



|| NAMO TITTHASSA ||
GACHHANAYAK JAINACHARYA SHRIMADVIJAY
YUGBHUSHANSURI
(PANDIT MAHARAJ SAHEB)

20th January 2020

To,
Mr. Justice Sharad Arvind Bobde
 Chief Justice of India
 New Delhi

Subject: Pride of Religions

धर्मशास्त्राचे यशस्वीरूप सादर सादर करणारे यशस्वी

Dharma-laabh - Blessings to you.

I am very happy that the nature has bestowed upon you an unprecedented opportunity to uphold the independence of religions in India. As a Dharmacharya, we always look at such opportunities as the highest service to religion. Following is for your consideration:

Historical religious sovereignty

In 1215, when the agitated barons of England and Bishops of English church got signed 'Magna Carta' they made sure that in any circumstance the English church should enjoy absolute freedom from state. The very first clause of 'Magna Carta', as promised by King John, states that,

"I. FIRST, We have granted to God, and by this our present Charter have confirmed, for Us and our Heirs for ever, that the Church of England shall be free, and shall have all her whole Rights and Liberties inviolable. We have granted also, and given to all the Freeman of our Realm, for Us and our Heirs for ever, these Liberties under-written, to have and to hold to them and their Heirs, of Us and our Heirs for ever."

It is worth noting that, even today, of 63 Clauses signed in 1215, this clause of 'Magna Carta' is one of only four alive clauses and is enjoying the status of constitutional law of England.

On 4th October 1965, Pope Paul VI, as a permanent observer at the United Nations, very humbly yet decisively asserted the necessities of temporal sovereignty in himself to carry out spiritual missions. In his words he said :-

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"...temporal sovereignty -the minimum needed in order to be free to exercise his spiritual mission and to assure those who deal with him that he is Independent of any sovereignty of this world."

(emphasis supplied)

Even the person of this stature, who enjoys absolute power in his sphere i.e. absolute spiritual sovereignty, feels necessity of temporal sovereignty for spiritual missions.

Today in United Kingdom religion enjoys temporal and spiritual sovereignty. The Measures (Act) of English Church enjoy invulnerability from challenge as like secular parliamentary legislations, and at times The Church of England can even opt out of secular legislation.¹ In West-Minister Parliament, which is mother of all Parliaments, religious heads (Bishops) enjoy reservations in upper house of Parliament allowing their interference in secular affairs of the country. Few of other western countries enjoy complete separation of State and Church as a matter of Constitutional law. Even few others enjoy non-interference of state into religion.

By quoting the above stated facts, without any prejudice, I wish to draw your attention that even though India is the founder of all oriental religions, the religions here do not enjoy even religious autonomy and are victim of frequent state interference post-independence.

Framing of Article 25 and 26

As far as India is concerned, historically Indian religions did enjoy autonomy and separation from State. With the advent of British Rule this autonomy was then tampered with. Post-independence, as precedents set by British, while framing constitution, Constituent Assembly unilaterally assumed the authority over religions and framed Article 25 and 26 without consulting all Religious heads.

Article 25 and 26 of Indian Constitution were borrowed from Article 44 of the Constitution of Ireland which deals with the aspects of religions, majorly Christianity, in Ireland. Foreign phrases incorporated in Article 25 and 26 were neither defined nor explained which rendered ambiguity over its application. Given the existence of

¹ Church Autonomy In the United Kingdom - by MARK HILL -
<https://michaellameshall.files.wordpress.com/2011/03/church-autonomy-in-the-united-kingdom-by-mark-hill.pdf>

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diverse religions and their practices and beliefs, these Articles were bound to face the challenges of application. Above referred incorporation in Article 25 & 26 was the first major action post-independence, whereby foreign framework was forcefully thrust upon Indian religions.

