory nature, antiquity and mentions in the religious scriptures.

Furthermore, the fundamental essence of the test changed with time. It has transformed from determining whether a practice is religious or secular, to whether it is essential to the religion. There have always been controversies surrounding the question of whether the sovereignty to determine the essential practice lies with the state or the specific religious community.

4. THE TEST OF RELIGIOUS DENOMINATION IN COURT

Over the years the courts of the country have decided upon the cases which involved scrutinizing the constitutionality of a practice. These religious practices often involve deep religious sentiments and often concern matters involving issues that are sensitive to the public at large. Often cases related to caste discrimination, religious freedom, minority rights, gender equality, etc. ends up attracting the attention of people and often the judgments put forward by the court have diverse reactions. Similarly, was noticed regarding the case of Sabarimala, which proved to be far more trivial and multifaceted. Cases like this often lead to a social and political uproar.

Article 26 of the Indian Constitution deals with the rights concerning religious denominations. The Article provides autonomy to the religious affairs and grants them a legal defence against any sort of state intervention. The burden to prove the religious denomination often falls on the religious groups to avail the advantage that comes with the autonomy which is provided by Article 26 once the validity of the article is invoked.

The legal argument that is put forward regarding the religious denomination is often done to defend religious practices and limit the intervention of the state.

There is no mention of the term 'religious denomination' in the constitution. In the case *Commissioner Hindu Religious Endowments, Madras v. Sri Lakshmindra Thirtha Swamiar of Sri Shirur Mutt*⁴, a denomination was defined as "a collection of individuals, classed together under the same name; now almost always specifically, especially a religious sect or body having a common faith and organisation

⁴ Commissioner Hindu Religious Endowments, Madras v. Sri Lakshmindra Thirtha Swamiar of Sri Shirur Mutt, AIR 1954 SC 282.

and designated by a distinctive name.” It was further stated that it can only fall under the category of religious denomination if the body has a common faith, is followed in a common organisation and have a distinctive name.

Under Article 26, the freedom to establish and maintain religious institutions for religious purposes or any charitable purpose is provided. It also provides the religious groups to manage their affairs which are related to the matters of the religion, acquire or own any movable and immovable property for their purpose and administer the property by the law.

Substantial autonomy to religious denominations was given in the initial rulings on religious freedom. The court allowed the religions to determine upon which practices are essential to their faith. By consenting the denomination of rights is to specify what comprises matters of religion. In this manner, the court often gave the denominations the power to determine the scope of Article 26.

Like in the case *Indian Young Lawyers Association v. The State of Kerala*⁵ where the restriction on women to enter the Sabarimala temple was questioned in the court of law. The court stated that the institution of the Sabarimala temple cannot be considered as a separate religious denomination. The institution does not have any distinct identity and therefore failed to satisfy the requirement for the test. It is controlled under Article 290-A of the Constitution. The temple functions according to a Statutory Board constituted under Travancore-Cochin Hindu Religious Institutions Act, 1950. As it is being controlled by Article 25, Article 26(b) cannot rescue the practice from the intervention of the state. The practice of barring menstruating women is a violation of their right to equality (Article 14), right to freedom of religion (Article 25) and is discrimination on grounds of sex as mentioned in Article 15(2).

5. THE TEST OF ESSENTIAL RELIGIOUS PRACTICE

The defence provided to all the religious practices in the judicial decisions is not as extensive as the constitution suggests. It is only provided when the practice is a part of the fundamental core of the religion and does not include any of the extrinsic elements that are found in the religion.

According to the progressive approach taken by the Supreme Court of the country the most extreme religious customs are almost entirely excluded from providing any legal protection. But it has always been a hectic task for the Supreme Court to answer the question of what can be specifically identified as the essential part of a religion. The essential practice test is one of the juristic technique adopted by the Supreme Court to come up with a sound solution.

⁵ Indian Young Lawyers Association & Ors. V. The State of Kerala & Ors., (2018) SCC OnLine SC 1690.

The essential practice test is an integral practice test as often called the doctrine of essential practices or the essential test is the three-step test that gives the solution to the complex question of which practices are to be an essential part of the religion.

The religious denomination test determines the rights available under Article 26. But, the Essential practice test, under Article 25 and 26 determine what are those practices that are entitled to such protections.

The test of essential practice used by the Supreme Court it is to scrutinize the rights that are claimed under both Article 25 and 26 of the constitution. Article 25 of the Indian Constitution provides rights to individuals which guarantees freedom of religion. According to this article and individual has the freedom to practice profess and propagate the religion they follow. But this right comes with certain limitation. No act can be done in the name of religion that is harmful to the public order or the morality and health of the public in general. Even in the past various such laws were passed which provides reasonable restrictions on practice profession and propagation of religion.

Over the years this crucial doctrine developed by the Supreme Court of India has been essential to determine the relationship between religion and the constitution. If the practice is said to be essential then it cannot be regulated by the state. To ascertain what is essential the court usually takes up two approaches. The first is to find out when was the religion itself determined and from where it has been formed or is the practice essential as per the religious text and manuscripts. The other test is for the court to decide whether to play the role of a social reformer and distinguish the religious aspect of life in India.

