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INDIA & FREEDOM OF RELIGION

AUTHORED BY - B.R. BENCI JERALD¹

Abstract

Freedom of religion and belief is one of the fundamental rights which are entitled to every individual irrespective of who they are, where they belong, their age, race, gender, and ethnicity. But over the passage of time, this particular right has been diluted to a larger extent. The interference of the State in religious affairs has maximized. This in turn had the right of freedom of religion diminished to just words in the Constitution. “Anti- conversion laws” which are paradoxically known as “Freedom of Religion Acts” are enacted by various State legislatures in India; to prohibit conversion through means reprehensible to the conscience of the community such as allurement, force, inducement, fraud. These legislations were enacted with the object of prohibiting forcible conversion but these laws are executed in a way that prohibits even genuine conversion by the people out of their conscience. The researcher, in this article has comprehensively dealt with the concept of freedom of Religion in India and its problems.

The term ‘Religion’

The term Religion has not been defined in the Indian Constitution and it is a term which cannot be confined to any rigid concept. The need to define the term ‘religion’ was raised by Dr. B.R. Ambedkar for the first time in the Constituent Assembly, when the matter pertaining to personal law and its relation with social matters came up for discussion. He being the chairman of the drafting committee pointed out that:

“Every aspect of life from birth to death is dealt by the religious conceptions in this Country. There is nothing which is not religion and if personal law is to be saved, giving it priority in social matters of life, we will come to a standstill. Therefore, we ought to strive to limit the definition of religion in such a manner that it shall not extend beyond beliefs and rituals as may be connected with ceremonies which are essentially religious”.²

Many other scholars, academicians, attempted to define the term ‘religion’ but the term could not be confined to any concrete definition, until the judiciary came to give a helping hand. The role,

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² Constitutional Assembly Vol,7, p.781

Judiciary played in evolving the definition of religion is very significant.

In 1889, Justice Field undertook to define the word 'religion' for the American Supreme Court. He pointed out that; "The term 'religion' has reference of one's view of his relations to his Creator and to the obligation they impose of reverence of His being and character and of obedience to His will."³

But the Indian Supreme Court in *Commr. Hindu Religious Endowments v. Sri Lakshmindra Thirtha Swamiar of Sri Shirur Mutt*,⁴ considered the definition provided by Justice Field as inadequate and tried to redefine the term religion in a very comprehensive way, therefore it noted that:

"Religion is undeniably a matter of faith exerted by an individual or community and it is not necessarily to be theistic. There are some well-known religions in India; such as Buddhism and Jainism, which do not believe in god or in any intelligent cause. No doubt, a religion has its basis in the system of beliefs and doctrines, which are regarded by those who profess that particular religion as conducive to their spiritual well-being, but it would not be correct to confine religion to just those beliefs and doctrines. A religion may not only lay down a code of ethical rules for its followers to accept, it might prescribe rituals and observances, ceremonies and modes of worship which is regarded as integral part of religion and these forms and observations might extend even to matters of food and dress."⁵

In the absence of constitutional definition of the term 'religion' and the matters connected with religion, the Supreme Court has held that the task of deciding whether an activity is religious or secular, with reference to article 25 and 26 depend on whether it is essential or integral to the religion. This was elaborated in *Commissioner vs. Lakshindra*,⁶ where the court stated that ".....what constitutes an essential part of a religion is primarily to be ascertained with reference to the doctrines of that religion itself.

In general parlance 'religion' means, a relationship between the God and an individual, being the follower of God. It is something inward and personal, which unifies all values and organizes all experiences. This spiritual aspect of religions has been lost in new religiosity, in which rituals have become far more important than the essence and larger purpose of religion. Thus religion is

³ *Davis v. Beason* 133 U.S. 333 at 342 (1889)

⁴ AIR 1954 SC 282:1954 SCR 1005

⁵ *Commissioner of H.R.E. v. Lakshmindra*, A.I.R. 1954. S.C. 282 at 290

⁶ AIR 1954 SC 282:1954 SCR 1005

an important right which encompasses an identity for an individual in the society. Moreover, only after establishing religious identity, many problems of an individual can be settled, such as marriage, divorce, inheritance and even property transfers.

