Critical Analysis of the Freedom of Religion in the Context of Social Change in India

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Abstract: The Scope of this paper is to analyze the aspect of State Intervention and the associated freedom given to all people. Religion is an important aspect of the lives of the people of India. It is a part of the identity of the people and it is important to analyze this in the context of changes that the State has brought about in the religion and the extent to which the State can make laws to govern this. There have been various attempts by the legislature to understand and make laws to govern the different aspects of religion. The objective of this paper is to analyze the scope and the extent of these laws. If these laws do bring about the necessary changes in the society is important. This is so because the religions in the country are very numerous and many of them are suffering from the clutches of superstition and this should be removed because it is a negative influence on the society and very harmful to development and this needs to be addressed as early as possible. This paper also has a further venture into the concept of secularism and secularism in Indian context. There are many jurists who truly believe Indian is not a secular country and this paper seeks to examine the validity of such statement in the light of freedom religion granted by our Constitution. The first and foremost question in this paper is if the individual in the country has any freedom of religion? Is this freedom unlimited or is it limited? Whether the State has any right to intervene in the matters of religion in the Country? If yes if the power is unlimited in its scope? If no then what is the curtailment of the power of the State? Whether secularism has been truly achieved in the State? This is the consequential question which this paper seeks to answer after the analysis of the freedom of religion. Secularism is an important aspect and has to be the final goal of the policies of the State. Whether that has been truly and completely achieved is the final question?
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1. Introduction:

The State in India from the time of Asoka and from time earlier, to the present day has never been afraid to speak of Righteousness in terms of Law and of Law in terms of Righteousness. A law which cannot speak the language of righteousness would naturally fail in the Indian State because it will fail to claim obedience of people. India is a multi religious State in which various faiths at some point are incompatible each other and is entitled to protection. The prominence of theses multi-religions, the fact that religious beliefs are so fundamental in the life of any normal Indian the role of religion in the all the aspects of governance in the country can be seen very prominently. An example is that the personal laws which are unique to different faiths in the country. The uniform civil code which was contemplated by the drafters of the Constitution in the Directive Principle of the State Policy can never be achieved to the fullest in India because people in the country will not disown their faith. Thus the word "secular" has much different connotations in the Indian Scenario than the meaning that the word has in the English or other jurisprudence. A multi-religious conglomeration of peoples can allow for great freedom of religion, since the very fact of multi religiosity proves the seriousness with which the majority accepts the validity, for the whole, of the sincere beliefs of the minorities.

The religious references in the Indian society are much different from other societies and thus the policies of the government are also different and varied accordingly. This is so because religion in India has a different and unique characteristic. The first characteristic which plays a large part in the Indian society is the non-confinement of religion to personal belief and its persistence irrespective of personal belief. Religion is a social phenomenon, and the character of the religious observance or right to perform a religious observance depends upon factual membership of a social group.

Since religion is such an important aspect of the Indian society the advent of the British rule brought along with some very confusing and different form of governance. It was expected that the British since they ruled the country they would apply the personal and religious laws as it is without changing any aspect of it. This has been clearly stated by Smith "*public opinion in India was quite clear that the British were to undertake the tasks of the religious governance. The fact that the new rulers were of a different faith would not justify their neglecting the traditional role of patron and protector of religion. For both Hindu*

and Muslim princes had, during certain periods patronized and administered the institutions of other religions with some impartiality." Ecclesiastical affairs were a central subject under the Government of India Act, 1919 and a federal reserved subject under the Act, 1935. This role that the British were expected to play brought along with it certain reforms in the religious aspect of the Hindu religion. Abolition of sati for one Regulation 1829 made Sati a penal offence etc. one can say that the same tradition was followed by the independent India after the Constitution where freedom of religion was guaranteed but with State Intervention.