In the case of *The Commissioner, Hindu Religious Endowments, Madras v. Sri Lakshmindra Thirtha Swamiar of Sri Shirur Mutt*⁶ or Shirur Mutt case, the Supreme Court stated that anything that is done according to the religious opinions and acts done in pursuance of those opinions can be said to be part of the religious practices. Therefore, all the rituals and modes of worship followed should come within the scope of the essential practice of the religion and should be granted protection under Article 25 and 26. This judgement gave unrestricted freedom to the religious communities.

The case of *Sri Venkataramana Devaru & Others v. State of Mysore*⁷, marked the departure of the principle introduced by the *Shirur Mutt case*. The court began to focus more on the essentiality test along with identifying the practice as being religious or secular.

In the Sabarimala case, Justice Chandrachud states that his observation about how before the Devaru case, the court only concentrated on the word crucial to distinguish between practices being religious or secular.

⁶ Commissioner Hindu Religious Endowments, Madras v. Sri Lakshmindra Thirtha Swamiar of Sri Shirur Mutt, AIR 1954 SC 282.

⁷ Sri Venkataramana Devaru & Ors. V. State of Mysore & Ors. 1958 AIR 255.

It was done by the court to limit the intervention of the state in issues of religion. The modification in the test now requires the court to enquire into the essentiality of the practice in question. This gives the court a better understanding of whether the practice would be afforded Constitutional protection or not.

The essential practice test illustrates an arrangement of different ingredients and has evolved various principles over the past years. Each of the principles is applied according to the judges' discretion to deduce the essentiality of a practice. The first guideline formulated by the Court was to look to the doctrine and tenets of the religion itself, a meritorious but vague approach. In many instances, the religious text were referred to. In the *Quareshi case*⁸, the Court added another condition that the practice must be obligatory to the respective religion. Discretionary practices, even if religiously authorized, cannot be held to be essential.

6. IS JUDICIAL ACTIVISM IN MATTERS CONCERNING RELIGIOUS AND TRADITIONAL PRACTICES NECESSARY?

Whenever it comes to judicial activism in matters related to religion, often leads to a debate on the scope of judicial intervention in the matters of private laws and practices. The court interferes to provide an external viewpoint on what is the validity of the practice and this is seen as an action against the liberal values of our Constitution which is said to provide recognition to the matters of faith, belief and religion.

As said by Justice Indu Malhotra in her dissenting opinion in the Sabarimala judgement that the rules of morality and rationality cannot be imposed when it is a matter of respect for the religion or to the form of worship to the deity. Doing so will deny the freedom to practice one's religion according to one's faith and belief.

Though the matter of religion is a matter which is very sensitive and often involves political and social interventions, the duty of the state to provide equality and liberty to have a dignified life cannot be ignored. In India practices that have been followed since time memorial are often seen as discriminatory and extensively degrading to certain sections of the society. The problem of gender inequality and untouchability is some of the kinds. Their effect on the overall society cannot be ignored. The courts have the responsibility to draw a fine line between what can be considered a valid religious and traditional practice, and what is a violation of the Constitutional rights of the citizens. The court has always tried to refrain from religious matters to ensure the protection of private laws but when it comes to the upliftment of the overall society the court often has to step up and intervene. Whenever the court feels that the practice is not essential to the religion and its practice disrupts the health, public order and morality of people at large and on the face of it is seen as wrong, it intervenes to abolish it.

⁸ Mohd. Hanif Quareshi & Others vs The State of Bihar, 1958 AIR 731.

The court deciding upon a religious matter may be very controversial but the interference to matter is always done for the greater good of the society.

7. CONCLUSION

The Indian Society is one of the oldest civilizations in the world. Religions that are practised and followed on this land has shaped the way our society is today. The practices are not only inseparable from society but also the lives of individuals. They have direct relevance to the lives, both for good or bad. Religion is often a sensitive matter to many. To many religion has been a weapon to overpower others. People often in the name of religion deceive people into humiliating and suppress other people of the community. The most common social prejudice is noticed against lower castes, women and other minorities. They have often fallen at a disadvantage when it comes to these religious and traditional practices. As these practices are viewed as religious practices they are followed blindly by a large number of people, affecting the structure of the society as a whole. Like this, the religious freedom of one person violates the constitutional rights of others. This leads to a conflict that goes against public order and peace. These practices often hinder the overall development of society. The prejudice against certain sections of society is morally wrong. Though in the Constitution it is mentioned that the discrimination is only valid when reasonable, none of these practices seem reasonable and only have been practised because of the wrongful interpretation of the religious roles over the years. The intervention of the state in these cases is necessary. The state does provide some level of autonomy to the religious groups to decide upon their private laws, but unfair practices are to be strictly separated from society. Through the tests of religious denomination and test of essential practice, the court tries to understand the importance and validity of practice in society. Some other principles and factors are employed by the judiciary to come to a sound conclusion. The court in recent years has been vocal about its worries about these discriminatory practices. Many are still being followed and affects the lives of the people deeply. The court must always be careful not to deduct the essence of the religion while deciding upon a case and also should keep the betterment of society in mind.