India and the Concept of Secularism:

Secularism in India, unlike the West, was not designed to create a wall of separation between church and state.⁷ Constitutionally, India is a secular nation but neither in law nor in practice, there exist a 'wall of separation' between the State and religion. The two can and often do interact and intervene in each other's affairs within the legally prescribed and judicially settled parameters. Indian secularism does not require a total banishment of religion from the societal or even State affairs. It was designed to assure minorities; that their culture, religion and identity would be protected and that the majoritarian view would not be imposed on them.⁸

The founding fathers of Indian constitution considered secular nature to be the very basis of the Indian constitution.⁹

Pandit Lakshmi Kanta Maitra,¹⁰ explained clearly the scope and nature of Indian secularism:¹¹

“By secular State, it is provided that the State is not going to make any discrimination against any person whatsoever on the ground of religion or community or professing any particular form of religious faith. The essence of which is that, the State shall not give preference to any particular religion whatsoever, further it shall not establish, patronize or endow any particular religion to the exclusion of others. Moreover, no person shall be given a preferential treatment or will be discriminated against simply on the ground that he professed a particular form of religion. In other words, the State shall not prefer any particular religion in its affairs. This I consider to be the essence of a State being called as secular. Also, the State should be very careful to see that no one is denied of his right to not only to profess, or practice but also to propagate any particular religion.” He thus

⁷ See Donald Eugene Smith, *India as A Secular State*, (1963). The term secularism implies three things in most Western democracies: freedom of religion, equal citizenship to each citizen regardless of his or her religion, and the separation of religion and state.

⁸ Secularism in India “means equal treatment of all religions.” SMITH. “Religion in India continues to assert its political authority in matters of personal law.”

⁹ *Per Ayyangar Jin Syedna taheer Saifuddin Saheb v. State of Bombay*, AIR 1962 SC 853

¹⁰ He was a member of Constituent Assembly of India. He was also a member of parliament representing nabadwip, West Bengal.

¹¹ Constituent Assembly Debates, 6 December, 1948; available at <http://www.parliamentofIndia.nic.in/Is/debates/vol.17p.20html>.

gave a broad view on what the word Secularism is meant in India.

Though most of our founding father and scholars advocated for secularism, nowhere in the original draft of the Constitution, the word 'secularism' was mentioned. It was only in the 27th year of Republic by the 42nd Amendment Act 1975,¹² the concept became explicit and it was added to the preamble of the constitution. Until then the concept of secularism was implicit in the constitution via Article 25 to 30. The most important provision in the constitution which patrons secularism was Article 25 which provides; all persons are entitled to freedom of conscience, right freely to profess, practice and propagate religion. The constitution not only guarantees a person's freedom of religion and conscience but also ensures freedom for one who has no religion. It also meticulously restrains the state from making any discrimination on the basis of religion.¹³ All the more Indian constitution can be lauded as it assures single citizenship to all persons irrespective of the religion to which they belong.¹⁴

Secularism was embraced as a fundamental principle based on two reasons. First being, by establishing equality between all religions, it can help prevent religious strife. This proposition of equality goes beyond the affirmation that all people have the freedom to practice their religion, which was guaranteed under Article 25 of the fundamental rights chapter of the Constitution.

The second reason for its adoption as a fundamental principle is that, secularism stretch beyond equality and freedom and goes on to declare that the State is not oriented to any particular religion.¹⁵

Thus, Secularism in Indian goes much beyond mere state neutrality in matters of religion to the extent of rendering protection to minority rights and that the religion of any majority community would not be given any upper hand by the State. Minorities have almost an absolute right to preserve their language, scripts and culture.¹⁶ They are also entitled to establish and administer educational institutions, including universities of their choice.¹⁷ It is this particular commitment

¹² Available at <http://legislative.gov.in/constitution-forty-second-amendment-act-1976>

¹³ Article 15 of Indian Constitution.

¹⁴ Inputs from; The constitution of India, P.M. Bakshi, universal law publications, new delhi.

¹⁵ The Secularism in India, HUBPAGES (June 16, 2016), <http://hubpages.com/politics/The-Secularism-in-India>

¹⁶ Article 29 of Indian Constitution

¹⁷ Article 30 of Indian Constitution.

that establishes the credentials of Indian Secularism.¹⁸ For example, since Pakistan had become a theocratic state, such an assurance for Indian Muslims was essential. Due to this assurance, a massive majority of Muslims decided to stay in India.