2. The Freedom of Religion in the Constitution of India:

India is a secular but a religious country. The constitution of India contemplates six articles which guarantee freedom of religion to every citizen. To begin with one has to start with the first and foremost article that provides for the freedom of religion and that is Article 25;

"Freedom of conscience and free profession, practice and propagation of religion.—(1) Subject to public order, morality and health and to the other provisions of this Part, all persons are equally entitled to freedom of conscience and the right freely to profess, practice and propagate religion.

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

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

(b) providing for social welfare and reform or the throwing open of Hindu religious institutions of a public character to all classes and sections of Hindus."

This Article is inspired by *Article 44 of the Irish Constitution* which provides; Freedom of conscience and the free profession and practice of religion are, subject to public order and morality, guaranteed to every citizen.

Article 25(1) confers an individual right, and the freedom conferred by it is not absolute. It is subject to public order, morality and health and these are the exceptions provided for in the provision itself. It is also true that these provisions are subject to the other provisions of the PART III of the Constitution. This can be said through Article 25(2) and would include Article 17 of the Constitution which abolished untouchability, for Article 17 is directly connected with Article 25 (2) (b) which, among other things, provides, in substance, the throwing open to untouchables of Hindu religious institutions of a public character. Duncan M Derret has stated about the Indian Constitution in this context as;

"*The constitution of India does not prevent the legislature from interfering with religion in the course of reform. The whole course of Indian legal history, as we have seen evinces a tendency to manipulate the sources of the law."*

Article 25 provides for the freedom of religion. It can be divided into four aspects i.e. conscience, profess, practice and propagate. These can be appropriated into two generic areas – *belief* and *practice*. Conscience means belief, faith, opinion, and to profess in one sense, means to belong to membership, adherence; that is again faith. Profess means to declare and it becomes an aspect of the right to practice one's religion. The question of what religion is entitled to protection came up in the case of *The Commissioner, Hindu Religious Endowments, Madras vs. Sri Lakshmi Thirtha Swamiyar of Shri Shrirur Mutt* (hereinafter referred to as the Shrirur Mutt case) and in this case Justice Mukharjea evolved a test to determine how any particular religious practice would receive its recognition. He impliedly rejected the "assertion" test where all that a person had to do was to assert that such a practice existed. According to him the Courts work would be to assert whether the religious practice existed with sufficient evidence. He proposed that the practice must not only exist but must be essential for that religion itself. Thus it can be said that the individual has no freedom to determine what is essential to his religion for if it were otherwise and if the law gave any protection to religion as determined on this basis the State's power to direct would be at an end. Another important aspect of the same is the statement of J. Mukharjea;

"*It would not be correct to say that religion is nothing else but a doctrine or a belief, and the guarantee extends to not only religious opinion but also acts done in pursuance of that religion."*

This was extended in the case of *Ratilal Panachand Gandhi vs. State of Bombay* where it was stated that;

"Religious practices or performances of acts in pursuance of religious belief are as much a part of religion as faith or belief in particular doctrines".

The Supreme Court has asserted this principle that the different religious principles form a part of the religion.

The extent of this right provided by the Constitution and the Supreme Court can be seen in the judgment in the case of *Jamshedji vs. Soonbai, "* if this is the belief of the community- and it is proved undoubtedly to be the belief if the Zoroastrian community- a secular Judge is bound to accept that belief – it is not for him to sit in judgment on that belief- he has no right to interfere with the conscience

of a donor who makes a gift in favour of what he believes to be the advancement of his religion and foe the welfare of his community or of mankind..” Further in the case of *Bijoe Emmanuel vs. Kerala* Chinappa Reddy J. for himself and Dutt J stated the following which describes the right given by this Article,

“*We endorse the view suggested by Davar J.’s observation that the question is not whether a particular religious belief or practice appeals to our reason or sentiment but whether the belief is genuinely and conscientiously held as part of the profession or practice of religion. Our personal views and reactions are irrelevant. If belief is genuinely and held conscientiously held it attracts the protection of Article 25 but subject of course to inhibitions contained therein.*”

