



Jus Corpus Law Journal

Open Access Law Journal – Copyright © 2022 – ISSN 2582-7820
Editor-in-Chief – Prof. (Dr.) Rhishikesh Dave; Publisher – Ayush Pandey

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Right to Religion or Right to Equality - Which right prevails in Case of Conflict?

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Received 16 November 2022; *Accepted* 27 November 2022; *Published* 08 December 2022

The constitution of India guarantees several fundamental rights to the people of this country. They are called fundamental rights because they are fundamental for the growth and development of an individual and a community as a whole. However, none of these rights is absolute and is subject to some restrictions. On many occasions, these rights come in direct conflict with each other and it's upon the courts to decide which right to be given preference over another. The right to equality and the right to freely profess, propagate and practice one's religion has been the most contested rights that courts in the recent past have been called upon to resolve. This article has sought to explain how such conflict arises, and what has been the court's approach to resolving such conflict. The basic tool used by the courts for resolving such conflict for years has been the Essential Religious Practice test. This article has explained what the test means and how it has lost its value with time, thereby jeopardizing the country's secular character and religious freedom. Though Article 25 has been expressly made subject to other fundamental rights, constitutional morality has always prompted balancing the competing rights wherein no right gets trumped by another in an effort of resolving the conflict. The question regarding how the conflict between these rights can be resolved was recently raised by the Hijab ban decision of the Karnataka high court and has remained unanswered till now. However, the nine-judge bench of the supreme court has the opportunity to decide upon such a question and permanently settle a debate regarding religious freedom and its subjugation to other fundamental rights. In doing so, the Supreme Court should not forget that each fundamental right guaranteed under our constitution is important. Overriding one right for the survival of another right by a mere interpretation of the provisions of the Articles would not do complete justice.

Keywords: *balancing rights, conflicting right, constitutional morality.*

INTRODUCTION

The recent hijab controversy has given a rise to a debate as to which right should be given primacy- the right to equality or the right to religion. Those advocating against the hijab, claim that the right to equality should prevail in places like educational institutions. Those in favour of the hijab argue that the right to religion vis-a-vis essential religious practice is a fundamental right and should be protected irrespective of the place where it is being worn. This controversy is not new as a similar kind of debate ensued when the supreme court had given its verdict on the Sabarimala case. The debate erupted by these cases poses a pertinent question: Can a state in a secular country interfere with an individual's religious right and can the right to equality claim primacy over the right to religion?

To answer this question, it is essential to know what does right to equality and the right to religion guaranteed by the constitution of India mean.

MEANING OF THE RIGHT TO EQUALITY AND THE RIGHT TO RELIGION

Right to equality

The framers of the Indian Constitution wanted to ensure that the state cannot discriminate based on religion, caste, sex, race, or the combination of any of these factors. Hence, Article 14 was drafted accordingly so that the citizens of India cannot be discriminated against by the actions of the State. The right to equality is one of the basic features of the Indian constitution and is embedded under Article 14 which provides that "The State shall not deny to any person equality before the law or the equal protection of the law within the territory of India"¹. Article 15 emphasizes the same and provides that "the state shall not discriminate against any citizen on the grounds only of religion, race, caste, sex, place of birth or any of them"².

¹ Constitution of India 1950, art. 14

² Constitution of India 1950, art. 15(1)

As held in the case of *E.P. Royappa v State of T. N*³ the right to equality is a sanction against state arbitrariness. Article 14 obligates the state to abolish discrimination among citizens. However, it also mandates the state to follow reasonable classification, wherein a law operates similarly on all persons situated under similar circumstances. Article 15 (4) gives the state power to make laws in favour of women, children, and, socially and educationally backward classes of citizens.⁴ Such laws will comprise under reasonable classification, a corollary to the concept related to equality, and will be in sync to achieve the “equality of status and opportunity as enshrined under the Preamble to the Constitution.

