ILS Law College, Pune

CENTRE FOR PUBLIC LAW'S

PUBLIC LAW BULLETIN

VOL. XIV

TUESDAY

JUNE 30, 2020

THEME: RULE OF LAW V. RULE OF RELIGION

Public Law Bulletin

CENTRE FOR PUBLIC LAW AT ILS LAW COLLEGE,
PUNE

CONTENT CONTRIBUTORS

Soham Bhalerao IV BALLB	Adithi Rao IV BALLB	Ashok Pandey III BALLB	Bhargav Bhamidipati III BALLB	Aarzoo Guglani II BALLB	Dewangi Sharma II BALLB	Samraggi Debroy II BALLB	Vishakha Patil II BALLB

INDEX

A. MESSAGE FROM THE EDITOR

Date: 30 June 2020

Reflecting on a dichotomy of rule of law and rule of religion- An Introduction

Dear all,

The theme of this issue of Public Law Bulletin is 'Rule of Law v. Rule of Religion. Karl Marx had opined that Religion is the opiate of masses. Going by this understanding, the theme of the bulletin may sound to have created an opposing dichotomy between religion and rule of law. As if Rule of law and religion are antithetical phenomena not amenable to station together. However, in my opinion, two are not antithetical rather they are antinomical, that is to say, they regulate values which are antagonising at times.

Rule of law is exemplified in provisions like art 14, art 15, art 16, art 19, art 21 etc. Whereas provisions like art 25 to art 28, 290A and certain provisions dealing with North-Eastern states have bearing on freedom of religion. However, when we look at the structure of freedom of religion in our constitution, evidently it is constrained and qualified. Interalia, the freedom of religion is subordinated to or is to be balanced against other provisions of Part III. To state accurately the freedom of religion under art 25 is subject to other provisions of Part III i.e. other Fundamental Rights. From the same, it becomes crystal clear that exercise of freedom of religion is subject to the rule of law reflected in other provisions of Part III recognising Fundamental Rights. The same therefore makes it clear that there is nothing like the rule of religion.

Of course, from cradle to grave, all of us are regulated and influenced by religious norms; however, observance of such norms is completely voluntary and aspirational. Of

course, to be a non- believer or being an atheist may incur social backlash. Normatively and constitutionally, both believers and non-believers and atheist and theist have equal protection of the law. Looked at from different angles, even atheist or non – believers may be characterized as adhering to their conscience. Adherence to one's conscience may itself be perceived as religious. At any rate, the phenomenon of religion is itself very ambiguous and defies any objective definition.

In India, we have recognized the freedom of religion of every citizen and we have also recognized the right of every citizen of this country to conserve his or her culture. At times culture and religion may in inextricably intertwined making it difficult to draw any distinction between the two. Particularly in deeply divided society that of India where religion pervades every aspect of life, it would be futile to expect state neutrality in respect of religion. On the contrary, the mandate for the state is to render equal respect and to show equal concern to all religions. In India, we don't subscribe to the wall thesis seeking a categorical divorce between the state and the religion rather our constitution advocates equal treatment and equal respect towards all the religions. Freedom of religion may sometimes apart from being intertwined with the idea of conservation of culture; its interfaces with other Fundamental Rights may equally be complex. Thus to put briefly by resorting to rule of law, we regulate freedom of religion and therefore it would be a false dichotomy to pitch the rule of law and rule of religion against each other.

Rather, our Constitution by subscribing to values like human dignity, fraternity, equality, liberty and justice aims at and strives to keep the balance between two and maintain constitutional traction.

However, whether the abovementioned exposition of law and commentary is reflected in judicial discourse is a vexed question. Just to illustrate whether the secular fabric of the constitution is nourished and endured by the Supreme Court in Ayodhya Shrine

case with its paternalistic gestures towards Muslims by recognizing the title of Hindus over the shrine is an issue deeply thought with a difference of opinion. Similarly, looking at Sabarimala Temple entry of women purely from the perspective of Civil Rights marked by secularism and formal equality has the court not disengaged itself from vital technicalities such as locus standi is a matter over which debate will not end very soon. Indeed, balancing the rule of law with freedom of religion in the context of personal laws and particularly that of the minority the judicial and legislative part is full of twist and turns.

I congratulate student editorial team for putting together good articles on the theme of 'Rule of Law v. Rule of Religion'.

Dr Sanjay Jain, Associate Professor & Additional Charge Principal; Faculty Coordinator Centre for Public Law
(Editor-in- Chief)

Mr D.P.Kendre, Assistant Professor & Faculty Coordinator Centre for Public Law
(Faculty Editor)

B. TO ENTER OR TO NOT ENTER?*

* Vishakha Patil, II BALLB

C. VITAL CONSTITUTIONAL QUESTION: (1) THE DOCTRINE OF ESSENTIAL RELIGIOUS PRACTICE: THE STALE AND HALF BAKED CAKE OF THE JUDGES.

AUTHORED BY: AARZOO GUGLANI, II BALLB & NIHAR CHITRE, IV BALLB

INTRODUCTION

The preamble of the Constitution of India declares it to be a"...Sovereign, Socialist Secular, Democratic Republic..." Although the word secular was added in the year 1976[1], we may take the liberty to say that the founding parents of our nation envisaged a vision for a secular country long before 'the word' itself was inserted. We just need to look at part III of the Constitution. Ideally, the Indian State shall not prescribe to any official religion and refrain from interfering from religious activities. But the framers of the Constitution have placed a caveat in part III. If one reads art 14, art 17, art 25 and art 26, the Constitution has interfered in the domain of religious practices through equality of law and equal protection of law (art 14), the abolition of untouchability (art 17), now when we look at art 25 and art 26, which provides for freedom of religion toevery person, the mere words in its proviso, "...subject to public order, morality and health...", along with other provisions of part III have managed to shape the judicial landscape of the country. In this article, we trace the development of the 'Doctrine of Essential Religious Practices 'or the 'Essentiality Test'.

[1]See, the Constitution (Forty-Second Amendment) Act, 1976

ORIGIN OF THE DOCTRINE OF ESSENTIAL RELIGIOUS PRACTICE

The Constitution of India was adopted on 26th January 1950, the Supreme Court and its judges entrusted with the job of adjudicating disputes and paving the way for constitutional interpretation. With no precedent to look upon and virtually interpreting a virgin document was indeed a difficult task. The Supreme Court of India had to decide amongst millions of rituals and practices spreading over numerous religions, caste, creed and region would receive the protection under the mighty wings of the Constitution. This made the Supreme Court as the interpreter of various religious tenets. This gave birth to the test of essentiality or popularly known as the Doctrine of Essential Religious Practice.

In 1954, the Supreme Court while delivering the judgment in The Commissioner, Hindu Religious Endowments, Madras v. Shri LakshmindarThirthaSwamiyar of Shri Shirur Mutt popularly known as Shirur Mutt Case[2]came up with this doctrine.

The Court said, "…what constitutes the essential part of a religion is primarily to be ascertained with reference to the doctrines of that religion itself. If the tenets of any religious sect of the Hindus prescribe that offerings of food should be given to the idol at particular hours of the day, that periodical ceremonies should be performed in a certain way at certain periods of the year or that there should be daily recital of sacred texts or ablations to the sacred fire, all these would be regarded as parts of religion and the mere fact that they involve expenditure of money or employment of priests and servants or the use of marketable commodities would not make them secular activities partaking of a commercial or economic character; all of them are religious practices and should be regarded as matters of religion within the meaning of Article 26(b)."

[2]1954 SCR 1005

Aishwarya Deb in his paper[3] argues that Supreme Court has indirectly gathered the idea of this doctrine from Dr Ambedkar's speech in the Constituent Assembly, "...there is nothing extraordinary in saying that we ought to strive hereafter to limit the definition of religion in such a manner that we shall not extend beyond the beliefs and such rituals as may be connected with ceremonials which are essentially religious."[4]

Firstly, it is imperative to note that, Judges of the Supreme Court are the protectors of Constitutional values and interpreters of the constitution, not religious texts. The only holy book that they should uphold is the Constitution. We fail to understand why did Supreme Court framed a half baked test when art 25 and art 26 provides a proviso along with other provisions of part III provides a filter to religious practices that are eligible for protection under 'constitutional net'. Instead, the Supreme Court relied on interpreting the words of Dr Ambedkar which were so remotely connected to art 25 and art 26. This test gives the judges the power to decide the essentiality of practice on case to case basis with blunt regard to constitutional provisions and is prima facia violative of art 14.[5]

In Durgah Committee Ajmer v. Syed Hussain Ali and ors[6], it further expanded its role that along with what it considers religious and 'essentially religious', it can rationalise religion and remove the superstitions embedded in it.So along with what is essentially

---

3See, Deb, Aishwarya, *Religion* v. Reform: Role of Indian Judiciary vis-à-vis 'Essential Religious Practices' Test (February 28, 2018). Army Institute of Law Journal, Volume XII, 2019. Available at SSRN: https://ssrn.com/abstract=3451484 or http://dx.doi.org/10.2139/ssrn.3451484

4Constituent Assembly Debate on 2nd December 1948 available at https://www.constitutionofindia.net/constitution_assembly_debates/volume/7/1948-12-02 (Last visited on 21st June 1948)

5See, Ankhi Ghosh, "Essential *Religious Paradox? The Supreme Court's interpretation of Article 25*" available at https://www.barandbench.com/columns/essential-religious-practices (last visited on 24th June 2020)

6[1962 SCR (1) 383]

religious, should not be a product of superstition. Does that meanthatan essential religious practice although not superstitious, that violates articles of part III, is constitutionally valid?

Now let's take another example, in Shastri Yagnapurushdaji v. Muldas[7], the court rejected the claim of the petitioner for the independent denomination. Here it went ahead and stated that the teaching of this denomination is based on ignorance and misunderstanding of tenets of Hindu philosophy. The court here has exceeded its authority as to discredit the philosophy and teachings of one sect or denomination. We humbly opine that as long as the practices of a denomination are not detrimental to the constitutional values and contradict the provisions of the art 25 and art 26, it should receive the state's protection to practice, profess and propagate freely.

The distinction between philosophy and religion is hard to tell, at least for a layman. Religious theologians might be able to distinguish it after years of studying both. But Supreme Court in SP Mittal v. Union of India, in a record two years successfully distinguished between religion and philosophy.

In Mohammad Ismail Faruqui v. Union of India[8], the Court came to a point where it held that visiting a mosque is not an essential element of Islam by relying upon the Quran and if the place of worship had particular significance, it would receive protection under art 25.