3. The limitations on the freedom of Religion:

The Article 25 in its provision lays down the restriction on the freedom of religion viz; public order, morality and health. The clause (2) of Article 25 gives the State the right to restrict or regulate certain religious activities which are done for financial or economic or political purpose. It is in at this stage that the State has a proactive role to play in the Indian constitutional framework. The State in India diverging from the role played by its counterparts in the western democracies especially like in the United States and Australia does not follow the principle of exclusion. This means that the State policy here is not that of complete exclusion but it is that of intervening for the public good, benefit, welfare of the people etc. In neither the America nor England does the Court determine whether the practices are religious in the absolute sense, nor does it purport to sit in judgment upon the communities own notions of the status of their practices, deciding, for example, whether it would be rational to call one religious, or whether to discard it as superstitious. This jurisdiction is typically and traditionally Indian.

India traditionally tolerates divergences in matters of religion and does not take up the position that one religion, or one sect, is entitled to patronage while the remainder are merely tolerated, nor does it take up the position that the State should abstain from concern in matters in religion. It does take the view, which a pre Constitution experience justified, that the State cannot be indifferent to religion; and that the balance between the claims of religions inter se, between religion and the State, and between the individual and his sect must be maintained as a state function. This function is exercised by the courts and therefore the court must be able to distinguish between what is religious and what is not, and once it has established what is claimed to be religious it can proceed to determine whether the practice contended for comes within the limited freedom the Constitution allows.

It is this function and this aspect of the functions that the State and the Courts play that leads to social change in the society. The fact that the Constitution has empowered the State to interfere with the practices when they come under any of the exceptions allowed for in the provisions ensures that the State can eradicate certain bad practices which might be in existence in the society. Also in addition to this the Courts also have the power to rule if any practice is genuine or just a superstition which is causing harm and which has been continuing for a long time. The court can determine whether the practice is essential and integral to religion. If it is an accretion, or an irrational or superstitious element it follows that in all probability not essential for the religion. If it is not essential it cannot claim protection against the State’s enactment or regulation.

In the case of *Saiffuddin Saheb vs. State of Bombay* Sinha C. J has stated the following; “*It was……. on humanitarian grounds, and for the purpose of social reform, that so-called religious practices like immolating a widow at the pyre of her deceased husband, or of dedicating a virgin girl of tender years to god to function as a devdasi or of ostracizing a person of all social contacts and religious communion on account of his having eaten forbidden food or taboo, were stopped by legislation”*

All of these changes in the society because the State interfered in the matters of the religion unlike other practices. There are a number of cases where the interference of the State on such affairs has been proved to be for the betterment of the Indian society. The freedom to believe is essentially not touched. The freedom to act is guaranteed subject to such limitations as will make the continuance of social life possible in India possible.

The essence of this provision is that the State can impose limitations on this freedom of religion if it of the opinion that it is so required in the interests of health, morality and public order. It is not an absolute freedom granted by the State but subject to restrictions. These cannot again be arbitrary but has to be a judicial exercise in the interests of the society as laid down by the provision. This acts as a State sponsored eradication of any evil or superstitious religious practice. In the words of Ramaswamy, “acts done in the name of religion might also come into conflict with the peace, good order or morals of the society-interests, the preservation of which is of vital importance”

This has been followed by the Supreme Court in many of its decisions. In the case of *Durgah Committee vs. Hussain Ali* (hereinafter Durgah Committee case) Gajendragadkar J. denied validity to

"those practices which, though religious, may have sprung from superstitious and unessential accretions to religion itself." Under this doctrine it was not enough that the religious practice satisfies an internal test of being essential to the religion but also had to satisfy an external test of not being a product of superstition. Though this Judgment seems like an extension of Shrirur Mutt case the obiter runs directly counter to the judgment of Mukharjea J in the Shrirur Mutt Case.

The next important case which is to be mentioned in this aspect is that of *Sastri Yagnapurushadji and Ors vs. Muldas Bhudardas Vaishya and Anr.* This involved the throwing open Hindu temples to all "classes of people". This was done in a reformist purpose in pursuance of the reforming the society and their view's towards untouchability. Although one can argue here that the judgment was a little far fetched but it was done with reformist attitude in mind. Gajendragadkar. J did the same and gave the Courts a new role to play and opened the door for further judgments to follow the same trend and to bring to an end many such mal practices which were continued in the society in the name of religion and religious freedom.

