



ANALYTICAL STUDY OF FUNDAMENTAL FREEDOM OF RELIGION UNDER INDIAN CONSTITUTION AND PRACTICE OF SALLEKHANA (SANTHARA) UNDER JAINISM

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Abstract-- Indian Constitution has given the fundamental freedom of religion to every Indian citizen. It consists of liberty to profess, practice and propagate one's religion. The preamble of the Indian Constitution has declared India as a secular state. The gist of the fundamental freedom of religion and secularism is nondiscrimination on the part of state among its citizens on the basis of religion. Fundamental freedom of religion under Constitution is not absolute. It is subject to public order, morality, decency and other provisions of the Constitution. Indian higher judiciary has played positive role in determining the ambit of fundamental freedom of religion. It has led down the test of secular aspects of religion and doctrine of essential religious practice. Accordingly it has streamlined the fundamental freedom of religion in larger public interest. Declaration of the practice of Sallekhana (Santhara) by Rajasthan High Court as illegal is the classic example of it.

Keywords: Preamble of the Constitution – Secularism – Fundamental Freedom of Religion – Limitations on the Fundamental Freedom of Religion – Practice of Sallekhana (Santhara) under Jainism – Right to Life under Article 21 of the Constitution – Essential Religious Practices – Decision of Rajasthan High Court.

I. INTRODUCTION

India is the only secular state among the countries situated in Indian subcontinent. The other countries in Indian subcontinent have either declared their official religion or they have legally promoted religion. Buddhism is the official religion of Bhutan and Sri Lanka, Islam is official religion of Pakistan, Bangladesh and Maldives. Hinduism is the legally promoted religion of Nepal¹. India is a secular country and it does not have any state religion.

Right from the ancient times while the gradual and long process of emergence of India as a State was going on the groups of people belonging to different religions, faiths, Sects etc. were always living harmoniously in Indian subcontinent. With the implementation of the Constitution India wanted to continue and legitimize that peculiar notion of harmony cum secularism on its soil. Therefore in the Preamble of the Constitution word secularism was not initially adopted and eventually by 1976 when that ancient culture of harmony and tolerance was re-established by the virtue of the Constitution, Laws and Judicial Decisions the word secularism came to be inserted in the Preamble. Thus with 42nd Constitution Amendment Act in 1976 India became 'Sovereign Socialist Secular Democratic Republic.'

The fundamental freedom of religion to every Indian citizen and state assurance of nondiscrimination on the basis of religion is the base of Indian secularism. However in India the state has not accepted the attitude of indifference towards religion on the contrary it is always keen to regulate secular issues of religion in positive manner.

II FUNDAMENTAL FREEDOM OF RELIGION, ARTICLE 25, 26, 27, & 28 OF THE INDIAN CONSTITUTION

These Articles of the Constitution have led down the fundamental freedom of conscience for every Indian citizen. Indian Constitution does recognize that all the human beings carry the minimum level of conscience but still there may be a difference in the levels of consciousness of the persons. Accordingly Constitution

Note: At present the process of making relevant changes in the new Constitution containing the provision of 'Secularism' is going on in Nepal.



guarantees every Indian citizen to determine that what is the supreme power in terms of God etc. and what kind of relationship it should have with that supreme power. With the freedom of conscience Indian citizens are entitled to enjoy following fundamental freedoms and the rights.

Article 25(1) specifies "The right to freely profess practice and propagate the religion." Article 26 denotes that "Every religious denomination or any section thereof shall have the right (a) to establish and maintain institutions for religious and charitable purposes; (b) to manage its own affairs in matters of religion; (c) to own and acquire movable and immovable property; and (d) to administer such property in accordance with law." Article 27 describes that there shall be "freedom as to payment of taxes for promotion of any particular religion" - by virtue of which no person shall be compelled to pay any taxes where the proceeds are specifically appropriated in payment of expenses for the promotion or maintenance of any particular religious denomination. Article 28(1) binds that no religious instruction is to be provided in the schools wholly maintained by State funding. Article 28(1) & (3) says that those attending any State-recognized or State-aided school cannot be required to take part in any religious instruction or services without consent. Article 29 (1) permits that "Any section of the citizens residing in the territory of India or any part thereof having a distinct language, script or culture of its own shall have the right to conserve the same." Article 30 (1) gives liberty to the Religious minorities that they are free to establish and administer educational institutions of their choice, which shall not be discriminated against by the State in the matter of giving aid. But no institution maintained by the State or receiving aid from it is to deny admission to any citizen only on the ground of religion.

III. THE LIMITATIONS ON THE FUNDAMENTAL FREEDOM OF RELIGION

The fundamental freedom of religion under Constitution is not absolute and they are subject to following limitations.

Under Article 25 (2) the State may pass laws providing for 'social welfare and reform,' and may also freely regulate or restrict 'secular activity' - economic, financial, political, etc. even though it may be traditionally associated with religion.

The fundamental duty under Article 51A (h) imposes obligations on every citizen that, "to develop the scientific temper, humanism and the spirit of enquiry and reform."

Under Article 25 (2) (b) State can impose reasonable restrictions on fundamental freedom of religion for maintenance of public order morality and decency.

Accordingly the state could remove all sorts of caste-based restrictions on entry to Hindu, Buddhist, Jain, and Sikh temples. Thus Indian concept of secularism differs from concept of secularism which is in existence in Western Democracies of USA and France. Indian secularism contains the combination of secular and religious elements and watertight compartment between the same is not expected. Moreover in India the state is prompt enough to curb a tradition under religion if it is violative of any of the Constitutional provision.