Agreed, that the doctrine is not all bad and there are instances of the yardstick used by the Supreme Court as a tool for social reform but it essentially encroaches and dictates religious practices. Is this the idea of secularism that we have envisioned?

[7]1966 SCR (3) 242

[8](1994) 6 SCC 360

Calcutta High Court in Acharya JagdishwaranandAvadhuta v. Commr. Of Police[9], said that, "if the Courts started enquiring and deciding the rationality of a particular religious practice, then there might be confusion and the religious practice would become what the Courts wished the practice to be."

The opinion of the Calcutta High Court is right. Encroaching and interpreting the tenets of religion essentially violates the freedom of religion. Won't it? When the caveat is framed by the framers, why frame another one?

In Shayara Bano v. Union of India[10], the Justice Kurian Joseph took the route of Essential Practice Test to strike down the practice of Triple Talaq, as it failed to show that it was sanctioned by the holy text and thus essential. Interestingly, Justice Nariman held it unconstitutional as it being arbitrary thus violative of art 14.

This new approach by Justice Nariman is quite interesting and relying on provisions of art 14.

CONCLUSION

Summing up, we think that religion is essential and forms a part of personal autonomy. Encroaching on the autonomy of religion, the state effectively takes up the functions which it should be away from, all in the name of religious freedom. This is a blatant attack on personal autonomy and an interventionist approach. We agree that the Constitution is a reformist document and it should look at religious practices through a reformist lens. We hope that the Sabrimala judgment review pending in the Supreme Court would do away with the essentiality test and rely on the emerging doctrine of Constitutional morality.

[9]AIR 1990 Cal 336, para 8.

[10](2017) 9 SCC 1

(2) THE MORALITY CONUNDRUM

AUTHORED BY: SOHAM BHALERAO, IV BA LL.B & DEWANGI SHARMA, II BA LL.B

INTRODUCTION:

A simple reading of the Preamble to the Indian Constitution would reflect that the principles of Secularism are one of the foundational basis of the Constitution. The idea of Indian Secularism is not one that separates Religion from public life but one that protects the freedom of religion of its citizens while maintaining 'principled distance'. The Indian Constitution guarantees the right to freedom of religion to individuals under Articles 25 and to religious denominations under Article 26. These rights are not absolute, and the Constitution does allow the State to legitimately regulate or limit religious practices and rights when they go against "public order, morality and health". The Indian Courts are regularly deciding on cases that shape the practice of religion, the limits of state intervention in religious practices and the role of religion in public life.[11] These decisions are often based on the Courts' interpretation of the term 'morality' in the Constitution. However, it needs to be noted that since the advent of the "Essential Religious Practices" test, the Court does not as a matter of rule, dwell into 'morality' every time while deciding a case pertaining to religion. If a particular case passes the ERP test, it is generally held to be valid without a literal interpretation of "public order, health and morality" The eternal question however as was evident in the case of Sabarimala is to decide is *Whose/what* morality would restrict a person's right to religion and conscience?[12]

[11] Ruling on Rituals: Courts of Law and Religious Practices in Contemporary Hinduism, Gilles Tarabout

[12]Legalizing Religion: The Indian Supreme Court and Secularism, Ronojoy Sen

ORIGIN OF THE TERM 'MORALITY'

During the Constituent Assembly Debates, Pt. Jawaharlal Nehru when discussing the various freedoms to be protected by the Constitution said that there can be no freedom without responsibility and these freedoms of speech, faith, belief, worship, etc. should be subject to public order and public morality.[13] Assembly members compared 'morality' to 'decency' and even adopted the comparison in the Constitution[14].

Even during the debates, the Assembly makers did not have one homogenous idea of 'morality'. Shri. M Ayyangar said, "All morality, and all good principles have to be traced to religion." Mr. Naziruddin Ahmad introduced an amendment to replace 'morality' as 'public morality' stating that both essentially have the same meaning and the latter would be a better expression. Some Assembly members also derived the meaning of 'morality' from ideas of righteousness and *Dharma.* The debates show that Constitution makers wanted to restrict the freedoms guaranteed in the Constitution to maintain order, communal harmony, decency, and security in the country. [15]

Dr. Ambedkar introduces the phrase 'Constitutional morality' in his speech 'The Draft Constitution', while defending the inclusion of administration structure in the Constitution so that Constitutional values are protected by the authorities. He quotes the Greek philosopher *Grote* giving importance to Constitutional values and says that "Constitutional Morality is not a natural sentiment. It has to be cultivated". [16]He based the notion of Constitutional morality on the edifice of values reflected in the Indian

[13]CAD, Vol VII

[14] Article 19(2) , Constitution of India, 1950

[15]Supra 3

[16]The Constitution and the Constituent Assembly Debates. Lok Sabha Secretariat, Delhi, 1990, pp. 107-131 and pp. 171-183.

Constitution: liberty, equality, justice and fraternity.[17] The term 'morality' finds its place in the Constitution not only in Article 25 but also in Article 19. Even though it is mentioned as a standalone term, in recent judgments ranging from Naz Foundation[18] to Sabarimala[19], the Supreme Court has chosen to interpret it as 'Constitutional morality' which can be defined as values that are inculcated by the Constitution in the preamble and other parts thereof. The idea of 'Constitutional morality' is different from how the Court has earlier chosen to interpret the term as 'public morality', 'religious morality' or 'general morality'. This inconsistency in jurisprudence has created a question which was raised by the Supreme Court in its order discussing the Review petition in the Sabrimala judgment. It listed one of the issues as "*delineating the contours of the term 'morality' or 'Constitutional Morality', lest it becomes subjective. Is it the overarching morality in reference to preamble or limited to religious beliefs or faith?*"[20] Is 'morality' the values and standards of society[21]or is it the Constitutional values and principles[22]

EVOLUTION OF CONSTITUTIONAL MORALITY:-

In the age of the judicial realism and doctrines such as the "arbitrariness doctrine" "basic structure doctrine" "essential religious practices" test, "reasonable classification" test, the Court using "Constitutional morality" which finds no direct mention in the Constitution just like its abovementioned counterparts, shouldn't surprise the followers of Constitutional jurisprudence. Even though the phrase was used as a passing remark in few judgements, no significant importance could be attached to it then as no judge

[17]https://www.india-seminar.com/2010/615/615_pratap_bhanu_mehta.htm

[18]NAZ Foundation v Government of N.C.T Delhi 2010 CriLJ 94

[19]Indian Young Lawyers Association v. State of Kerala, (2018) SCC Online SC 1690

[20]https://www.livelaw.in/pdf_upload/pdf_upload-366587.pdf

[21]S.Rangarajan v. P.Jagjivan Ram1989 SCC (2) 574

[22]Navtej Singh Johar v. Union of India W. P. (Crl.) No. 76 of 2016; D. No. 14961/2016

used "Constitutional morality" as a ground to legitimize their analysis of a particular claim. This changed in the Naz foundation case which was a case pertaining to the Constitutional validity of S.377 of the Indian Penal Code, wherein Justice A.P Shah of the Delhi High Court struck down the defense of the State who claimed that they had "legitimate state interest" in criminalizing an act which was widely perceived by the public as "immoral". He stated that while analyzing "State interest", Constitutional morality and not public morality should be the determining factor.[23] This view found favour subsequently in the case of Navtej Singh Johar wherein the Apex Court held that the Court must be "*guided by the conception of Constitutional morality and not by the societal morality.*" i.e. public morality.[24] And thus the term "Constitutional morality" was sharpened to strike down abhorrent wrongs of the society. Justice Chandrachud characterized it as "*Constitutional morality reflects that the ideal of justice is an overriding factor in the struggle for existence over any other notion of social acceptance.*" Simply put, Constitutional morality dictates that "morality" has to be interpreted in light of the principles enshrined in the Constitution. This would include Part III provisions which give a significant amount of importance to concepts like civil liberty, equality, equity, and individual freedom. The simplest definition of Constitutional morality was provided by the Court of Appeal for Ontario in Canada, in a 1995 judgement. The Court noted that "when governments define the ambit of morality, as they do when they enunciate laws; they are obliged to do so in accordance with Constitutional guarantees, not with unwarranted assumptions"[25]. Thereafter "Constitutional Morality" found a place in numerous judgements such as the Joseph Shine case which dealt with the Constitutionality of S.497 of the Indian Penal Code, the Independent Thought case which dealt with the Constitutionality of a certain exception to S.375 of the Indian Penal

[23]Supra 8

[24]Supra 12

[25]https://scroll.in/article/905858/indias-attorney-general-is-wrong-constitutional-morality-is-not-a-dangerous-weapon

Code. These judgments used this concept as one of the major grounds to analyze the validity of an argument. Perhaps taking into consideration ideas like transformative Constitutionalism, Constitutional morality as a concept arguably had few naysayers until its usage in the Sabarimala judgment which had its roots into religious beliefs and their validity. The consequence of which was that not only the "Essential Religious Practices" test underplayed but religious beliefs and faiths of a particular community were sieved through layers of intellectual rationalization via the concept of "Constitutional morality". While it had its supporters, it attracted the ire of legal jurists, social commentators, and the public as well. The Attorney General of India, K.K Venugopal minced no words calling it as a "dangerous weapon" and hoped that it would "die at birth".[26]

The supporters of the concept often place reliance on Dr. Babasaheb Ambedkar's speech during the Constituent Assembly debates wherein he mentions the term and hence argue that the term isn't unfounded and has its roots in the Constitutional framework itself. However, the context in which the term was used has to be understood. As has been mentioned above, Dr. Ambedkar used the term to justify including seemingly banal details concerning administration in the Constitution rather than leave it to the Parliament to do so. He began by saying that he agreed that "*administrative details should have no place in the Constitution…however...It follows that it is only where people are saturated with Constitutional morality such as the one described by Grote the historian that one can take the risk of omitting from the Constitution details of administration and leaving it for the Legislature to prescribe them.*"[27] Hence it is evidently clear that Constitutional morality was not, within Ambedkar's intention, meant to be used as a test by Courts to invalidate legislation or government action. Grote's idea of "Constitutional morality" was a rhetorical device used by Ambedkar to justify why seemingly mundane details

[26]*Ibid*

[27]CAD, Vol VII

about the administration of the government had been included in India's Constitution.[28] Nevertheless, the Constitution is considered a living document with new facets and interpretations being added by the day. Hence independent of Dr. Babasaheb's speech, jurisprudence on the interpretation of the Constitution certainly does not bar interpreting a particular provision as the need arises if it serves the interest of the principles enshrined in the Constitution.