The dissenting opinion of Justice Subba Roa in the case of *State of U.P. v Deoman Upadhyaya*⁵ states that the doctrine of equality consists of two concepts. The first is equality before the law, which is a positive concept and requires that everyone is equally subjected to the ordinary law of the land, where no one can claim any kind of privilege. The second concept is the equal protection of the law, which is a negative concept that entails equal protection of all alike in the same situation and similar circumstances. Hence, reasonable classification is both permissible and necessary for achieving equality in a real sense and should be seen as a corollary to the concept of equality.

Right to Religion

The right to practice, profess and propagate religion is provided under Articles 25, 26, and 29 of the Indian Constitution. Article 25 of the constitution provides for freedom of religion which is “subject to public order, morality, and health and the other provisions of this part. The state can further regulate or restrict any economic, financial, political, or other secular activity associated with religious practice.”⁶ Article 26 provides religious protection, allowing every religious denomination the right “to manage its affairs in matters of religion.”⁷ Article 29 protects cultural

³ *E.P. Royappa v State of T. N* (1974) SC 555

⁴ Constitution of India 1950, art. 15(4)

⁵ *State of U.P. v Deoman Upadhyaya* (1960) SC 1125

⁶ Constitution of India 1950, art. 25(1)

⁷ Constitution of India 1950, art. 26

minorities by providing that any minority group in India “having a distinct language, script or culture of its own shall have the right to conserve the same.”⁸

In the constituent assembly while drafting Article 19 of the Draft Constitution (Article 25 of the Indian Constitution) the main cause of issue among the members was whether an individual is granted a right to religion as a fundamental right in a secular country. On the one hand, it was argued that India, being a secular state cannot grant the right to religion as a fundamental right as it would paralyze the normal life of the state. While on the other hand an argument in support of Article 19 of the Draft Constitution was raised that a country like India has always been known for its religious and spiritual concepts and ideals. The people’s right to practice, profess and propagate religion has always been there from the very past, not just as a right but as a fundamental right, and hence, cannot be snatched from them. Through many arguments and discussions, the right to religion was finally accepted as a fundamental right, however, it was subjected to a certain condition that the state can impose on the grounds of public morality, public order, and public health. This right was also made subject to other fundamental rights to prevent conflict and the general welfare of the public.⁹

Right to religion as it stands in its present form has been a subject of various supreme court decisions. In many of its landmark judgments, the Supreme Court has embarked on the journey of interpreting the people’s right to religion vis-à-vis essential religious practice as a fundamental right. The word religion has not been defined in the Indian Constitution, however, the court on various occasions¹⁰ held that the term religion covers all the practices and rituals that are integral to that particular religion and may also extend to matters of food and dress. The Supreme Court in the Shirur Mutt¹¹ case adopted the doctrine of essential religious practice for the first time and held that only those religious practices shall be protected under the constitution which is essential and integral for the existence of the religion. In the Durgah

⁸ Constitution of India 1950, art. 29

⁹ *Ibid*

¹⁰ *Commissioner of H.R.E. v Lakshmindra* (1954) SC 282; *Ratilal v State of Bombay* (1954) SC 388; *Taher Saifuddin Saheb v State of Bombay* (1968) SC 662

¹¹ *Ibid*

Committee, *Ajmer v Syed Hussain Ali*,¹² case, the Supreme Court has prescribed that the court should actively interpret the religious text to ascertain whether the religious practice in question is significant to the concerned religion. The main purpose of understanding these rights individually is to bring forth an idea that both are fundamental rights and are intrinsic to human development and functioning. But what will happen when both these rights collide with each other or a conflict arises between the two rights?