In exercise of the legislative powers and subject to the provisions of secularism and fundamental freedom of religion the Central and State legislative assemblies have enacted laws regarding relevant neutral issues of religion. Accordingly laws have been made for regulating the following nonreligious subjects like Religious Conversion and Renouncement, Prohibition on the slaughter of Cows and Bullocks, Religious and Charitable Endowments, Management and Administration of Particular Shrines, Foreign Pilgrimages, issue of Personal laws of the Christians, Parsis, Hindus and a few aspect of Muslim law.

IV. FUNCTIONING OF HIGHER JUDICIARY IN CONTEXT OF FUNDAMENTAL FREEDOM OF RELIGION

The Constitutional and legislative provisions pertaining fundamental freedom of religion with its various aspects have been interpreted by the higher judiciary. It has also solved many religious disputes between the people and the state on one hand, and between various communities, sects, and groups on the other.

Practice of Sallekhana (Santhara) under Jainism



Sallekhana consists of two words sal (meaning 'properly') and lekha, stands for thinning out. It is ultimate way of thinning out one's passion and physical existence. Sallekhana (Santhara) means a fast unto death. A person after taking a vow of 'Santhara' stops eating and even drinking water and awaits death.

Under practice of Sallekhana (Santhara) under Jainism individual is at liberty to put an end to his life if he is coming to an end of his natural life, if one is suffering from incurable disease or disability. The Jain person whether living family life or the life of the Monk can practice Sallekhana (Santhara).

Practice of Sallekhana (Santhara) and Right to Life under Indian Constitution

Article 21 of the Constitution has enshrined right to life and personal liberty. Right to life and personal liberty are the positive concepts, right to life means right with dignified life.

In *Gian Kaur vs. State of Punjab*² the five judge Constitution bench of the Supreme Court has overruled the verdict of Bombay High Court in *Maruti Sripati Dubal vs. State of Maharashtra*³ and the decision of Supreme Court in *P. Rathinam vs. Union of India*⁴ and held that right to live under Article 21 of the Constitution does not include right to die or right to be killed. The court clarified that right to life under Article 21 includes right to live with human dignity and that would mean the existence of such a right up to the end of the natural life.

Thus practice of Sallekhana (Santhara) is violative of Article 21 of the Constitution. It (Constitution) doesn't permit any individual / Indian citizen to waive fundamental rights including right to life.

Rajasthan High Court has termed the practice of Sallekhana (Santhara) as an attempt to commit suicide, an offence punishable under Section 309 of the Indian Penal Code. The court also ruled that support to Sallekhana (Santhara) by any person is punishable as an abetment under Section 306 of the IPC⁵.

DETERMINING NECESSARY RELIGIOUS PRACTICES

In several cases, the courts have decided the religious practice followed by any community that whether the same is an 'essential practice' of its religion and accordingly entitled for protection under Article 25 of the Constitution. In *Ismail Faruqui v. Union of India*⁶ the Supreme Court held that offering prayers in a mosque is not necessarily an 'essential practice' in Islam. And accordingly the Muslims have been prohibited from offering a *Namaj* at the disputed site of Ram Janmabhoomi.

In *Acharya Jagdishwaranand Avadhuta v. Comm'r of Police*⁷ the Supreme Court held that the so-called 'tandav' dance (worshippers dancing with human skulls in their hands) is not an essential practice of the Anandmargi Hindu faith.

The practice of Sallekhana (Santhara) is not essential religious practice under Jain religion. It can be compared with the 'Satipratha' under Hinduism. The tradition of 'Sati' was not in existence in all classes / castes / sects of the Hindu religion and some groups under Hindu religion were observing that custom. It was not essential religious practice moreover it was violative of the concept of right to life hence in British regime only it was prohibited and after independence Prevention of Sati Act has been strictly implemented. In the same manner every Jain person is not observing the practice of Sallekhana (Santhara) and it is violation of Article 21 of the Constitution therefore the Rajasthan High Court has invalidated the custom of Sallekhana (Santhara) under Jain religion.

² (1996)2SCC648

³ 1987 Cr. L J 549

⁴ (1994)3 SCC 394

⁵ Note: At the admission level the decision of Rajasthan High Court has been stayed by Supreme Court accordingly matter is subjudice before Supreme Court

⁶ A.I.R. 1995 S.C. 605.

⁷ A.I.R. 1984 S.C. 51, P 17.



V. CONCLUSION

The Indian Constitutional law has decided the nature and scope of the concept of secularism and fundamental freedom of religion in Indian legal system. The unique Indian pattern of secularism and fundamental freedom of religion as expected by the Forefathers of the Indian Constitution has been validated and protected by higher judiciary. The Parliament and State legislative assemblies have also time to time enacted the laws for regulating nonreligious aspects of the religion. Moreover they are able to regulate the fundamental freedom of religion in the larger interest of right to life, public order, health, morality and decency.

At present also Indian mind is largely dominated by the religion. In such situation with the unique notion of secularism and fundamental freedom of religion under the Constitution; State and judiciary both are able to maintain the balance between religious and secular interests of the people of India. And that is the reason of success of Indian democracy and unity and integrity of India as the strong nation in nation-state system.

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