It is not hard to observe that like any other judicially invented test, 'Constitutional morality' confers an insurmountable amount of power to the judiciary to impose their understanding of right and wrong on the society. Afterall, morality as a term is inherently subjective. Giving power to the judiciary to strike down provisions of law by looking into the "soul and spirit" of the Constitution is undoubtedly a dicey proposition. As Abhinav Chandrachud rightly observes, "What is to stop a judge, for example, from finding that communism is a part of the undefined 'spirit' of the Constitution".[29] However it needs to be understood that much of Constitutional law jurisprudence is no stranger to magnanimous interpretations of catch phrases and terms. To name a few, Article 21 jurisprudence, Article 14 jurisprudence as well as the now popular "manifest arbitrariness" doctrine acts as a testimony to the same.

EVOLUTION OF PUBLIC MORALITY

Typically, the sense of 'morality' is derived from the accepted values, norms and beliefs in a society/country. 'Public morality' sources its origin from these generally accepted values which could be traditional values, national values, popular religious values, cultural values and the values that significantly define the country.The phrase, 'public order, morality and health' if meaningfully constructed and in its true spirit would be

[28]Abhinav Chandrachdud, The many meanings of Constitutional morality , https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3521665 , 12 Feb 2020

[29]Ibid

read as public order, public morality and public health. It can be argued that the source of 'public morality' has its source in the Constitution, the Constitution Assembly Debates and the history of events that took place during the framing of the Indian Constitution.'

In *State of Bombay v. R.M.D. Chamarbaugwala*[30], the Supreme Court rejected the argument that 'gambling transactions' would be protected under Article 19(g) relying on the ground that gambling is considered a 'vice'. Similar arguments have also been accepted by the Court for prohibiting or regulate liquor sale[31]. In *K.A. Abbas v. Union of India*[32], the Court commented that, "The larger interests of the community require the formulation of policies and regulations to combat dishonesty, corruption, gambling, vice and other things of immoral tendency", justifying State restrictions in interest of public morality and decency. In Mr. 'X' v. Hospital 'Z'[33], the Court said that in conflict between two fundamental rights, the right advancing 'public morality' would prevail. Thus, the notion of what constitutes 'public morality' has significantly shaped and influenced the contours of freedoms in India.

MORALITY AND ITS INTERPLAY WITH RELIGION:

As Adv. Gautam Bhatia rightfully observes "The Supreme Court's religious freedom cases can be broadly divided into two types: cases involving State intervention into the management of temples, *durgahs*, *maths*, *gurudwaras*, which primarily include administration of estate, and appointment of officials; and cases involving the relationship between the members of religious communities, or practices of those

[30]The State Of Bombay vs R. M. D. Chamarbaugwala, AIR 1957 SC 699

[31]Nashirwar v. State of M.P ,1975 SCR (2) 861

[32]K. A. Abbas vs The Union Of India &Anr(1970) 2 SCC 780

[33]Mr. 'X' vs Hospital 'Z'(1998) 8 SCC 296

members (beef eating, bigamy, excommunication, *tandava* dancing)".[34] In both types of cases, the Court in order to make a judgment has majorly placed reliance on the Essential Religious Practices test which is simply the Court analyzing whether a particular practice is essential to the practice of the religion involved instead of sticking purely to the text of the Constitution. This is evident from a catena of judgments ranging from the NarasuAppa Mali to Sabarimala. In such a manner interpreting "morality" has often taken a backseat as if a religious practice passed/failed the test, the Court in most cases did not deem it necessary to delve into the actual text of the Constitution i.e. "public order, morality and health". This is apparent from cases like the Ananda Margi case which dealt with whether the police can prevent the 'Tandava dance' which involves a public procession, and the use of skulls, knives and tridents. Even though the Court could have prevented it simply using Article 25 (1) which dealt with the public order clause it held that since the dance was not considered as an essential religious practice of the Ananda Margi, the police had the power to prevent it. The Court even specified that since it did not pass the test, it did not deem it necessary to go into the public order and morality question.

As for the case of Sabarimala, the majority opinion of the Court found the practice to be violative of the Essential Religious Practices test as well as violative of 'Constitutional morality'. The Court read the morality clause in Article 25 and 26 to mean Constitutional morality which sparked off a debate as to whether the term morality needs to be interpreted as Constitutional morality even in religious matters?

Interpreting morality in such a manner would entail religious practices to be devoid of any kind irrational practices and therefore Justice Indu Malhotra in her dissenting opinion argues that "*notions of rationality cannot be invoked in matters of religion by*

[34]Gautam Bhatia, Individual, Community, and State: Mapping the terrain of religious freedom under the Indian Constitution, https://indconlawphil.wordpress.com/2016/02/07/individual-community-and-state-mapping-the-terrain-of-religious-freedom-under-the-indian-constitution/ , Feb 2016

Courts".[35] By doing so it defeats the purpose of religion itself which is inherently irrational and rightly so. As has been mentioned above the Constitution makers certainly did not envisage downplaying people having the right to observe religion or the matters connected thereof. While the term being inherently vague and hence being prone to mischief has been mentioned above, it must not be forgotten that progressivism forms the pillar of an evolved society. Constitutional morality if used in a calculated manner is an effective tool to attain the same.

As far as public morality is concerned, in spite of its apparent usage the inherent problem with it is the lack of a precise definition and subjectivity associated with the idea of morality and values. The notion of what is right and what is wrong, accepted societal norms and values keeps on changing and evolving. This ambiguity leads to individual judges and States imposing their own ideology and notions of morality and public interest on citizens. Tests like the Essential Religious Practices test confer absolute power to the judge to interpret a religious notion which can have disastrous effects. These notions can be skewed, or even against the ideals envisaged in the Constitution. The practice of prohibition of entry of women in the Sabarimala temple would have stood the test of 'public morality' and probably would have been upheld as was argued by the State.[36] Religious practices are discriminatory towards one section of the community; if 'morality' is viewed from the narrow lens of 'public morality' these practices would not be considered unconstitutional. After all the State in *Navtej Singh Johar v. Union of India* did argue that homosexuality is against the perceived notions of religious and social morality.[37]With the notion of 'public morality' open to

[35]Supra 9

[36]https://www.firstpost.com/india/a-lawyer-for-lord-ayyappa-advocate-sai-deepak-turns-heads-in-supreme-Court-arguing-for-sabarimala-deitys-right-to-celibacy-4859291.html

[37]https://www.livemint.com/Opinion/Nh7EO3OkC1xipQhoc2U8aO/Opinion--What-the-Section-377-verdict-says-about-India.html

interpretation, practices like 'khatna' (Female Genital mutilation in Dawodi Bohra community), 'nikah-halala', restriction on entry of women to several places of worship, etc. can be justified by the State, the religious communities and even the judiciary. Public Morality can be seen from the prism of deep religious sentiments and beliefs. A narrow approach based on one sections' or religion's understanding of morality if adopted to effectively restrict fundamental freedoms such freedoms would simply cease to exist and remain only on paper.

But should a concept be discarded only because it is open to interpretation? Ideas like liberty, equality, discrimination, dignity would also fall in the same category. The vagueness of the concept does create a jurisprudential challenge before the Courts to maintain consistency and remain true to the spirit letter of the Constitution. But the real challenge is to understand the true Constitutional meaning of religion and whether Individual rights can even be protected when they are directly juxtaposed against group rights guaranteed by the Constitution. After all the theory of harmonious construction clearly states that "*the rule of construction is well settled that when there are in an enactment, two provisions which cannot be reconciled with each other, they should be so interpreted that, if possible, effect should be given to both.*"[38] "*To harmonize is not to destroy any statutory provision or to render it fruitless.*"[39]Therefore using Constitutional morality in the aforementioned context arguably renders the right to religion pointless while using Public morality arguably makes provisions pertaining to equality and liberty futile. Hence the Court's approach to morality has to differ from case to case depending upon the magnitude of the practice in question which the Essential religious practices test seeks to do.

[38]International Airport A.I. vs. Union of India (UoI) and Anr. ,AIR 2006 Delhi 46

[39]Commissioner Of Income Tax vs. M/S Hindustan Bulk Carriers ,Appeal (civil) 7966-67 of 1996

D. INTERSECTION OF PUBLIC LAW: IMPOSING SILENCE ON THE STRONG- S.295A OF THE IPC

AUTHORED BY: RASHMI RAGHAVAN, IV BALLB & SAMRAGGI DEBROY, II BALLB

INTRODUCTION

Richard Dawkins, a celebrated author on Atheism writes in his wildly popular book, The God Delusion,

"*The God of the Old Testament is arguably the most unpleasant character in all fiction: jealous and proud of it; a petty, unjust, unforgiving control-freak; a vindictive, bloodthirsty ethnic cleanser; a misogynistic, homophobic, racist, infanticidal, genocidal, filicidal, pestilential, megalomaniacal, sadomasochistic, capriciously malevolent bully.*"

It is Dawkins' work to critique religion. Being an atheist, he fundamentally rejects a God or any religious institution claiming to have answers to the creation of life. Sam Harris, another contemporary atheist scathingly remarks,

"*It is merely an accident of history that it is considered normal in our society to believe that the Creator of the universe can hear your thoughts while it is demonstrative of mental illness to believe that he is communicating with you by having the rain tap in Morse code on your bedroom window.*"[40]

Such people consider it imperative that society be free from the evils that religion perpetuates- mostly the freedom to believe irrational beliefs. Dawkins and Harris dare to touch on subjects that most countries' laws prohibit via blasphemy laws or laws that incite religious hatred. India's variant of the blasphemy law can be found in Section

[40]Sam Harris, the End of Faith.

295A of the India Penal Code, 1860,[41] a token of the '*divide and rule*' policy from the colonial days. The infamous section was incorporated to curb competitive communalism in 20th century Punjab. The existing penal laws did not cover tracts that insulted or mocked religious figureheads, and this was perceived to be a serious lacuna.[42] The *Rangila Rasul* case (1924)[43] and the *Risala Vartman* case (1927)[44]catalyzed the insertion of the said section in order to rectify the deficiencies of Section 153A, that was originally aimed at penalizing acts that disrupted public harmony.[45] Sections 295A laid down the requirement of a 'deliberate and malicious intention' to outrage or insult the religious feelings of a particular class.[46] However, the broad scope of interpretation and the capacity of the said section to attract arrest without a warrant makes it problematic, to say the least.