Freedom of Religion

Freedom of religion or belief (FoRB) is a fundamental right of every human being. It is universal in nature in the sense that it applies to all persons equally, regardless of who they are, where they live, their age, gender, race or ethnicity and what they believe or do not believe in.¹⁹ Free exercise of this right will directly contribute to democracy, development, rule of law, peace and stability. Further it protects the conscience of all people and allows us to think, express and act upon what we deeply believe.²⁰

FoRB is an expansive bundle of rights covering extensive issues of distinct yet interconnected issues. Universal Declaration of Human Rights noted that “all are endowed with dignity and conscience” meaning that, freedom of religion and belief, is not just a privilege provided by a State but an individual’s birthright. Added to this, an individual has an absolute and unconditional right to hold any religion or belief. Under no circumstances, limitations can be placed on beliefs of an individual.²¹

There are two dimensions to Religious Freedom;

1. Right of individuals to freedom or religion and beliefs:

Freedom of religion protects the right of all people to hold their own religious beliefs and express them openly and freely without the fear of persecution; it also protects the equal rights of citizenship. Further the freedom, ensures that the people can freely chose or change any religion and teach their faith, beliefs to their children and to receive, disseminate religious information also to gather with other in a fellowship and worship and participate in ceremonies and practice their faith. Moreover, this freedom protects individuals from discrimination in employment,

¹⁸ Neera Chandhoke, “Why is Secularism Important for India, in *Contemporary India: Economy, Society, Politics*”. (Neera Chandhoke & Praveen Priyadarshi eds., 2009). . “Secularism, by outstripping freedom and equality, stipulates that the state will maintain an attitude of principled distance from all religious groups. It also contracts that the state would neither align itself with any particular religion, especially the majority religion, nor pursue any religious tasks of its own.”

¹⁹ Cited from European Union Guidelines on the Promotion and Protection of Freedom of Religion or Belief, Para 16.

²⁰ Article on Religious Freedom. Available at <https://newsroom.churchofjesuschrist.org/official-statement/religious-freedom>

²¹ European Union Guidelines on the Promotion and Protection of Freedom of Religion or Belief,

housing and other basic service on the basis of religion and prevents people from being denied the right to have an occupation, business or a professional license based on their religion.²²

2. Right of Religious communities to practice or manifest their religion, in public or in private, through worship, observance, practice and teaching.²³

It is not only individuals who are protected under freedom of religion but also religious organisations that make faith communities possible. It encompasses the right to form churches and other religious institutions, such as religious schools and charities. It affords such institutions the freedom to establish their doctrines and modes of worship; to organise their own ecclesiastical affairs; to determine requirements for membership, ecclesiastical office and employment and to own property and construct places of worship.²⁴

Other fundamental rights are intrinsically and inextricably intertwined with the right to religious freedom, including the right to freedom of expression, freedom of association, right of privacy and the universal principles of non-discrimination and equality of all.²⁵

Further religious freedom also provides that, no one may be compelled to reveal adherence to a religion or belief. Likewise, no one may be mandated to declare non adherence to religious beliefs to obtain employment or other social or economic benefits.²⁶

As reiterated, freedom of religion encompasses in its ambit that; without being subjected to the approval of State or majority religion community, one has the right to manifest one's own religion and it includes the right to share one's religion or belief to others peacefully. However, in exceptional cases, limitations can be placed on the freedom to manifest religion or belief but such limitation must be in compliance with international standards.²⁷

Therefore, the health of a diverse society depends on the enjoying of the right of religious freedom of freedom of conscience. It allows different faiths and beliefs to flourish together. Religious

²² Inputs from <https://www.churchofjesuschrist.org/topics/religious-freedom?lang=eng&old=true>

²³ Universal Declaration of Human Rights, Article 18; International Covenant on Civil and Political Rights, Article 18; European Convention on Human Rights, Article 9.

²⁴ Ibid

²⁵ Inputs from <http://www.scientologyreligion.org/religious-freedom/what-is-freedom-of-religion/page2.html>

²⁶ United Nations Human Rights Committee General Comment 22.