Even though Article 25 and 26 were to protect fundamental religious rights, they were made subject to, plethora of restrictions. The restrictions were not only limited to public order, health or morality but also in case of rights in Article 25 were made subject to other provisions of Part III. Additionally, the rights were further significantly restricted by conferring powers to State to regulate and restrict all financial, economic, political and other secular activities 'associated with religious practices' (which have been later interpreted very broadly). State was further empowered to overrule religious scriptures and control religious practices in the garb of social welfare and reforms. Even, administration and management of religious properties were made subject to power of Legislation (which have also been interpreted very broadly). Consequently, religions and their rights and privileges did not get any significant protection under these articles and remained at the mercy of State to get their due justice.

Vesting of Rights under Article 26

Secondly, it remained (and still is) unclear as to where the rights protected by article 26 vest. It is pertinent to note that unlike religious rights in Article 26, other fundamental rights in the constitution vest in definite legal personalities i.e. person, citizens etc. As a matter of facts in the religious field, apart from the 'deity' no other legal juridical entity has been recognized. 'Religion' (which is not defined either in Constitution or by the Apex Court) and 'religious denomination' are not recognized even though many artificial legal personalities have been recognized in Indian jurisprudence including society, corporation etc.

Further there is no proper legal framework or legal machinery to exercise, enforce and challenge rights for 'religion' and 'religious denomination'. In the absence of such legal recognition or any such framework, the 'religion' cannot enforce its legitimate and valid rules upon its followers. In same manner 'religious denominations' are also unable to enforce the same.

Generally in India, although even the legal status of 'Trust' is ambiguous, trustees enjoy the power in the religious field in ad-hoc manner. In this premise, the trustees

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may impose new rules upon the followers which may be even against religions and religious denominations, provided they are not contravening the Trust Deed itself.

I would like to mention here that as a Dharmacharya it is painful when, by judicial pronouncements, the 'Supreme God' or 'Deity', a spiritual and temporal sovereign, as legal personality, is subjected to temporal and secular jurisdiction and is further met with derision by tagging it as "perpetual minor²", "mentally incapable³", and "disabled⁴".

International scenario on legal recognition of religion

It is important here to draw attention to the fact that Holy See is recognized as international juridical personality which is independent of the criterion of territorial sovereignty. Whereas in case of 'Dharmas' and 'Dharmik Sampradays' of India, let alone in international jurisprudence, even in Indian jurisprudence, they have not been recognized as independent juridical personality.

It is also necessary to look at the benchmark document containing minimum international standards in the area of recognition of religious or belief communities⁵. It has been mentioned in the said benchmark document that access to legal personality for religious communities should be quick, transparent, fair, inclusive and non-discriminatory.⁶ Further, the process of obtaining legal personality status should be open to as many communities as possible, without excluding any community on the grounds that it is not a traditional or recognized religion or through excessively narrow interpretations or definitions of religion or belief⁷. And that, a refusal to recognize it as a legal entity has also been found to constitute an interference with the right to freedom of religion under Article 9 of the ECHR as exercised by both the community itself and its individual members⁸. At the same time, under international human rights law, religious or belief communities should not be obliged to seek legal personality if they do not wish to do so. The choice of whether or not to register with the state may itself be a religious one, and the enjoyment of the right to freedom of

² AIR 1967 SC 1044

³ 1970 SCR (1) 936

⁴ 2017 (II) ILR-CUT1064

⁵ "Guidelines on the legal personality of religion or belief communities" which is published by OSCE Office for Democratic Institution and Human Right (ODIHR) in 2014.⁵

⁶ Ibid para 24

⁷ Ibid para 26

⁸ Ibid para 18



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religion or belief must not depend on whether a group has sought and acquired legal personality status.⁹ It is a matter of grief that though as per international standards a 'religious community' should be given liberty to obtain legal juristic personality; in India, for a 'religious community', let alone such liberty, there is no framework for legal juristic existence even after 70 years of independence.

The framing of constitution post-independence was a good opportunity to reset the historical wrongs been carried out by British Raj to various religious rights in India. The said opportunity could have been capitalised to reinstate the real status of religion, as was in ancient India. Unfortunately, the opportunity was lost and only husk of it was achieved in the Constitution. Today the situation is such that whilst there is assumed protection of religious practice in Article 25 and 26, real protection can be tested only when the practice is adjudicated.