[41]S. 295A, IPC: Deliberate and malicious acts, intended to outrage religious feelings or any class by insulting its religion or religious beliefs.— Whoever, with deliberate and malicious intention of outraging the religious feelings of any class of citizens of India, by words, either spoken or written, or by signs or by visible representations or otherwise, insults or attempts to insult the religion or the religious beliefs of that class, shall be punished with imprisonment of either description for a term which may extend to three years, or with fine, or with both.

[42]https://www.livemint.com/Sundayapp/TFCMsqPVQ8rK6dJj2E2kSN/Blasphemy-law-and-the-Constitution.html

[43]Stephens, "The Politics of Muslim Rage"

[44]"The 'Vartman' Case: Hearing in High Court," The Tribune, July 17, 1927

[45]http://theleaflet.in/vague-unreasonable-constitutionally-untenable-why-indian-variant-of-blasphemy-law-section-295a-ipc-should-go/

[46]S. 295A, IPC

IS SECTION 295A A 'REASONABLE RESTRICTION' ON FREE SPEECH?

"I disapprove of what you say, but I will defend to the death your right to say it."[47]

The Constitution of India has granted the right to express one's thought freely and without fear under Article 19(1)(a) subject to restrictions like defamation, incitement, contempt etc.[48] Post-independence, our free speech jurisprudence evolved without having to deal with S.295A until Ramji Lal Modi's writ petition came to its doors. Here, Ramji Lal Modi was already serving a sentence under Section 295A when his writ petition challenging the vires of the provision came to Court. The Petitioner's counsel deliberately used the over breadth doctrine to highlight the vagueness that the law brought. Rejecting it in toto without any substantial analysis, the Court upheld the constitutionality of the provision by highlighting that, the restriction of any deliberate act (of speech) is only to further the interests of "public order" enumerated under Art.19(2). But the judgment never truly dealt with the intricacies of the overbreadth analysis. The **doctrine** holds that if a statute is so broadly written that it deters free expression, then it can be struck down on its face because of its chilling effect—even if it also prohibits acts that may legitimately be forbidden.[49]

While the Court drew a legitimate state interest in wanting to curb public disorder, it did blatant disservice to this test by not analysing it to its logical extent. For an over breadth analysis, what needs to be checked foremost is whether the law is aimed at curtailing free speech. This in case of S.295A was of absolute certainty. Secondly, the Court should employ all possible permutations arising out of such a law. This includes

[47]Voltaire

[48]A.19(1) CoI

[49]P. Ramanatha Aiyar, The Law Lexicon

considering of hypothetical or fictional scenarios alongside legitimate concerns like public order and morality, if they are all sought to be covered by the same law.

The provision's permutations can be analyzed as thus. It criminalizes all honest and bona fide statements as well as inciteful and hateful remarks. It criminalizes all methods of expression, be it through words (spoken or written) and signs or gestures. More recently, television actor Kiku Sharda was arrested for merely impersonating Gurmeet Ram Rahim Singh, the leader of the Dera Sacha Sauda.[50] This was followed by Mahendra Singh Dhoni (cricketer) getting booked under the section when an image of him portrayed as Lord Vishnu was published in a magazine with the caption 'God of Big Deals'.[51] Therefore, even frivolity and comedy is hurtful under this section. It is so broad that it can criminalize the defamation of a religious class, not only on their scriptures, but also on any of the actions of their past spiritual gurus. The provision penalizes comments on the state of being or habits of any religious community in the present. Common law only knows defamation of an individual, but the provision was overbroad to cover defamation of an entire class of religious people, even its multiple sects and sub sects. The most severe blow was that of intention to cause outrage to religious *feelings*- one need not even have to incite violence or cause violence themselves! Add to this, there was no standard at which religious feelings could be hurt; one of a devout, an ordinary man or a reasonable man. Even speech in isolation thus, would be suspect of hurting the religious feelings of its members under such a law. The provision is so broad, that it ranges on vagueness and uncertainty as to what it ultimately seeks to criminalize. Bentham would have certainly been irked at the state of S.295A when it held the power to punish most free speech actions related to religion.

[50]https://www.hindustantimes.com/tv/i-went-to-jail-for-a-day-and-now-sir-has-gone-for-20-years-kiku-sharda-pokes-fun-at-ram-rahim-singh/story-hPwUpLeEDfJP0alyXTFzeJ.html

[51]Mahendra Singh Dhoni v. YerragunthaShyamsundar, 2017 SC 450.

An over breadth analysis is incomplete until it analyzes the chilling effect such a law has. This chilling effect is produced when the law uses criminal sanctions as deterrence to the free expression of thoughts. S.295A seeks to impose a prior restraint on speech that hurts others, while effectively accomplishing the task of silencing any religious criticism. It may interest us that while the law was being drafted, the Select Committee recommended an explanation to balance this chilling effect---

Explanation 1. It is not an offence under this section to set out facts and offer criticism based on such facts, pertaining to the public conduct of founders or saints or representative-men or protagonists of any religion or any sect of any religion, provided that such setting out of facts and such criticism is not malicious.

Explanation 2. It is not an offence under this section to set out facts and to offer criticism based on such facts, pertaining to the principles, doctrines or tenets or observances of any religion or any sect of any religion, in the course of a historical or philosophical or sociological disquisition and with a view to promote social or religious reform.[52]

These explanations sought to protect those seeking to induce social reform by their writings and speeches. However, these explanations never made it to our Statute books and continue to harass the Dawkins, Harris and Dan Browns of our time. The chilling effect of this law is not only the prior restraint of speech but the additional harassment of Petitioners by opening them to lengthy and expensive litigations and lengthier incarcerations. M.F. Hussain and countless others ultimately acquitted of offending religious sensibilities faced a tough trial and periods in and out of jail during the time justice was being dispensed.

[52]See Neeti Nair, Beyond the 'Communal' 1920s:
The Problem of Intention, Legislative Pragmatism, and the Making of Section 295A of the Indian Penal Code

Thus, the constitutionality of S.295A is founded on an incorrect application of the over breadth analysis. Public order cannot be used as a forefront to protect a law that otherwise criminalizes all actions mentioned above and produces an effect so chilling, that people fear speaking about religion.

DOES S.295A VIOLATE FREEDOM OF RELIGION?

The Indian concept of secularism cannot be equated to its western counterpart. In the West, it refers to the complete separation of the church and state. During the Constituent Assembly debates, the secular nature of the country was discussed and deliberated upon. The two ways out were either the no concern theory or respecting all the religions equally.[53] Owing to the multi religiosity of India, a 'principled distance' was proposed and accepted instead of a strict wall of separation.[54] The Court in *St. Xavier's College v. State of Gujarat* had affirmed that "secularism is not anti - G0d or pro - God, it treats alike- the devout, the agnostic and the atheist."[55] Indian secularism swings between giving a blind eye to religious belief and banning them at one stroke in order to bring about social reform. It promotes fraternity among major communities and in the same breath does not discriminate among religious institutions.

The controversial section snatches the secular nature from the Constitution, in more than one way. It does not give any leeway for fair criticism of any religion in order to introduce reforms owing to the broad ambit of the law.[56] The Constitution provides for

[53]https://www.epw.in/journal/2002/30/special-articles/secularism-constituent-assembly-debates-1946-1950.html

[54]https://iow.eui.eu/wp-content/uploads/sites/18/2014/05/Bhargava-04-Bhargava.pdf

[55]*St. Xavier's College v. State of Gujarat*

[56]https://www.epw.in/engage/article/blasphemy-law-antithetical-indias-secular-ethos#:~:text=Section%20295A%20of%20the%20Indian,the%20secular%20character%20of%20Constitutio

the freedom to reform the redundancies of any religion. But this will involve some critical deliberation to fill the shortcomings of a religion - a process that will surely tickle the intolerant spine of a religious fanatic. In *Sujata Bhadra v. State of West Bengal* (2005),[57] it was observed that if the act is inflicted in good faith in order to facilitate some measure on social reform, then such an act would not attract the penalty of the section in question. However, the trend of banning books[58] randomly, owing to the '*malicious*' intent of the author showcases the inconsistency of the judiciary. The lack of a yardstick defining malicious intent or evaluating the plausible outcome of a speech or book makes the application of the section tricky leading to high subjectivity and poor judgments. Moreover, Courts often forget that the Right to Religion is 'subject to other provisions of Part III' rightly enumerated in the DaVinci Code Case. Here, the Madras High Court rightly held that

"*As regards the harmonious interpretation of Article 25 and 19, it is clear from a reading of these provisions that the rights under Article 25 are subject to the other provisions of Part III, which means they are subject to Article 19(1). It was also not clear before the Court how the exhibition (of the film) will interfere with anyone's freedom of conscience or the right to profess, practice and propagate a particular religion."*[59]

In any case, Dawkins' critique of the Old Testament does not harm millions of Christians from celebrating Easter and Good Friday nor does it tumble the Bible from being the most popular book in the world. Harris' critique of the Kuran does not devalue the importance of the Prophet's teachings in millions of Muslim households.

---

n.&text=First%2C%20it%20interferes%20with%20ideals,disallowing%20fair%20criticism%20of%20religion.

[57](2005) 3 CALLT 436 HC

[58]Bhasin

[59]Sony Pictures Releasing of India Ltd. and Another v. State of TN and Others, (2006) 3 MLJ 289.

Ultimately, deliberate acts that hurt religious feelings do not stop people from practicing a faith that they hold very dear. Both liberties, of speech and religion are best realized when there is freedom to believe (and not believe) simultaneously and freedom to act in accordance with belief (or not) simultaneously.

DOES S.295A HAVE TO GO?

The current state of affairs propounds the bitter truth that though judicial reform comes at the end, the process of going through tumultuous litigation is the punishment.[60] This penal provision gives prominence to community interests over the individual, without having any backing from our Constitution. The Courts have made strides in free speech jurisprudence- by moving from a proximate link[61] to the restrictions to a more direct test of imminent harm[62] but only time will tell if they can relegate this provision to history. At present, the doughty doubter, the diligent sociologist, the absent-minded philosopher, the mischievous but kindly humorist and the apparently merciless satirist who uses the knife but only in the spirit of a surgeon when performing what may be a necessary operation for the good of society all need to be protected from the clutches of this law.

