



SHAYARA BANO TO SABARIMALA: RELIGION VS PART III OF THE CONSTITUTION

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This paper aims to address and study the existent conflict between the right to religion, the immunity of personal laws and the constitutional ideals as a whole. The subject of the study, *prima facie*, appears oxymoronic and contradictory, given that religion (rather, the right to it) is itself a Fundamental Right and hence, a component of Part III of the Constitution. This paper, however, aims to analyse-in light of the recent Supreme Court judgements-the existing balance, if any, between 'religion'-Article 25, Article 26 and personal laws on one hand and the remaining Fundamental Rights on the other.

The first is the *Shayara Bano* case, that decided the *triple talaq* issue and gave some important observations on personal law in the process. The second would be the *Sabarimala* decision, that laid down elaborate law regarding the exercise and limits of Article 25 and 26. The author examines these laws-not as precedents-but as subjects of research, while considering every other Court decision as a reference for comparison.

The paper also employs the use of the '*basic structure doctrine*' in the examination and analysis of this presumed balance that is the subject of the study. The extent of

permissibility of Judicial Review in cases like these is also examined.

The Premise

*"Religion (in modern States) is, in part, constituted by means of law, but simultaneously as something that is constituted to stand at an arm's length from the law."*¹

The *first* reason is that religion is a feudal institution—a component of the feudal society where equality among all was not justified. Early civilisations flourished with the use of muscular strength, manpower and the availability of water-resources. The concept of religion and the Gods were conceived during those ages. The possibility of organization and employment of intellect for sustenance grew with time and an industrial society was created. New opportunities were created, division of labor emerged at all levels—gradually, the possibility of contribution of all genders and all classes of people became equally possible.

The *second* reason is that although human society grew from feudal to industrial, religion remained a matter of faith and not facts. Hence, these tenants of human faith that remained unchanged were bound to collide with the newfound ideas of the 'industrial human society'. In such a society, a progressive interpretation of the Constitution ascertains that the rights under Part III of the Constitution are geared towards recognition of individual at its basic unit,² and women are treated as equal individuals. As something that is intended to remain "*at*

¹ Michael Lambek, *Interminable Disputes in Northwest Madagascar*, Religion in Disputes pp 1-18

² India Young Lawyers Associations & anr. v. The State of Kerala, Writ Petition (Civil) No. 373 of 2006, decided on 28.09.2018 (Supreme Court)



an arm's length"³ from religion, law has, by virtue of creation and necessity, attempted to control it.

The Conundrum and the Difference of Opinion

The two case laws that are the focal points of our study are: *India Young Lawyers Associations & anr. v. The State of Kerala*⁴ (the Sabarimala case) and *Shayara Bano v. Union of India & ors.*⁵. Both these cases involved aspects of religion in conflict with other Constitutional ideals. Individual dignity, specifically dignity of women, as opposed to religious constraints were examined in these cases. In the *Shayara Bano* case, the majority struck down the practice of triple talaq (or *talaq-e-biddat*) in exercise of its powers of 'judicial review' under Article 13(1) of the Constitution. The Sabarimala case led to the wiping out of an age-old practice of banning menstruating women from entering a place of worship. Rules were made pursuant to this disability, owing to the celibate nature of the deity. The apex Court struck down the law supporting this disability. While the societal effects of these rulings are intended to be nothing but positive, the complications of law were not far behind. The dissenting opinions of the same case laws paint a suave picture of these complications.

The minority opinion in the *talaq-e-biddat* issue concluded that although the practice is a social bane and is infested with gender bias at its very core, it satisfies the constraints provided by Article 25 of the Constitution. Personal laws have the protection of Article

25. To quote the former Chief Justice, "We (the Bench) were obliged to keep reminding ourselves, of the wisdoms of the framers of the Constitution, who placed matter of faith in Part III of the Constitution."⁶ He further said that if the Court itself endeavored to proceed on the issue, "it would amount to overlooking the clear letter of law". Khehar, J. speaking for himself and Nazeer, J., denied to take judicial course to entertain the issue, not before declaring that manifestation of the 'legislative will' for the cause would be the appropriate cause of action. An intermediate relief was given by granting injunction against the exercise of *triple talaq* for six months, and if legislative action was initiated until the event of such law. Hence, in this case the Bench differed in their opinions of the jurisdiction of the Court.