CONFLICT BETWEEN THE RIGHT TO EQUALITY AND THE RIGHT TO RELIGION

During the constituent assembly debates, the major concern was over the compatibility of the right to equality with the right to religion. The members were susceptible to the inclusion of the right to religion as a fundamental right because of its relation to the rituals and customary practices with no rational basis. Another concern was regarding its interference with the general welfare of the people as certain religious practices may prevent the state from enacting necessary laws for reform if the right to religion was given the status of a fundamental right. However, with much deliberation, the right to religion was made subject to other fundamental rights.

In general, the conflict between the two articles arises when one party claims that the action in issue is their right to religion vis-s-vis essential religious practice and the other party claims that such action is violative of their right to equality and is discriminatory. In the recent past, there have been several cases where the issue regarding the conflict between the right to equality and the protection of religious rights has cropped up before the courts, the latest being the pronouncement of the Hijab Ban judgment and the Sabarimala case.

Shayara Bano case¹³ is one among the many cases where the Supreme Court came across the issue of conflict between the right to equality and the right to religious freedom. In this case, the court declared the Muslim form of divorce by triple talaq invalid by applying the doctrine of essential religious practice. In yet another case of the hijab ban,¹⁴ the Karnataka high court by applying the essential religion practice test uplifted the Karnataka government ban on hijab and

¹² *Durgah Committee, Ajmer v Syed Hussain Ali* (1962) SCR (1) 383

¹³ *Shayara Bano v Union of India* (2017) 9 SCC 1

¹⁴ *Smt Resham and another v State Of Karnataka and Others* (2022) LL (Kar) 75

declared wearing hijab as a non-essential religious practice of Muslim women. As can be seen from the above-mentioned cases, the court has often resorted to applying the essentially religious practice test as a means to resolve the conflict between the two competing rights. Essential religious practice is used as a tool for adjudicating and deciding upon the constitutionally permissible limit of practising religious freedom.

ESSENTIAL RELIGIOUS PRACTICE

The origin of the Essential Religious Practice doctrine can be traced from the speech given by Dr. B.R Ambedkar in the Constituent Assembly dealing with the interpretation of Article 25 of the Constitution. He acknowledged that in India, every aspect of human life is guided by religion and its practices, however, only those religious practices that withstand the test of constitutional morality shall be allowed to continue. Relying on such reference by Dr. B.R Ambedkar the Courts in India, in numerous cases, have applied the essential Religious Practice test to decide upon the validity of the religious practice in the issue. However, with time the interpretation and usage of this test have evolved to a great extent and the application of such a test has not been very justifiable in resolving the conflict in a real sense posing a serious threat to Indian secularism and unity.¹⁵

In the earlier judgments regarding essential religious practice the court in the case of *Commissioner, Hindu Religious Endowments, Madras v Sri Lakshmindra Thirtha Swamiar of Sri Shirur Mutt*,¹⁶ made the proposition that the religious denomination has complete autonomy to decide which religious practice is important for their religion. The court also recognized the non-theistic religion and declared that article 25 and 26 is not just limited to beliefs but also to the practices that emanate from those beliefs. On the question, of who can decide the essentiality of religious practice the Supreme Court in the case of *Ratilal Panachand Gandhi v the State of*

¹⁵ Pranav Sharma & Jugaad Singh, 'The Test of Essential Religious Practices: A Huge Burden on The Backs of Our Judiciary' (RGNUL Student Research Review, 01 June 2022) <<https://rsrr.in/2022/06/01/essential-religious-practices-hijab-ban/>> accessed 15 September 2022

¹⁶ *Commissioner, Hindu Religious Endowments, Madras v Sri Lakshmindra Thirtha Swamiar of Sri Shirur Mutt* (1954) SC 282

Bombay,¹⁷ held that the outside authority cannot decide on the essentiality of religious practice and the state cannot restrict the same on any grounds they like.

A complete departure can be seen from the abovementioned principle when the court in the case of Durgah Committee, Ajmer v Syed Hussain Ali¹⁸ decided that the courts can decide upon the essential religious practice through the interpretation of the religious text and only those practices that are essential and integral to the religion shall be protected and no other. The test has now evolved from “essentially religious” to “essential to religious” and hence, only core religious beliefs will be taken into consideration for its protection under Article 25.