²⁷ European Union Guidelines on the Promotion and Protection of Freedom of Religion or Belief.

freedom thus protects the rights of all individuals and groups, including the most vulnerable, whether religious or not.²⁸

The importance of religion for human, social and political flourishing was understood by the American founders. That is the reason they drafted the right of religious freedom as their first freedom, which provides; freedom to all to exercise their religion. They were convinced that religious freedom was essential for the well-being of their citizens, for the common good and also for the public virtue without which they believed that the new republic would fall. This view was most accurately called the 'free exercise equality'.²⁹

India and Freedom of Religion:

Freedom of religion is guaranteed to persons, in almost all the countries in the world in some form or the other. And in a multi religion country like India, such a guarantee assumes special importance³⁰ whose religious diversity is not just a recent or contemporary phenomena but can be traced back to the history of civilization.³¹ Religion is an indispensable part of human existence. After the rights of life and personal liberty and the freedom of speech and expression, freedom of religion is considered to be the third most important civil liberty.

Among the seven countries of South Asia forming, the South Asian Association for Regional Cooperation (SAARC),³² India stands out as the only country that as declared itself as a secular State. In each of the other six countries, one or another spiritual faith has the status of officially adopted or legally promoted religion; Buddhism in Bhutan³³ and Sri Lanka,³⁴ Hinduism in

²⁸ Inputs from <https://newsroom.churchofjesuschrist.org/official-statement/religious-freedom>.

²⁹ "What in the World is Religious Freedom." Available at <https://www.religiousfreedominstitute.org/blog/what-in-the-world-is-religious-freedom>.

³⁰ The Indian subcontinent is the birthplace of 4 major world popular religions; Hinduism, Buddhism, Sikhism and Jainism. According to report on 2011 census data, 79.80% of the population of India is Hindu, 14.23% Muslim, 2.30% Christian, 1.72% Sikh, 0.70% Buddhist, and 0.37% Jain.

³¹ Emperor King Ashoka, in his teachings to his subjects said that:-"Each one should respect other's religion. It is both wrong to praise one's own religion or criticise another's. If one praises one's own religion while criticising another's, one is actually doing greater harm to one's own religion. Therefore, one should try to understand the main ideas of another's religion and respect it."

³² For more information, see the official SAARC website at <http://www.saarc-sec.org/main.php>

³³ The Bhutan Constitution 2005, defines Buddhism as the 'heritage which is spiritual to Bhutan' and further provides that the head of the State shall be 'as a Buddhist' and be as a 'symbol of unity of the kingdom and the people of Bhutan'. Inputs from Bhutan draft Constitution 2005 Articles 2,3.

³⁴ The Sri Lanka Constitution, under Article 9 it provided that, 'the foremost place in the Republic of Sri Lanka shall be given to Buddhism and accordingly the State shall have the duty to protect and foster the Buddha Sasana.'

Nepal,³⁵ and Islam in Bangladesh,³⁶ Maldives,³⁷ and Pakistan.³⁸

India is deeply religious and pluralistic society. With more than 1.2 billion people, it is the world's most populous country and has outstripped China as the most populous in the world. It is also by far the world's largest democracy. With the growing population, India can be lauded for its diversity in religions and its practices.

In India, like most other traditional societies, Religion has been the foundation of the society and has played a vital role in the functioning of whole of its machinery throughout all ages and also in the process of her transition to a democratic nation. This religious India is not only a birth place of many religions but has also provided shelter for various other religions that came from different parts of the world.

India, an officially secular nation has detailed constitutional provisions for religious rights. The preamble of Indian constitution describes it as a "Secular Nation" emphasising that there is no State religion, which means there is no officially adopted or legally promoted religion unlike other SAARC Nations. The Preamble also provides for "Liberty of thought, expression, belief, faith and worship, rendering its citizen; liberty in their faith and belief. The Indian constitution also contains detailed provisions for religious freedom. Article 19 provides for freedom of speech, expression and association along with other fundamental freedoms. Article 25 provides for freedom of conscience, free profession and practice of religion as well as right to propagate religion. Article 28 to 30 protects religious freedom in relation to religious instruction and Article 51A imposes a positive duty on the citizens to promote harmony and the spirit of common brotherhood transcending religious boundaries. There are also various international documents to which India takes reference in deciding various disputes, such as UDHR, ICCPR and ICSR which also advocates for religious freedom.

³⁵ The Nepal Constitution, under Article 4, provides Nepal to be a 'independent, indivisible sovereign, secular, inclusive democratic, socialism-oriented federal democratic republican State'. But it define the term 'secular' to mean protection of religion and culture being practiced since ancient times and religious and cultural freedom. To note the ancient religion of Nepal was Hinduism and Buddhism.