The definitions and the scope of both Article 25 and 26 were considerably increased in the case of *Sardar Syedna Taher Saifuddin Saheb vs. Bombay*, and this case was with respect to excommunication and its effect. It was held in that case that "the words providing for social welfare and reform as used in the Article 25 (2) (b), it was intended to save the validity of only those laws which did not invade the basic and essential practices of religion guaranteed by Article 25 (1), for to read the article as covering even the basic essentials would render the guarantee nugatory. A law providing for the social welfare and reform was not intended to reform a religion out of existence or identity. Just as the activities referred to in Article 25 (2) (a) were obviously not the essence of religion, similarly the saving in Article 25 (2) (b) was not intended to cover the basic essence of the creed.

Thus in India the Court has upheld the fact that State does need to make certain reformative laws for the benefit of the society. In the above mentioned cases an attempt has been made to ensure that certain evil practices prevailing in the country which have a religious background or which are based on religion are eliminated. They are not given the sanction of the law. Such a practice has been held to be invalid because the authority of the law is denied to them. By declaring these practices to be bad and illegal the Courts are trying to eradicate such a practice from our society. The same was also the objective of the Drafters of the Constitution when the Constitution was drafted.

4. The Reforms adopted by India:

Ecclesiastical affairs had been one of the prime concern under the Government of India Act, 1919 and a Federal Reserve subject under the Government of India Act, 1935. However the role of British Government as a protector of religion can be too credited to the social reforms and the reformers at that time in British India, especially in the second half of the 19th century. Raja Rammohan Roy arousing strong resentment against the practice against the sati practice created the supporting background of public opinion facilitating Governor General William Bentinck to declare by Regulation of 1829 Sati a penal offence. Similarly infanticide practiced to propitiate the gods was punishable as an offence of murder by the Bengali Regulation of 1802. Thagi was also set to be associated with religious legend and therefore sanctioned by it. It was severely suppressed by Bentinck. The British also regulated the popular practice of procession by the Hindus and the Muslims in order to control communal riots. The Penal Code formulated and enacted by the British has a Chapter on "offences relating to religion" is dealing with the problems of law and order arising out of religious sensitivities. The Devdasi system was also abolished by many States including the State of Mysore. The platitudinous distinction between respect for religion and dictates of social norms built the necessary teleological dichotomy between religious reforms and social reforms, which distinction was inherited by the Constitution in Article 25 (2) (b).

The State after adopting of the Constitution had not been sitting idle. There are many instances which proceed to show that the religious rights were respected but the State could take welfare measures whenever it felt the need to do the same. Some of these measures are abolition of untouchability, the prevention of exploitation, police power pertaining to public order, health and morality provisions, the opening up of temples, and blanket immunity provisions pertaining to various measures of agrarian reform and public policy. These social welfare reform provisions have been given further direction by the Directive Principles of State Policy which are being very seriously by the Supreme Court.

Soon after the Constitution was promulgated a large part of the Hindu law was codified, including the laws relating to marriage, adoption, succession, guardianship and maintenance. Although the law relating to the joint family remained uncodified , sections of the Hindu Succession Act 1956, ensured that women not only held on to their property within their possession and control but could in the future also inherit severable shares of joint family property on the death of a coparcener. Bigamy was abolished and various aspects of family life reconstituted under

the aegis of these statutory enactments. Other instances involving the personal laws are the Special Marriage Act, 1955, Hindu marriage Act, 1955, the Hindu Minority and Guardianship Act, 1956, and the Hindu Adoption and Maintenance Act, 1956 and the Dowry Prohibition Act, 1961. Similar laws affecting the Personal Laws of Muslims were also enacted like the Wakf Act, 1954, the child Marriage Restraint Act, 1939, Parsi Marriage and Divorce Act, 1936, the Bombay Prevention of Excommunication Act, 1955, etc.