Such an application of the doctrine in its present form has resulted in yielding inconsistent results and has severely narrowed down the scope of religious freedom in India.¹⁹ The consequential result is that the Supreme Court in *Ismail Faruqui v Union of India*,²⁰ by employing the essential religious practice test declared Mosque as non-essential to the religion of Islam. In the *Shayara Bano*²¹ case, it declared triple talaq as invalid because it is a non-essential religious practice not on the ground that it is outrightly violative of the right to equality and dignity. The hijab ban by the Karnataka high court is another example. Another case for reference is the *Haji Ali Dargah*²² case where the Bombay High Court allowed the entry of women into the Dargah because of the lack of evidence on the part of the Dargah Trust to prove that the exclusion of women is essential to Islam. The Supreme Court in the famous *Sabrimala* case²³ rejected the claims of Ayyappans allowed the entry of women between the age of 10 to 50 years to the Sabrimala temple.

¹⁷ *Ratilal Panachand Gandhi* (n 10)

¹⁸ *Durgah Committee, Ajmer* (n 12)

¹⁹ Anubhav Raj Shekhar, ‘Essential Religious Practices: The Supreme Court needs to urgently reconsider its jurisprudence on religious freedom’ (*Bar and Bench*, 11 Feb, 2022)

<<https://www.barandbench.com/columns/the-supreme-court-urgently-reconsider-jurisprudence-religious-freedom>> accessed 15 September 2022

²⁰ *Ismail Faruqui v Union of India* (1995) SC 605

²¹ *Shayara Bano* (n 13)

²² *Durgah Committee, Ajmer* (n 12)

²³ *Indian Young Lawyers Association & Others v The State of Kerala & Others* (2018) SCC OnLine SC 1690

The subjectivity of the opinion and finding rationality in matters related to religion has immensely trumped the religious freedom to every fundamental right and therefore the right to religion has lost its importance.²⁴ Justice Indu Malhotra, in her dissenting decision, stated that “Notions of rationality cannot be invoked in matters of religion”.²⁵ Justice D. Y. Chandrachud observed that “these compulsions, nonetheless, have led the Court to don a theological mantle.” He further opined that Judges don’t have the requisite competence and authority to decide whether a practice is essential to religion.²⁶

The hijab ban was heavily criticized on the same ground. Those advocating in favour of equality assert that religious symbolism should not be permitted in educational institutions which prescribe a set of uniforms to be worn inside the educational premises, while those advocating for religious freedom are questioning how can a scarf or a turban in educational institutions disrupt the discipline that the uniform prescribes.²⁷ The real answer to such a question lies in balancing the right. Only through the balancing approach can the conflict between religious freedom and the right to equality be resolved in the real sense.

RESOLVING THE CONFLICT- BALANCING THE RIGHTS

The nine-judge constitution bench will decide upon the 7 questions referred to it by the five-judge bench in a Sabrimala review case. The Sabrimala case is well known for the clash between the fundamental rights guaranteed by the Constitution i.e., the right to equality and the right to religious freedom. The key question that Supreme Court has to decide upon is which right will take precedence in case of conflict between two fundamental rights. It is pertinent to note that the Constitution does not prescribe which right prevails over another right in case of conflict. The constitution grants every individual a right to freely profess, propagate and practice their

²⁴ Pranav Sharma & Jugaad Singh (n 15)

²⁵ Indian Young Lawyers Association & Others (n 23)

²⁶ *Ibid*

²⁷ Avani Bansal, '[Hijab Row] Uniform v Religion: Middle path is the Constitution's answer' (*Bar and Bench*, 14 February 2022) <<https://www.barandbench.com/columns/hijab-row-uniform-v-religion-middle-path-is-the-constitutions-answer>> accessed 16 September 2022

religion. It also provides other fundamental rights like the right to equality, privacy, etc. The constitution itself does not provide any kind of hierarchy between these rights.²⁸