[60]https://www.thehindu.com/opinion/editorial/tale-of-two-sections/article18195720.ece

[61]Superintendent, Central Prison Fatehgarh v. Ram Manohar Lohia, 1967.

[62]Shreya Singhal v. Union of India (2015)

E. OBJECTION YOUR HONOR: REVISITING SARDAR SYEDNA TAHER SAIFUDDIN SAHEB V. STATE OF BOMBAY

AUTHORED BY: ASHOK PANDEY AND BHARGAV BHAMIDIPATI, III B.A.LL.B

INTRODUCTION AND FACTUAL BACKGROUND

Social boycott, ostracism and excommunication of individuals have been common practices among diverse communities of the country, since time immemorial. Citing public interest and deprivation of legitimate rights as a result of such practices, the then Government of Bombay, enacted The Bombay Prevention of Excommunication Act, 1949.[63] The Act prohibited the excommunication of any person from his/her religious creed, caste or sub-caste. This enactment was done since, such expulsion deprived a person of his/her rights or privileges which are legally enforceable by a suit of civil nature and it included the right to office, property, worship at a religious place, right to burial or cremation. The only community which challenged the Act was the Dawoodi Bohras (a sect of Shia Muslims), whose then spiritual head, the 51st Dai-ul-Multaq, Sardar Syedna Taher Saifuddin Saheb filed a petition challenging the Act as violative of his fundamental rights under the Constitution. The Bombay High Court rejected his allegations and aggrieved by the same, he appealed to the Hon'ble Supreme Court where a five judge constitutional bench, with a 4:1 majority, declared that the impugned Act violated Article 25 and 26 of the Constitution and was hence, void. Chief Justice Bhuvaneshwar Prasad Sinha was the lone dissenter.

The petition was argued at length and the primary contentions of the Petitioner, to which the majority conceded, were:

[63]Bombay Act no. 42 of 1949

1. The process of excommunication was an "essential religious practice".
2. That excommunication was a "religious affair" under Article 26(b) of the Constitution.

As Mr. Gautam Bhatia rightly pointed out, apart from adjudicating upon the constitutionality of the legislation with regards to Article 25 and 26, there was also a deeper, philosophical question which was addressed i.e. "to what extent can a liberal democracy, which respects the rights of cultural communities to exist and propagate, impose democratic or liberal norms upon a community's internal functioning?"[64]

The authors, through this article, aim to reanalyze the arguments behind these contentions and opine a more probable conclusion which the Hon'ble Court should have arrived at.

ESSENTIAL RELIGIOUS PRACTICE

Religious liberty is at the heart of every liberal democracy. One is unlikely to hear a principled case for religious intolerance, disabilities, and persecution. We wish to look below the surface towards the tenets, reflecting the more fundamental disagreements, specifically around which aspects or tenets of a religion ought to receive absolute protection under a democratic constitution.

To simplify this controversy, we can categorise religious liberty into two expressions; *forum internum* and *forum externum*. While the former refers to the internal freedom to believe, the latter is the manifestation of such religious belief into private and public spheres of the citizens. Our contention in challenging the majority decision shall remain that the "essential religious practices" doctrine as evolved in the Indian jurisprudence

[64] Monday: An important case on Religious Freedom before the Supreme Court, Indian Constitutional Law and Philosophy, Gautam Bhatia, 9th Jan 2016

limits the constitutional protection to only when a practice reaches the level of *forum internum* of the followers of that religion. Apart from this we shall further rely on the intention of the drafters and contemporary decisions of the court to illustrate the constitutional wisdom in Justice Sinha's dissent.

The Court has dealt with the applicably of this doctrine by bringing into play the 'essential practices' test to decide what is essential to the religion and used it to distinguish between the sacred and the secular. The Court's intervention to decide what is religious and what is not in a secular, constitutional culture is hardly peculiar to India.[65] There are three ways in which the court applies this test. First, the Court has taken recourse to this test to decide which religious practices are eligible for constitutional protection. Secondly, the Court has used the test to adjudicate the legitimacy of legislation for managing religious institutions. Finally, the Court has employed this doctrine to judge the extent of independence that can be enjoyed by religious denominations.

Before we critique the observations of the majority decision, we must take a look at their observations on these questions of the law. On the question of whether excommunication was a religious act (and not a secular one), the court relied on the idea that excommunication was an instrument of discipline within the religion.[66] On the question of whether it was an important part of the independence enjoyed by the Dai-ul—Mutlaq, the court highlighted the supremacy of the Dai's position in the Dawoodi Bohra community. And lastly on the question of the ability of the Bombay Prevention of Excommunication Act, 1949 to manage such religious practices, which is dealt with in the latter part of this article.

---

[65]Part VII, Chapter 49, 'Secularism and Religious Freedom', The Oxford Handbook of the Indian Constitution, pg. 885.

[66]Sardar Syedna Taher Saifuddin Saheb v. The State of Bombay (1962) (MANU/SC/0072/1962), ("hereafter "**Saifuddin case"**) para 39

The primary submissions of the Petitioner in this regard were relating to the importance of excommunication in a religion. The Privy Council's decision in *Hasanali v. Mansoorali*[67] held that the Dai had the right to excommunicate a particular member of the community for reasons and manners indicated in the judgment. Although the Respondent did not deny the same but it essentially regarded excommunication as a practice tangential to religion and not essentially religious. The Attorney General made it clear in his submissions that the impugned Act deals with preservation of rights of civil nature which are violated by the practice of excommunication and thus it would not violate religious rights.

The discussion on essential practices cannot be complete without the mention of the *Shirur Mutt* case[68] which largely adopted a broader concept of religion as encompassing not just faith or belief, but its practices too; like rituals, ceremonies and other modes of worship which are regarded as an 'integral' part of the religion. The case is a landmark decision which in turn adopted the definition from *Adelaide Company v. Commonwealth of Australia*[69] which included acts in pursuance of religious beliefs as part of religion.

Neither the respondents nor did the dissenting opinion of Justice Sinha deny this proposition, nor did they deny the fact that the Dawoodi Bohra community including the Dai-ul-Mutlaq are religious denominations under Article 26. The primary bone of contention however, is whether excommunication relates to acts and matters being religious or secular in nature.

[67]ILR (1947) IndAp 1

[68]The commissioner, Hindu Religious Endowments, Madras v. Sri LakshmindraThirthaSwamiar of Sri Shirur Mutt, [1954] 1 SCR 1005, para 16

[69](1943) 67 CLR 116, 127

It is quite clear that the essential religious practices require a two-pronged test – whether a claim was religious in nature and whether it was essential to the faith.[70] The court largely accepted the act of excommunication as religious in nature on the basis of the undisputed position of the Dai in the Dawoodi Bohra community which at best may fulfil the second requirement.[71] But what was a missing logical link was why the act of excommunication a purely religious act is considering it impacted civil rights like burial of the deal in community burial grounds and rights in the property of the community were also impacted by excommunication. The court valued its contention by emphasizing on the second part of this test of the importance of excommunication within the religion, while considering the impact on civil rights as irrelevant. But deprivation of civil right indicates that excommunication was a tangentially religious act which dealt with civil rights of the followers, thus rendering it as not a purely religious act.

Justice Sinha highlighted the need to demarcate a line between purely religious acts and acts which were a part of religious institutions or tangentially religious. The foundation of this approach is clear from Ambedkar's address in the Constituent Assembly Debates which reads:

"There is nothing which is not religion and if personal law is to be saved, I am sure about it that in social matters we will come to a standstill... There is nothing extraordinary in saying that we ought to strive hereafter to limit the definition of religion in such a manner that we shall not extend beyond beliefs and such rituals as may be connected with ceremonials which are essentially religious. It is not necessary that the sort of laws, for instance, laws relating to tenancy or laws relating to succession, should be governed by religion"

[70]Rajeev Dhavan and Fali Nariman, 'The Supreme Court and Group Life: Religious Freedom, Minority Groups, and Disadvantaged Communities' in BN Kirpal and others (eds) *Supreme But Not Infallible: Essays in Honour of the Supreme Court of India* (Oxford University Press 2000) p. 260

[71]Saifuddin Case, paras ,39, 41, 69

This clearly hints towards the intention of the drafters to only protect the purely religious rites. Ceremonies and anything merely related to religion like tenancy, succession, etc. may be governed by the State, which means that religious denominations under Article 26 have independence to govern matters purely of religious nature and not tangentially religious or civil matters. The fact that excommunication extends this power beyond religious rights and affects the individual's civil rights goes on to show that Justice Sinha's observations are very much in consonance with the truer scheme of Constitution which does not protect incidentally religious practices.

The majority opinion also reverses the general thematic direction of the jurisprudence of the time in this regard. In the *Durgah Committee v. Syed Hassan Ali*, although Justice Gangendragadkar held that the khadims were a religious denomination under Article 26 of the Constitution, it did not affect the court's decision on the validity of the DurgahKhwaja Saheb Act.[72] Thus, the court in Saifuddin case as well should more clearly rationalize as to why the excommunication was an essentially religious act and then weigh it against the intentions of the impugned legislation.

Thus, considering that excommunication is not purely religious in nature, it hints towards the idea that the act falls outside the domain of *forum internum* and goes on to affect *forum externum* including civil rights of the followers. Thus, the true constitutional scheme does not, in reality, protect such acts under Articles 25 and 26.

MANAGEMENT OF RELIGIOUS AFFAIRES

With regards to the violation of Article 26 of the Constitution, the Petitioner argued that the Dawoodi Bohras are a religious denomination and are hence entitled to take measures to ensure continuity by maintaining discipline and unity. And the right to enforcing such discipline extends to the right of excommunication of the dissidents. The

[72]AIR 1961 SC 1402.

Respondent, on the other hand argued that excommunication was not a matter of religion within the ambit of Article 26(b) and what the Act really intended was to put an end to "the practice indulged in by religious denominations to deprive it's members of their civil rights".

The Respondent also touched upon Article 25(2)(b) and said that the Act was intended for social welfare and social reform. Therefore, even if the practice of excommunication touched religious matters, the Act was in consonance with the modern notions of human dignity and individual liberty.

Not only did Chief Justice Sinha concede to the arguments of the Respondent, but he also concluded by equating excommunication to a practice that promoted untouchability, the likes of which have been abolished in all forms, by Article 17 of the Constitution.