The Sabarimala issue, although different from the *Shayara Bano* case, faces the same conundrum of Equality vs Religion. The majority gave their ruling based on the general presumption that "in the Constitutional order of priorities, the individual right to freedom of religion is not intended to prevail over but was subject to overriding postulates of equality, liberty and personal freedoms as recognized in other provisions of Part III."⁷ The dissent in this case was given by Indu Malhotra, J., wherein she said that issues of deep-rooted religious faith and sentiment must not ordinarily be interfered by Courts in a secular polity. In addition to cautioning the Court's unwarranted interference in the matter, her opinion differed from the Bench in the matter of maintainability of the petition. Malhotra, J. questioned and dismissed the plea for

³ Supra 1

⁴ Supra 2

⁵ 2017 (9) SCALE 178

⁶ Supra 5

⁷ Supra 2



considering the petition. The perils that could result out of questioning “*long-standing customs at the behest of persons who do not subscribe to the faith*” were not lost on her. She made her apprehensions, regarding setting a dangerous precedent, clear in her part of the judgment. Her concerns about religious minorities, especially for a religiously-motivated country like India, are well-founded. She went on to enunciate a number of precedents, namely a.) *Commissioner, Hindu Religious Endowments, Madras v. Shri Lakshindra Thirtha Swamiar of Sri Shirur Mutt*⁸, b.) *Sri Venkataramana Devaru & Ors. v. State of Mysore & ors*⁹, c.) *Mahant Moti Das v. S.P. Sahi, The Special Officer-in-Charge of Hindu Religious trust & Ors.*¹⁰, d.) *Durgah Committee, Ajmer & Anr. v. Syed Hussain Ali & Ors.*¹¹, e.) *Sardar Syedna Taher Saifuddin Saheb v. State of Bombay*¹² and f.) *Bijoe Emmanuel & Ors. v. State of Kerala & Ors.*¹³. In all of these cases, the challenge to a religious practice was entertained because the aggrieved person filed the petition in Court. Justice Malhotra, while limiting the scope of Public Interest Litigation (PILs) on one hand, also said that Courts should interfere in matters of faith only if they are “*pernicious, oppressive or social evils*”.

Judicial Interpretation and Judicial Review: Possibilities and Limitations

Judicial activism has affected religion as much as it has other diverse areas like the

environment or the or federalism.¹⁴ The instant case laws have examined laws created by religious denominations, personal laws and customs. To claim rights as a ‘denomination’, the ingredients of the same must be fulfilled. Evidence/declarations help to that cause. While the status of a religious denomination is clearly enunciated in the Constitution of India, the status of customs and personal laws has been controversial and open to interpretation. Some believe that customs and personal law are harmonious terms, while other repel this view. In the *Narasu Appa Mali* case¹⁵, customs have been considered as deviations from the personal laws, while in the *Shayara Bano* judgment¹⁶, the ability of the Court to rule on a custom and a personal law is discussed in parallel. Courts have tried to exercise self-restraint in exercising its powers when it comes to religion, as discussed in the previous heading. One cannot help but deny that the judiciary is playing this role of a progressive protector of human dignity when it comes to archaic and derogatory religious practices. One of the reasons judiciary can play this role is the legitimacy it enjoys in public perception.¹⁷ However, it must not be forgotten that in a pluralistic society comprising of people with diverse faiths, beliefs and traditions, to entertain PILs challenging religious practices followed by any group, sect or denomination, could cause serious damage to the Constitutional and secular fabric of this country.¹⁸

⁸ 1954 SCR 1005

⁹ . AIR 1958 SC 255

¹⁰ AIR 1959 SC 942

¹¹ AIR 1961 SC 1402

¹² AIR 1962 SC 853

¹³ (1986) 3 SCC 615

¹⁴ Ronojoy Sen, *Legalising Religion: The Indian Supreme Court and Secularism*, East-West Center Washington (2nd ed., 2007)