The validity of these reformative personal laws was questioned in the case of *State of Bombay vs. Narasu Appalli.* The Bombay Prevention of Hindu Bigamous Marriage Act, 1946 made it an offence for Hindus to contract Bigamous Marriages. The State had excluded Muslims from the purview of this Act in deference to their practice of polygamous marriages. In the Judgment it was held that the State may rightly decide to bring about social reform by stages and the stages may be territorial or they may be community wise. In the same year the Madras High Court also upheld the Madras (Bigamy Prevention and Divorce) Act, 1949 in *Srinivasa Aiyar vs. Sraswathi Ammal*. Now the Union parliament has held bigamous marriages invalid in the Hindu Marriage Act, 1955 and has abolished polygamy and polyandry. Even the Indian Penal Code makes bigamy an offence under Sections 494 and 495. The Centre passed the Central Act, the Untouchability (Offences) Act, 1955 was passed by Parliament in 1955. The Act penalized imposition of religious or social disabilities on account of untouchability, opens access to public religious places and public commercial and general service establishment.

At this instance it would be appropriate to give a special emphasis on one of the cases which brought the Courts and the Religious leaders to position where there was a clash of ideals. This was the *Shah Bano's case*. It was with respect to the payment of maintenance to the Muslim woman. The Court argued that the mahr amount cannot be reduced from the Decreed amount for the maintenance of the woman after her divorce. The Court went a step further and stated that the shariat laws need a change and suggested a uniform civil code. The case raised mixed reactions and had the result of immense controversies in the country. The Government due to the pressures from the fundamental leaders of the Muslim community passed a Bill which ensured that Husbands could divorce their wives and the maintenance would be in the hands of the relatives and the wakf board.

The Shah Bano's case created new controversies. It emphasized a new duty on the State to go beyond the need to regulate secular aspects of religion and cosmetic religious reform. This new duty obliged the State to identify and eliminate the socially and economically exploitive aspects of many Indian religions. The constitution makers had recognized this and anticipated this demand and incorporated in the constitution itself two important reformative concepts in Hindu Religion. The First was the abolition of untouchablity and the other being opening of all Hindu temples to all believers. However other than these obvious factors that need correction in the Hindu Religion itself it was felt that the other reforms could be achieved on an incremental basis. This was not because that the need for these reforms was *de minimus* but because there was much that was needed to be done for these reforms in the religion.

5. Secularism and Freedom of Religion in Indian Context:

The study of the Freedom of Religion is of any value because the Indian Constitution expressly declares that the India is a secular State in the Preamble. Though the word Secular is nowhere been expressly stated in the Constitution other than the Preamble, the underlying words of the provisions of the Constitution state the same. To what extent can the provisions of Article 25 i.e. that the State can interfere for various reasons be reconciled with the concept of Secularism.

The word secular usually means that the State is completely ousted of any say in any religious matter. Smith D.E., defines the term Secular State as

"*A State which guarantees individual and corporate freedom of religion, deals with the individual irrespective of his religion, is not constitutionally connected to any particular religion nor does it seek either to promote or interfere with religion*."

But this cannot hold true for the Indian scenario and in the Indian Constitution because in India the role of religion is much different from what it is any other country. Justice Jeevan Reddy has stated the following about the secularism in India as "*Secularism is ...more than a passive attitude of religious tolerance. It is a positive concept of equal treatment of all religions."* This was further elaborated by Justice Gajendragadkar, and he also explained the reason for the State being given any power at all. He has stated the following in this concept,

"*It is true that the Indian Constitution does not use the word secularism in any of its provisions, but its material provisions are inspired by the concept of secularism. When it promised all the citizens of India that the aim of the Constitution is to establish socio-economic justice, it placed before the country as a whole, the ideal of welfare State. And the concept of welfare is purely secular and not based on any consideration of religion. The essential basis of the*

Indian Constitution is that all citizens are equal, and this basic equality obviously proclaims that the religion of a citizen is entirely irrelevant in the matter of his fundamental rights. The State does not owe loyalty to any particular religion as such; it is not religious or anti-religious; it gives equal freedom for all religions and holds that the religion of the citizen has nothing to do in the matter of socio-economic problems. That is the essential characteristic of secularism written large in all provisions of the Indian Constitution."