Disregarding the view of the Petitioner that Article 26(b) could not be read subject to legislation under Article 25(2) (b), Justice Sinha placed reliance on *Shri Venkataramana Devaru v. The State of Mysore*[73] which laid down that Article 26(b) had to be read subject Article 25(2)(b). To add weight to the argument on the legislation having a purpose of "social reform and welfare", he also gave examples of abolition of deleterious religious practices like Sati and widow remarriage by way of legislations. In fact, in paragraph 11 of the Judgment, he says that the Act is a culmination of the history of social reforms which began in our country more than a century ago.

While delivering the judgment for him and two of his brother judges, Justice K C Das Gupta conceded with the arguments of the Petitioner and said that excommunication also took place on grounds of "lapse from orthodox religious creed or doctrine". And by interfering with this right, the legislature did interfere with the rights under Article

[73] 1958 (1) SCR 895

26(b). Although Justice Gupta also agreed that the practice did take away civil rights, he declared their deprivation to be inconsequential since there was no legal protection granted to them under Article 26. With regards to the legislation having been enacted for the purpose of social reform, Justice Gupta was of the view that just because the legislation sought to protect civil rights, it was not a reason enough to say that the law provided for "social welfare or reform". Concurring with the views of Justice Gupta, Justice Ayyengar further said that Article 25(2) (b) could not have an overriding effect over Article 25(1). He also said that practices ensuring discipline and preservation of the community are of prime significance in the religious life of the member of the community.

It is pertinent to note, that there were no arguments from either side to show whether the impugned legislation went against “Public Order, Health and Morality” or not.

What distinguishes this case further from the previous Supreme Court's adjudications on religious liberty is that fact that the powers of a spiritual head of a community under Article 25(1) were given precedence over the rights of an excommunicated person.

Our country's history is full of instances where social boycott has been used as a tool to suppress and humiliate people. Such humiliation stripped the person off a dignified life. Therefore, not accepting a legislation which seeks to end the practice of excommunication, which further promotes such humiliation, cannot be justified. Agreed that religious unity and maintaining the sanctity of a religion is important. However, if such unity and sanctity is reinstated by taking away a person's right to follow his/her conscience or desired conduct; it ought to be eliminated on constitutional grounds. And this was rightly stated by Justice Sinha in Paragraph 18 of the judgement where he asks, whether an individual can be compelled to have a particular belief on pain of a penalty like excommunication?

Justice Ayyengar, while adjudicating upon the non-applicability of Article 25(2)(b), said that it doesn't have an overriding power over the right under Article 25(1) to practice, profess and propagate religion because the state cannot “reform a religion out of its existence”. However, if this interpretation is universally accepted, the division of duties on the basis of person's *varna* or caste, as the Manu Smriti prescribed, would also be justified. Since a reform to end those practices would also "reform a religion out of its existence". Justice Ayyengar, while elaborating further, said,

"*The barring of excommunication on grounds other than religious grounds say, on the breach of some obnoxious social rule or practice might be a measure of social reform and a law which bars such excommunication merely might conceivably come within the saving provisions of clause 2(b) of Art. 25.*"

This, in the view of the authors, is an interpretation which goes against the transformative nature of the constitution. Justice Ayyengar has not given any justification as to what exactly would construe to be an "obnoxious social rule or practice". Considering that he was talking about practices such as sati and widow remarriage, it should have been considered by the court that the society has evolved from those conditions and the modern problems of the society which are governed by a constitution made by the people of India, needs to be looked at with a modern and liberal lens. Simply put, what is to be considered an “obnoxious” practice evolves with time which the majority failed to consider.

The view of the majority also goes against the principle of "ameliorative secularism" which is the nature of secularism in the Constitution of India, as opined by Gary Jacobsohn.[74] Ameliorative secularism is embodied by an approach to religion that allows the State (or the Court) to intervene in religious practices with the goal of

[74]The Wheel of Law: India’s secularism in Comparative Constitutional Context, by Gary Jeffrey Jacobsohn, Princeton and Oxford: Princeton University Press, 2003 (ISBN: 0-691-09245-1)

ensuring individual autonomy and freedom. Explaining this concept further with the idea of liberalism, he says that the reason why a liberal Constitution also provides for group rights is not because groups are valuable in themselves, but because they are central to a complete and fulfilling life. Consequently, insofar as groups fail to provide the basic conditions of individual autonomy (by forcing people to conform to the dominant ideology on pain of excommunication), to that extent, the State can intervene through reformatory measures.

14 years after this judgment, the Hon'ble Supreme Court in *Maneka Gandhi v. Union of India* laid down that the Right to Life is not merely a physical right but it also includes the right to live with dignity.[75] Practices such as excommunication strip off a person of all his dignity and hence, the continuance of this practice not only takes away a person's civil rights, but also violates the Right to Life of a person guaranteed under Article 21. And although no argument was advanced in this regard and neither did the bench address it, linking such deprivation to Article 25 and 26, we are of a strong opinion that it is nothing but immoral for a democratic and liberal Constitution like ours, to uphold the practice of excommunication, which has widespread negative implications on the life of a person.

CONCLUSION

A review petition was filed in 1984, however, it took as long as twenty years for the court to decide that the petition will be heard by a five judge bench, which will further decide whether the ruling is flawed enough for it to be referred to a higher bench of seven judges.[76] Fortunately, the Supreme Court has outgrown itself from being a conservative and narrow approached court that it was during the initial years post constitutional enactment to becoming a much more liberal and progressive court. While

[75] AIR 1978 SC 597

[76] Writ Petition (Civil) No. 740 of 1986

judicial pendency and other evil termites have invaded the judicial machinery to cause further delays, it won't be incorrect to hope for a better ruling on the next date!

F. PUBLIC LAW IN THE NEWS

COMPILED BY: VISHAKHA PATIL, II BALLB

SUPREME COURT IN THE NEWS

1) RANA NAHID @ RESHMA @ SANA & ANR. versus SAHIDUL HAQ CHISTI[77] : The Supreme Court bench comprising of Justice Indira Banerjee and Justice R. Banumathi gave a split verdict on the issue whether a family court has the jurisdiction to entertain a petition for maintenance under section 3 of the Muslim Women (Protection of Rights on Divorce) Act, 1986. Therefore, a larger bench would be constituted to decide the same.

2) IN RE: PROBLEMS AND MISERIES OF MIGRANT LABOURERS[78]: The Supreme Court passed a series of directions to all the states and UTs in the suo motu petition taken on the crisis of migrant workers during lockdown. All the states and UTs are required to identify stranded migrants and transport them back to native places within 15 days. States are required to consider withdrawal of all cases filed against migrants under Disaster Management Act for lockdown violations, for attempting to walk back to native places, crowding stations, etc. All the states have to bring on record how they would provide employment and other kinds of relief.

---

[77] CRIMINAL APPEAL NO.192 OF 2011; Ashok Kini, "Can Family Court Entertain Maintenance Petition Under Muslim Women (Protection of Rights on Divorce) Act? SC Delivers Split Verdict", 18 June 2020, *livelaw,* available at: https://www.livelaw.in/top-stories/muslim-women-maintenance-family-court-jurisdiction-158542

[78] SUO MOTU WRIT PETITION(CIVIL) No(s).6/2020; Sanya Talwar, "Adequate Food, Shelter, and Transport to be immediately provided by Centre, States Free of Costs to Migrants Workers: SC takes suo motu cognisance of migrant issues ", *livelaw,* 26 May 2020, available at: https://www.livelaw.in/top-stories/breaking-adequate-food-shelter-and-transport-to-be-immediately-provided-by-centre-states-free-of-costs-to-migrant-workers-sc-takes-suo-motu-cognisance-of-migrant-issues-157342

3) M/S LG POLYMERS INDIA PVT. LTD vs. The state of Andhra Pradesh and others[79]: The Supreme Court requested the Andhra Pradesh High Court to decide expeditiously on the pending pleas of LG Polymers challenging sealing of the plants and praying for grant to access to the plant. The bench also restrained the disbursal of the deposit amount of 50 crores by LG polymers for 10 days. Styrene gas leaked from a polymer plant near Visakhapatnam, impacting villages in a five-km radius, leading to numerous deaths and many problems like breathlessness.

4) Subhash Sahebrao vc. Satish Atmaram Talekar and others[80] : The Supreme Court bench set aside the order passed by the Additional Sessions Judge and High Court, reiterated that where a complaint has been dismissed by the Magistrate under Section 203 of the CrPC, when such a dismissal has been challenged before the Sessions Court or the High Court, such persons have a right to be heard in a revision petition as per section 401 (2) of the Code.

[79] SPECIAL LEAVE PETITION (CIVIL) Diary No(s). 11636/2020); Livelaw Newsnetwork, "Vizag Gas Leak : AP HC Directs Seizure Of LG Polymers Premises; Restrains Directors From Leaving Country", *livelaw,* 24 May 2020, available at: https://www.livelaw.in/top-stories/vizag-gas-leak-ap-hc-directs-seizure-of-lg-polymers-premises-restrains-directors-from-leaving-country-157247"

[80] CRIMINAL APPEAL NO. 2183 of 201; Livelaw News Network, "Accused Is Entitled To Be Heard In A Revision Petition Against Dismissal Of Protest Petition: Supreme Court", *livelaw,* 19 June 2020, available at:
https://www.livelaw.in/top-stories/accused-is-entitled-to-be-heard-in-a-revision-petition-against-dismissal-of-protest-petition-supreme-court-read-order-158588

5) Odisha Vikash Parishad v. Union of India[81]: The Supreme Court vacation bench lifted the stay on Puri's annual Rath Yatra festival. This came in response to Centre's application seeking modification in SC's decision on 18th June, which was supported by the Odisha government and other interveners. The court was left with no option but to grant an injunction. The festival will be conducted without public attendance and certain safety guidelines.

6) Komal Hiwale vs. State of Maharashtra[82] : The Supreme Court constituted a Medical Board before permitting a woman, bearing a 25 weeks old twin pregnancy, to undergo procedure for foetal reduction, on the ground of "serious foetal abnormalities." The bench allowed the Special Leave petition, preferred against the order of Bombay High Court, whereby the petitioner was denied relief. Termination of pregnancy on the grounds of "physical or mental abnormalities" of the unborn child is allowed under section 3(2)(ii) of the Medical Termination of Pregnancy Act, 1979. The board was of the opinion that the termination of pregnancy would not directly affect the health of the mother as well as the other child in the womb.