¹⁵ State of Bombay v. Narasu Appa Mali, AIR 1952 Bom 84

¹⁶Supra 5 at 2

¹⁷ Supra 14

¹⁸ Supra 2 at 2



The Extent of Permissible Religious Freedom and Indian Secularism

Religious freedom implies the freedom to profess one's religion: rituals and practices. According to the Bombay High Court, "Whatever binds man to his own conscience, and whatever moral and ethical principles regulate the lives of men alone can constitute religion as understood in the Constitution"¹⁹. If such a progressive and inherently harmonizing definition of religion is adopted, there would be a minimal requirement of checks and balances. Right to religious freedom is enshrined in Article 25 and 26 of the Constitution. On the other hand, secularism is the basic feature of the Indian Constitution. This was laid down in *Keshavananda Bharti v. State of Kerala*²⁰, and unequivocally in *S.R. Bommai v. Union of India*²¹. In a 700-page ground breaking judgment, a 13-judge Bench of the Supreme Court had evolved and recognized the basic feature of the Constitution²²—making it beyond doubt that secularism, one of the basic features of the Constitution, cannot be compromised with. The subject of the present discussion, however, is religion. Some view secularism as an anti-thesis of religion, while actually it is a formula for the co-existence of more than one religion. Religion and associated activities get their rights by virtue of the secular character of our legal system. religious freedom is derived from the roots of secularism.

There is altogether a new discussion regarding what forms a part of the private domain of religion and what constitutes the public domain. The Constitution of India laid down "*a relatively sound basis for the creation of a secular State.*"²³ Celebratory neutrality, along with religious freedom and reformatory justice, are the three components of Indian secularism.²⁴ "*Celebratory neutrality entails a State that assists in the celebration of all faiths, while reformatory justice implies regulation and reforms in the religious institutions, setting aside core elements beyond regulation.*"²⁵ All that remains to be done is the execution of the Constitutional directives in letter and spirit. However, in a country with multiplicity of religion and a history of communal violence, it is easier said than done.

Conclusion: Blurred Lines

According to Marc Galanter, who gave the concepts of limitation and intervention with reference to law's control over religion,²⁶ *limitation* implies the superiority of 'secular public perception' over 'religious ideals'. *Intervention*, however, implies something more than limitation—it refers to some sort of 'reformulation' of the very basics of the religion. Having studied the aforementioned case laws on issue, it can be concluded that today's Supreme Court is ensuring a fine balance between the efforts at '*limitation*' and possibilities of '*intervention*'. The Courts had to define the legal boundary between the religious and the secular through successive

¹⁹ Ratilal v. State of Bombay, AIR 1953 Bom 242

²⁰ (1973) 4 SCC 225

²¹ (1994) 3 SCC 1

²² Supra 20

²³ Donald E Smith, *India as a Secular State*, Princeton Legacy Library (3rd ed., 1963)

²⁴ Rajeev Dhawan, *The Ayodhya Judgment-Encoding Secularism in the Law*, Economic and Political Weekly, Vol. 29, Issue No. 48 (November, 1994)

²⁵ Supra 14

²⁶ Marc Galanter, *Hinduism, Secularism and the Indian Judiciary*, Philosophy East and West, Vol. 21, No. 4 (October, 1971) pp 467-87



rulings, a boundary which became both clear-cut and yet forever shifting as the corresponding case-law developed.²⁷ One can include the One cannot help but notice that the dissent given by Khehar, J. in the *Shayara Bano* case appeared as to be a strict interpretation of law, irrespective of any societal considerations. Although an injunction was ordered by the judgment, the action was still contingent of the promptness of the Legislature. However, the minority opinion of Indu Malhotra, J. in the *Sabarimala* case, without effort, seems to be a result of proactive societal observation and a wholesome interpretation. She examined the perils and dangers associated with setting a judicial precedent in the highest Court of law in the country, and rightly so. Having said all this, the borderline conclusion of both the dissenting judgments remain the same— Courts should not interfere in matters of faith, unless exorbitant circumstances compel otherwise. Lines are blurred, and probably will remain so for a long time to come. Until then, a progressive judiciary and an inspired Legislature—in harmony with the needs of the society, shall act as saviours.

²⁷Gilles Tarabout, *Ruling on Rituals: Courts of Law and Religious Practices in Contemporary Hinduism*, South Asia Multidisciplinary Journal, 17/2018