The State has under Indian Secularism appears to have a missionary role to reform the Hindu society……and dilute the beliefs of caste hierarchy.

India is a country, which is very diverse culturally, religiously, and in every aspect of the life of a person. Thus in spite of the fact that secularism is one of the goals to be achieved by the State, there is no complete exclusion of State from religious affairs. Thus many might argue that India is not a secular nation at all. This is because in the western nations there is predominantly only one religion and that is Christianity and it is not burdened with different castes and other sub aspects of it, whereas India has numerous religions and countless castes. All of these are historically deep rooted in the Indian society. They have their own distinct customs, traditions, practices that have been followed since time immemorial. It is also true that there is no one such agency that unifies the different religions and regulates their code of conduct. This is performed by the Church. And strictly speaking secularism emerged as a concept separation of the Church from the State. Such a unifying organization for religion is a factor that has to be considered while regulating religious aspects of any religion. Since in this country religion is a purely independent entity and the some of practices of the religion are a hindrance to the growth of the society the State has been allotted the responsibility to bring about those changes in the religion required for the society at that time in by the Constitution itself. But again the very same Constitution prohibits the State from treating religions differently or from leaning towards any religion. Thus the freedom of religion granted by this Constitution limited by State action is not antithesis to the concept of secularism but on the other hand it is order to follow the principle of secularism that such a provision has been incorporated in the Constitution.

Conclusion:

Religion is a matter of man's faith and belief, but a religion is not merely as opinion, doctrine, or belief. It has its outward expression in acts as well. The freedom of religion clashes with the concept of secularism mainly due to these outward expressions an acts relating religion. These are also called as religious practices. When a religious practice infringes upon the freedom of religion, that is when a delicate balance between when one's freedom of religion can be said to be too much of an infringement into another's freedom. Next aspect is that what if the practices of religion are bad practices, which have no basis in the society as it exists today. Then is the entire concept of freedom of religion redundant or when it has been guaranteed is it only on paper.

Although India's libertarian and egalitarian constitution promotes the freedom of religion, it cannot allow any religion to sustain any patterns of social and economic inequality. The Constitution makers had obscured this issue by using phrases like "social welfare and reform" and "public order, health and morality" rather than the more threatening phrases portraying the campaign to root out exploitation and equality. This new emphasis is necessary for a new secular order. But there is a difference between dealing with exploitation in an imaginative and persuasive way and assimilating the various religions and religious practices into a new secular orthodoxy. It is possible to oppose secularism while being sensitive to the imperatives of religious and group and religious life in India. This is not because certain groups are more important but because it strikes at the very essence of democracy and the basis of our constitution that the sensitivities of religion be reconciled and understood in bringing about reforms in that religion.

The State in such a situation must strive to achieve a balance between the freedom of religion and the right to practice religion as enshrined in the Constitution and the need to reform the religion to bring it into the present century. The State has always made the laws or interfered in the religious norms of the persons only when the existing norms seem to have done a lot of cruelty to any person. This interference is required because certain practices are evolved from superstition and manipulation of certain persons for their own purpose. If the State does not pass a law to correct this then they will continue. Some examples are sati, child marriage (which still exists despite laws being framed against it), infanticide etc. If the State had not interfered when it did then that practice would have continued even now. Religion is a strong reason for people to follow certain bad practices. It is a very strong motivation. To make people stop this there requires an even stronger reason. The State in this context would serve that purpose. The law is to be obeyed. The sanction behind the law is a coercive factor for any person to obey it whether they really believe it or not. The fear of what will befall them for non conformity to the same acts as a strong force for people to obey the law. This will be

eventually accompanied by the change in the minds of the people and the attitudes of the people.

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