[81] Writ Petition(s)(Civil) No(s).571/2020, Sanya Talwar, "SC Allows Jagannath Rath Yatra At Puri On Conditions:, *livelaw,* 22 June 2020, available at: https://www.livelaw.in/top-stories/breaking-sc-allows-jagannath-rath-yatra-at-puri-on-conditions-158724

[82] SPECIAL LEAVE PETITION (CIVIL) NO.7379 OF 2020; Nitish Kashyap, "Plea By Woman With Twin Pregnancy For Medical Termination Of One Foetus With Down's Syndrome; SC Directs Medical Board To Add Foetal Expert And Submit Report", *livelaw,* 11 June 2020, available at: https://www.livelaw.in/top-stories/plea-by-woman-with-twin-pregnancy-for-medical-termination-of-one-foetus-with-downs-syndrome-sc-158144

7) IN RE THE PROPER TREATMENT OF COVID 19 PATIENTS AND DIGNIFIED HANDLING OF DEAD BODIES IN THE HOSPITALS ETC[83]: In a Suo motu case, the Supreme Court took cognizance of the shortcomings in providing medical care to COVID-19 in various states. The order emphasized on the importance of supervision and monitoring of infrastructure and facilities being provided in government hospitals, while also dealing with issues regarding testing and pricing of treatment among others.

[83] Suo Motu Writ Petition (Civil) No(s). 7/2020; Nilashish Chaudhary, "Rising Number Of Covid Cases] SC Directs States/UTs To Constitute Expert Team For Inspection And Supervision Of Govt.Hospitals", *livelaw,*, 19 June 2020, available at:
https://www.livelaw.in/top-stories/rising-number-of-covid-cases-issues-directions-covid-patients-158601

HIGH COURT IN THE NEWS

1) Vinod Mittal vs. State of HP[84]: Though it is not legally permissible for a court to issue directions to a person to undergo Narco-analysis, polygraph and Brain electrical activation profile (BEAP) test, the Himachal Pradesh High Court held that the court can direct it if the accused consents to it. This was raised in a case, where the Special judge allowed an application preferred by Investigating Agency seeking permission to seek a voice sample and to conduct a polygraph test of the accused observing that he gave the consent for the same.

2) Prateek Sharma and another vs. Union of India and another[85]: After a petitioner claimed that that both the government and Universities had neglected the visually impaired or specially abled, the Delhi High Court has directed the Delhi university to file a counter affidavit in a plea seeking directions to the Central government to set up affective and effective mechanisms for providing the required educational and teaching material.

[84] Cr. MMO No. 596 of 2018; Livelaw News Network, "Court Can Direct Polygraph Test If Accused Consents To It: Himachal Pradesh HC", *livelaw,* 24 June 2020, available at: https://www.livelaw.in/news-updates/court-can-direct-polygraph-test-if-accused-consents-to-it-himachal-pradesh-hc-read-judgment-158838

[85] W.P.(C) 3199/2020 & CMs.No.11121/2020, 11708/2020; Karan Tripathi, "Delhi HC Directs DU To File Affidavit in Plea Seeking Stay on DU Exams For Not Making Online Study Material Accessible To Specially Abled Students", *livelaw,* 24 June 2020, availbale at: https://www.livelaw.in/news-updates/delhi-hc-directs-du-to-file-affidavit-in-plea-seeking-stay-on-du-exams-for-not-making-online-study-material-accessible-to-specially-abled-students-158857

3) Safoora Zargar vs. State[86]: The Delhi High Court granted bail to student activist Safoora Zargar, who was arrested in connection with the Northeast Delhi riot case under the Unlawful Activities Prevention Act (UAPA). The court allowed the bail, when the Delhi Police did not oppose it on humanitarian grounds, in reversal of its earlier stand. The petitioner was granted a regular bail by furnishing a personal bond of Rs. 10,000, along with certain other conditions. The petitioner is not to indulge in "activities she is being investigated for", "refrain from hampering investigation", cannot leave Delhi without the leave of trial court and remain in touch with the investigating officer.

4) Neha Fareena and another vs. Government of NCT[87]: Delhi High Court has directed the Government to expeditiously process the applications seeking compensation for the victims of Delhi riots under the Delhi government assistance scheme, without insisting on furnishing a copy of FIR.

5) Nitesh Kumar Mulchandabhai Prajapati vs. State of Gujarat[88]: The Gujarat High Court granted relief to a couple who had been separated by the wife's family on account of caste-based differences. The High Court remarked on the social impact of these incidents, as the caste systems make it more difficult for young people to decide

[86] Bail Appln. 1318/2020; The Wire Staff, "Delhi High Court Grants Jamia Student Safoora Zargar Bail", *The Wire,* 23 June 2020, available at: https://thewire.in/rights/safoora-zargar-bail-delhi-high-court

[87] W.P.(C) 3650/2020, karan tripathi, "Delhi HC Directs Delhi Govt To Expeditiously Process Applications Claiming Compensation For Victims of Delhi Riots", *Livelaw,* 23 June 2020, available at: https://www.livelaw.in/news-updates/delhi-hc-directs-delhi-govt-to-expeditiously-process-applications-claiming-compensation-for-victims-of-delhi-riots-158781

[88] Special Criminal Application no. 2463 of 2020, Akshita Saxena, "Caste System Makes It Difficult For Young People To Decide Their Own Life Partner: Gujarat HC", *Livelaw,* 18 June 2020, available at: https://www.livelaw.in/news-updates/caste-system-makes-it-difficult-for-young-people-to-decide-their-own-life-partner-gujarat-hc-read-order-158515

their own life partners and it becomes extremely difficult for the administration to handle this social and emotional upheaval which turns into a legal battleground.

6) Dr. Binu Varghese versus State of Maharashtra and Ors[89]: In a PIL filed by a social worker, he sought directions to waive off 50% of school fees during the pandemic and expressed the financial distress it was causing to the parents, was dismissed by the Bombay High Court. The Court observed that the schools were not impeded from the respondent's side, therefore they declined interference. Furthermore, the changes in fees structure would require a policy decision and courts ought to stay at a distance.

7) Madhu Bala vs. State of Uttarakhand and others[90]: The Uttarakhand High Court heard a habeas corpus writ petition filed by one Madhu Bala, against illegal confinement of her alleged partner Meenakshi, by Meenakshi's mother and sister. The petition was eventually dismissed on account of Meenakshi's reluctance to continue the relationship with the petitioner. Yet, the High Court made some made significant remarks with respect to the rights of adult homosexual even if they were incompetent to enter into wedlock. Couples had the right to choose their life partner and to live with each other, without any pressure from their parents or the society.

---

[89] PIL NO.-CJ-LD-VC-24 OF 2020, https://www.scconline.com/blog/post/2020/06/20/bom-nothing-prevents-financially-distressed-parents-to-approach-govt-seeking-reduction-in-schools-fees-pil-seeking-fee-reduction-dismissed/

[90] Habeas Corpus Petition No. 8 of 2020, Livelaw News Network, "Consensual Cohabitation Between Two Adults Of Same Sex Not Illegal; They Have A Right To Live Together Even Outside The Wedlock: Uttarakhand HC", *Livelaw,* 19 June 2020, available at: https://www.livelaw.in/news-updates/consensual-cohabitation-between-two-adults-of-same-sex-not-illegal-they-have-a-right-to-live-together-even-outside-the-wedlock-uttarakhand-hc-read-order-158570

8) Muraleedharan T vs. State of Kerala and others[91] : The Kerala High Court upheld the constitutional validity of the Kerala Animals and Birds Sacrifices Prohibition Act, 1968. The Act prohibits propitiation of deity through sacrifice of animals and birds in temples and temple precincts. The bench observed that there is evidence on record to prove that sacrificing animals and birds are essential to the religion.

9) Ali Mohammad Charloo Sagar vs. Union Territory of J&K and others[92] : The Jammu and Kashmir High Court quashed the order for detention of senior National conference leader Ali Mohammad Sagar under the J&K Public Safety Act. The order for detention was passed on 05.02.2020, while Sagar was still in custody; he was arrested on August 6, 2019under section 107 and 151 of the CrPC to prevent him from disturbing the tranquility in the backdrop of abrogation of Article 370 of the Constitution. Therefore, the High Court held the order as illegal and observed that there was nothing on record to show that the detaining authorities were aware of the fact that the detenu was likely to be released. The court also remarked that the grounds for detention mentioned in the order were "normal activities" of a politician in a democracy.

10) (WPSS No. 557 of 2020)[93]: Uttarakhand High Court has held that non-payment of subsistence allowance is in violation of Article 21 of the Constitution. This was

---

[91] WP(C).No.11142 OF 2020(S), Livelaw News Network, "Kerala HC Upholds Constitutional Validity Of Kerala Animals and Birds Sacrifices Prohibition Act", *Livelaw,* 19 June 2020, available at: https://www.livelaw.in/news-updates/constitutional-validity-kerala-animals-and-birds-sacrifices-prohibition-act-upheld-158583

[92] WP(Cr1) No. 53/2020, Livelaw News Network, "Activities Of The Detenu Are Normal Activities Of A Politician In A Democracy': J&K HC Quashes Detention Order Of NCP Leader Ali Mohammad Sagar", *Livelaw,* 16 June 2020, available at: https://www.livelaw.in/news-updates/breaking-

[93] Livelaw News Network, "Non-Payment Of Subsistence Allowance Is Violative Of Article 21 Of Constitution: Uttarakhand HC", *livelaw*, 18 June 2020, Available at: https://www.livelaw.in/news-

reiterated in a service petition filed against the District Education Officer, Elementary Education, for non-payment of subsistence allowance, despite mention of the same in the order for suspension.

11) Mubeen Farooqi vs. State of Punjab and others[94]: The Punjab and Haryana High Court dismissed a PIL challenging the restrictions on religious places during COVID-19 lockdown. The court observed that the imposition of restrictions is in larger public interest and are reasonable based on objectivity; these restrictions do not interfere in the religious activities of any community.