³⁶ West Bengal. Which was formerly a province of Pakistan was later made into a Sovereign State in 1971. Bangladesh initially stated that it is a secular State but then eventually it amended its constitution to adopt Islam as its State Religion.

³⁷ The Constitution of the Republic of Maldives, under Article 2 provides that, "the Maldives is a Sovereign, independent, democratic Republic based on the principles of Islam".

³⁸ The Pakistan Constitution in its Article 2 has provided that the 'State Religion of Pakistan shall be Islam'. Further in Article 31(a), it provided that the steps have to be taken to enable the Muslims in Pakistan, that their lives were to be lived in accordance to the fundamental principles and basic concepts of Islam and to understand the meaning of life according to the Holy Quran and Sunnah."

Despite these positive attributes in its fundamental law and it being part of various international covenants and also having diverse religious demographics and a robust civil society, India finds itself in the throes and tangles of religious fundamentalism and violence against religious minorities for a past few decades.

“Anti- conversion laws” which are paradoxically known as “Freedom of Religion Acts” are enacted by various State legislatures in India; to prohibit conversion through means reprehensible to the conscience of the community such as allurement, force, inducement, fraud. These legislations were enacted with the object of prohibiting forcible conversion but these laws are executed in a way that prohibits even genuine conversion by the people out of their conscience. These legislations fail to distinguish between conversion by force and conversion by genuine conscience of the person converting his/her religion. This is explicitly in contravention to the religious freedom guaranteed by the constitution and international instruments, which advocates for freedom of religion and conscience. Furthermore it also curtails the right to propagate one’s own religion, which is guaranteed by the constitution. These laws appear to shield ‘indigenous religions’ and some of these legislations have gone to the extent of even eclipsing the freedom of religion.³⁹

In 1977 the Supreme Court of India in *Rev Stanislaus v. the State of Madhya Pradesh*⁴⁰ upheld the Madhya Pradesh anti conversion law (known as Madhya Pradesh Swatantrya Adhiniyam 1968), arguing that the Constitution's guarantee of the right to “freedom of conscience” and “freedom to profess, practice and propagate religion” (Article 25) did not extend to the right to convert another person against his or her free will, using force, fraud, or inducement. This judgment of the Supreme Court can be lauded for the reason that, it prohibits forcible conversion but this decision has come under some academic criticism for not recognizing ‘the right to convert’ as inclusive of the ‘right of propagation’.

Moreover, as the right to freedom of conscience encompass within its ambit; the right to change religion. The right to change religion circumscribe in itself the right to choose of religion. Significantly right of choice can be exercised by one only when one is aware of the various choices that are available to him. Therefore, to enable a person to get acquainted with various religious proponents, propagation of religious tenets is essential. Thus, in this perspective, right

³⁹ Emphasised in Shodhganga Article: *Other Legislative Framework on freedom of religion in India.*

⁴⁰ *Rev. Stanislaus v. State of Madhya Pradesh*, (1977) 1 SCC 677

of propagation can be said to be a right derived from the freedom of conscience.

The true problem lies in the fact that, the state actors under the guise of prohibiting forcible conversion and also backing with the authority of law and judgments are prohibiting genuine conversion of the people out of their conscience which are not done by way of coercion or inducement of the others. The supreme court in its judgment did not prohibit genuine conversion, in which people convert out of the own will. There is a clear contravention of fundamental rights of the people when they are stopped from converting out of their own will, which is guaranteed by Indian Constitution under Article 25.

All the more, none of these laws- ‘Anti conversion laws’ define the terms “fraud, force, allurement or inducement” with any specificity. Leaving these terms undefined looks like the laws regulating conversion primarily serve the interests of those who profit most from the status quo. These open-ended definitions, gives ample place for arbitrariness and discretion in the hands of executors.

Conclusion:

To conclude undoubtedly there is no justification for conversion brought by force, violence or other illegitimate means. But on examining the legislations, one can see their impropriety in the language adopted and these legislations goes far beyond the protection of religious freedom. The terminology used by these statutes transforms them from their purported role as protectors of constitutional rights into violators of these very guarantees. These anti conversion law clearly violate Article 25, as these laws put a blanket ban on conversion, which curtails the freedom of conscience of every individual. Moreover, these laws ostensibly violate the right of propagation.