The Universal Declaration of Human Rights does not contain any hierarchy. All rights are treated equally as it prescribes the same criteria of restrictions on all the rights: “everyone shall be subject only to such limitations as are determined by law solely to secure due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society.”²⁹ The convention on Human Rights shows a similar stand as UDHR by stating that every right ranging from the rights to privacy, religion, speech, assembly, etc. may be subjected to a restriction for the protection of the rights of others.³⁰ Therefore, any right may be restricted for the reasonable securement of another right. The issue of whether the restriction can be placed on the right is decided by the European Court of Human Rights through a proportionality analysis, wherein the Court tries to balance these equal rights against one another and ascertain whether the restriction if placed on the right will breach that balance by favouring one right over the other. Other human rights-related conventions and laws like the International Covenant on Civil and Political Rights 1966 or the Constitutional law of South Africa and Canada envisage the same principle of balancing rights.

In cases of such conflict between fundamental rights, the courts in India should follow the path of Constitutional Morality, which envisages that both individual and collective rights are protected. One right cannot be trumped over by another right. It should be harmoniously balanced as advocated by the constitution of India. The minority judgment of the Sabrimala case by Justice Indu Malhotra has directly hit the point of the issue. She opined that in every pluralistic society, constitutional morality gives the freedom to practice irrational customs, and religious practice cannot be judged based on the notions of rationality.

²⁸ Gautam Bhatia, ‘Nine Judges, Seven Questions’ (Indian Constitutional Law and Philosophy, 16 February 2020) <<https://indconlawphil.wordpress.com/category/constitutional-interpretation/balancing-rights/>> accessed 16 September 2022

²⁹ Universal Declaration of Human Rights 1948, art. 29

³⁰ European Convention on Human Rights 1948, art. 8(2), 9(2), 10(2), 11(2)

How such a harmonious balance between religious freedom and equality can be maintained was also answered in her dissenting decision when she stated that Courts have no authority to cannot interfere with religious communities' right to freely practice their religion unless and until it is oppressive and counter to human progress. She further opined that Courts should not indulge in the activity of rationalizing matters related to religion and faith as religious practices cannot be tested solely based on the right to equality.

Constitutional Morality in a secular state means the harmonization of the Fundamental Rights, wherein every individual, together with each religious denomination, or sect, has a right to practice their faith and belief by the tenets of their religion, irrespective of whether the practice is rational or logical. Unless a religious practice is outrightly oppressive or opposed to human life and dignity, every individual has a right to freely profess, practice, and propagate his religion and such a right cannot be overridden by Article 14 of the Constitution.

CONCLUSION

The controversies and mass uproar surrounding the decision of the Supreme Court starting from the Ayodhya case to the Sabarimala case and then the recent Hijab ban case by the Karnataka high court has posed a serious question regarding the mechanism used by courts while dealing with issues comprising the conflict between two fundamental rights. Every right granted under the Indian constitution is intrinsic to individual growth and development and hence such rights are given fundamental status. Overriding one right over another or asserting the prevalence of one right over another is not a solution for doing complete justice to a particular case as it would anyway defeat one of the rights fundamentals for an individual's peaceful existence. If complete justice has to be made in such cases of conflict, it will have to be made by finding the mid-way, and only then can the constitutional values of equal status and opportunity be upheld. That mid-way referred to above is nothing but striking the appropriate balance between competing rights and upholding both individual and collective rights. The dissenting judgment of justice Indu Malhotra holds an important position for the courts in deciding upon cases with similar conflict and also on deciding the Sabrimala review case and the hijab ban decision.

The court should be mindful of the fact that though Article 25 is subjected to other fundamental rights it also emanates from the right to free speech and expression and hence cannot, as stated by Justice Malhotra.