12) EXECUTIVE ENGINEER, KERALA STATE ELECTRICITY BOARD, ELECTRICAL DIVISION vs M.N.SWAMINATHAN & KERALA STATE HUMAN RIGHTS COMMISSIONER[95] : The Kerala High Court considered a writ petition filed by Kerala State Electricity Board challenging an order of State Human Rights Commission directing it to remove four stay wires from the property of the complainant. The commission had passed this order in a complaint filed by M.N Swaminathan. The Court held that this order was passed without jurisdiction, and the Human Rights Commission cannot decide any dispute which arises out of an exercise of statutory powers and duties. The Commission's power is recommendatory in nature, when it is

---

updates/non-payment-of-subsistence-allowance-is-violative-of-article-21-of-constitution-uttarakhand-High Court-read-order-158527?infinitescroll=1

[94] CWP-PIL-52-2020 (O&M), Livelaw News Network, "Restrictions Imposed On Religious Places During Lockdown Are In Larger Public Interest: Punjab & Haryana HC", *livelaw,* 9 June 2020, available at: https://www.livelaw.in/news-updates/covid-lockdown-restrictions-158047

[95] WP(C).No.30871 OF 2013(H), Livelaw News Network, "Human Rights Commission Cannot Decide Disputes Arising Out Of Exercise Of Statutory Powers And Duties: Kerala HC", *Livelaw,* 8 June 2020, available at:

https://www.livelaw.in/news-updates/human-rights-commission-recommendatory-powers-157987

called upon to decide the rights of the individual which otherwise are available to him collectively.

13) [96]Delhi High Court granted bail to a person accused of burning shop during Delhi riots, and held that if the courts are convinced that no purpose in aid of investigation and prosecution will be served by keeping the accused in judicial custody, then 'sending a message to the society' can't be the basis for denying bail. Keeping such under trials in prison inordinately leads to overcrowding and being treated unfairly by the system as they are punished even before the trial.

14) Court on its motion vs. GNCT of Delhi and others[97] : Delhi High Court division bench has directed the Delhi government to file a status report to state the compliance with its own guidelines on proper disposal of bodies of COVID-19 patients. These guidelines were issued with an aim to dispose of the concerned daily bodies at the earliest and informing the concerned to hasten the other formalities.

---

[96] Karan Tripathi, "Prisons Are For Punishing Convicts, Not For Detaining Undertrials In Order To 'Send Message To Society': Delhi HC Holds While Granting Bail To Delhi Riots accused", *livelaw,* 1 June 2020, available at:
https://www.livelaw.in/news-updates/prisons-are-for-punishing-convicts-not-for-detaining-undertrials-in-order-to-send-message-to-society-157656

[97] W.P.(C) 3270/2020; Karan Tripathi, "Delhi HC Directs Delhi Govt To Show Compliance With Its Own Regulations On Proper Disposal Of Bodies of COVID19 Victims", *Livelaw,* 3 June 2020, available at:
https://www.livelaw.in/news-updates/delhi-hc-directs-delhi-govt-to-show-compliance-with-its-own-regulations-on-proper-disposal-of-bodies-of-covid19-victims-157749

15) Azra Ismail vs. Union territory of Jammu and Kashmir[98]: The Jammu and Kashmir High Court called availability of e-connectivity to courts as a fundamental right which cannot be impeded, as no court can discharge essential judicial functions without it in the times of COVID-19 and the resultant restrictions. This issue was taken along when the Court was taking stock of the lockdown situation in the UT. Various issues like availability of essentials in the far flung areas, ensuring provision of care to dependants/families of the front liners, supply of protection kits for the Hospital personnel, plight of cattle and stray in the midst of lockdown were addressed.

[98] WP(C) PIL no. 4/2020; https://www.scconline.com/blog/post/2020/06/06/jk-hc-in-the-current-times-of-covid-19-crisis-e-connectivity-to-the-courts-ensure-that-the-citizens-are-not-deprived-of-their-right-to-seek-judicial-remedies/

G. CASES ACROSS THE POND

COMPILED BY: ADITHI RAO, IV BALLB

Date	Court and Name of the Case	Judgment
2/06/2020	High Court of South Africa Reyno Dawid De Beer v. The Ministry of Cooperative governance and traditional affairs.[99]	The South African High court declared the Level 3 and Level 4 lockdown restrictions announced by the President as "unconstitutional and invalid" To determine the validity of the restrictions the court applied the "rationality test". This test determines the connectivity of the regulations to the stated objectives of preventing the spread of infection. These included restrictions on funerals, exercising on promenade but not entering the beach, prohibiting hairdressers from reopening their business until the last level of the lockdown is reached and allowing only certain types of clothing to be purchased during the lockdown. The court held that these restrictions did not satisfy the test, their encroachment on and limitation of rights guaranteed in the Bill of Rights in the Constitution are not justifiable in a

[99] https://www.livelaw.in/pdf_upload/pdf_upload-375951.pdf

		democratic society based on dignity, equality and dignity as per Section 36 of the Constitution. Therefore they need to be reviewed and amended so that they do not infringe the rights more than what is justified.
29/05/2020	The Constitutional Court of Taiwan [100]	In a landmark judgement the Court held the Article 239[101] of Criminal Law of Taiwan criminalizing adultery as unconstitutional. The court rightly recognized that individual personality autonomy has been more recognized and valued. The prohibition of sexual activity between a spouse and a third person is a restriction on the freedom of sexual behavior, right of sexual autonomy has an inseparable relationship with the personality of the individual which is closely related to human dignity guaranteed under Article 22 of the Constitution. Further even if it helps deter such an act, it is not necessarily suitable for the purpose of individual marriage relationship. It is a private affair and when process of discovery, prosecution, and trial takes place it inevitably infringes

[100] https://www.judicial.gov.tw/tw/cp-1887-222519-60aa3-1.html

[101] "People who have spouses and commit adultery shall be sentenced to not more than one year in prison. The same applies to those who commit adultery."

		the privacy of personal life. This state interference has also had a negative impact on marriages. Furthermore it does not significantly damage public welfare therefore the state need not punish adultery with criminal law.
15/06/2020	Supreme Court of the United States. Bostock v. Clayton County[102]	The court in a historic 6-3 decision declared that workers cannot be fired for being gay or transgender. The court did not dwell into the intention of Congress that conferred rights under Title VII of the Civil Rights Act which says that employers may not discriminate based on "sex" but when Congress chooses not to include any exceptions to a broad rule, courts apply the broad rule. Therefore Congress's failure to speak directly on transgender status or homosexuality supplies no reason to ignore the laws demands. It held that Title VII prohibits employers from taking certain actions "because of" sex. If an employer "intentionally relies in part on an individual employee's sex when deciding to discharge the employee" or "if changing the

[102] https://www.supremecourt.gov/opinions/19pdf/17-1618_hfci.pdf

		employee's sex would have yielded a different choice by the employer," then an employer violates Title VII. Further an employer cannot escape liability by demonstrating that it treats males and females comparably as groups. The dissenting judges were of the opinion that the concept of discrimination because of "sex" was different from discrimination because of "sexual orientation" or gender identity. Further it was of the opinion that there was no intention of the Congress to allow such a broad explanation of term sex. However these arguments were rejected due the view given by the majority.
29/05/2020	Supreme Court of the United States South Bay United Pentestecostal Church v. Gavin Newsom [103]	The court in a 5-4 ruling rejected the Church's Plea Against COVID-19 Restrictions in Attendance in Places of worship. The precise question before the court was when restrictions on particular social activity should be lifted during the pandemic in a fact-intensive matter subject to reasonable disagreement. The court said that the under the constitution the safety and

[103] https://www.livelaw.in/pdf_upload/pdf_upload-375615.pdf

		public health of the people was entrusted to the officials of the state. When there exists large medical and scientific uncertainties the actions taken by the officials also should be broad. The court said that such restrictions also extended to secular gatherings including lectures, concerts, movie showing etc. where people gather in close proximity for extended periods of time. The dissenting opinion was that this violated the First Amendment argued that it is unconstitutional to restrict church gatherings(with a 25% occupancy cap) , especially when other secular so-called "essential" or "life-sustaining" entities – such as grocery stores, liquor stores and cannabis dispensaries – are allowed to stay open without a 25% occupancy cap. It said that the church would suffer from irreparable harm from not being able to hold services. However this view was rejected because of the views of the majority.

H. PUBLIC LAW ON OTHER BLOGS

COMPILED BY: ADITHI RAO, IV BALLB

https://www.barandbench.com/columns/essential-religious-practices

http://theleaflet.in/vague-unreasonable-constitutionally-untenable-why-indian-variant-of-blasphemy-law-section-295a-ipc-should-go/

https://criminallawstudiesnluj.wordpress.com/2020/02/03/the-peril-of-hate-speech-in-india/

https://rmlnlulawreview.com/2019/01/01/reconciling-nature-and-religion-efficacy-of-the-cracker-ban-its-implications-and-the-way-forward-part-2/

https://jilsblognujs.wordpress.com/2020/02/27/dissenting-opinion-in-sabarimala-judgement-can-pave-better-contours-for-religious-rights/

https://indconlawphil.wordpress.com/category/freedom-of-religion/essential-religious-practices/

"Gopalan at 70" https://youtu.be/OIwZ3RDfcqo

"Romesh Thappar at 70" https://youtu.be/Du0eUvuUoQQ

"Champakam Dorairajan at 70" https://youtu.be/QRJKg9LKWpA

"Sankari Prasad at 70" https://youtu.be/aZWLKMvTr6A

I. MESMERIZING QUOTES

COMPLIED BY: ADITHI RAO, IV BALLB

"Religion must mainly be a matter of principles only. It cannot be a matter of rules. The moment it degenerates into rules, it ceases to be a religion, as it kills responsibility which is an essence of true religious act."

– Dr. BR Ambedkar

"Devotion can't be subject to discrimination"

– Judges' Sabarimala Verdict.

"There is nothing which is not religion and if personal law is to be saved, I am sure about it that social matters will come be a standstill... There is nothing extraordinary in saying that we sought to strive hereafter to limit the definition of religion in such a manner that we shall not extend beyond beliefs and such rituals as may be connected with ceremonials which are essentially religious. It is not necessary that the sort of laws, for instance, laws relating to tenancy or laws relating to succession should be governed by religion."

- Dr. BR Ambedkar (2nd December, 1948 at the Constitutional Assembly Debate)

"The superstitious practices which deform the Hindu religion have nothing to do with the pure spirit of its dictates."

– Ram Mohan Roy

"Faith is a matter of individual believes. Value of a secular Constitution lies in mutual deference."

– Judges' in Ayodhya Verdict

CONTACT US

PUBLIC LAW BULLETIN

CENTRE FOR PUBLIC LAW AT ILS LAW COLLEGE, PUNE

CONTACT US

For any queries, insights, feedback, contributions, suggestions and advice, kindly write to us at publiclawbulletin@gmail.com. We eagerly look forward to hear from you.

Feel free to reach out to our Student Editors at:

NiharChitre

niharchitre@gmail.com

RashmiRaghavan

rashmiraghavan1202@gmail.com