Today although India became a democratic republic State, it is regrettable that religions here are not provided with opportunities to flower and flourish democratically.

Interpretative Journey Post Framing of Indian Constitution

Apart from the explicit restrictions to rights of religion, as worded in Article 25 and 26, the residual religious rights were further narrowed down by stricter interpretation of the said provisions.

The first such challenge was faced in 1954 when seven judges constitutional bench of the Apex Court was formed to decide the matter in Shirur Mutt case.¹⁰

Interpretation of "Religious denomination"

While interpreting Article 26, 'religious denomination' was interpreted from Oxford dictionary rather than looking at the Indian context by referring to the Hindi translation of the Indian Constitution which mentioned the term 'dharmik sampraday' for 'religious denomination'. In the Indian context, it would have been appropriate to consider this Hindi term taking into consideration religious scriptures and tenets,

⁹ Ibid para 21

¹⁰ (1954) 1 SCR 1005



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which could have been wider, pragmatic and acceptable approach to all Indian religious traditions.

Essential religious practices

The same Shirur Mutt case was also faced with the challenge to identify the practices which were protected by Article 25 and 26. Here, the word 'essential' was employed and inserted for the first time for the religious practice. The whole idea of using the word 'essential' was only to separate the secular affairs and religious affairs with no other implied effect to the term and even the 'essential' religious practice was also to be only determined by the reference to the doctrines. However, this term was then begun to be used in a fixed manner.

Post that, in Ajmer Dargah case¹¹ and Tilkayat case¹², Apex Court although apparently accepting the judgement in Shirur Mutt case, added a word of caution and assumed the powers to determine religious practices as 'non-essential' on the basis that these are superstitious or irrational.

While the intention may have been good in Shirur Mutt judgement, unfortunately later on, the reference of the word 'essential' to the religious practices has been interpreted in a very restrictive way. In the post Shirur Mutt judgements (barring few judgements) till date, only those religious practices which are very inherent to the existence of religion are considered as 'essential' while the religious practices which are supportive, complementary, optional or residual in nature are 'non-essential' (virtually 'secular' if read with Shirur Mutt Case) to get protection under Article 25 and 26. To worsen it further, the meaning of 'essential' is considered as a practice which is perpetual (continuous).

In the recent Sabrimala judgement¹³, scope of religious rights has been further narrowed down by subjecting it to the additional test of constitutional morality coupled with the existing narrowed essentiality test of the religious practice. As a result, protection provided to even essential religious practices under Article 25 and 26 is now considerably insignificant with maximum powers vested with the Courts to decide its applicability.

¹¹ (1962) 1 SCR 1983

¹² AIR 1963 SC 1638

¹³ (2019) 11 SCC 1



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Interpretation and effect of other provisions on Article 25 and 26,

In India, religions were always, since ages, been affluent and resourceful because of strong religiosity of devotees. Thus, they were always able to play the role of enabler in the social, moral and spiritual welfare. However, with the advent of the British and even in Independent India, law framers have enacted many laws resulting in the declination of religious assets including movable and immovable properties leading to reduction in spread of social, moral and spiritual values. Large land parcels owned by religions including quarries, mines, forests were all subjected to land reforms, acquisition, land ceiling or forest laws. This resulted in acute depletion of the assets of religion / religious denomination including reserve funds with the religious institutions, losing trillions and trillions of wealth. On the other hand, religious protection under Article 25 and 26 were of no avail since Article 25 was anyway subject to other provisions of Part III, and Article 26, as described above, had limited accessibility. Even if Article 26 could have been invoked, Article 31 (A) (B) and (C) are strong enough to nullify its protection. Also it may be noted that part of Article 26 has been held not forming part of basic structure of the Constitution¹⁴ making it further vulnerable to constitutional amendments.

As of now, when we observe the history of interpretation of fundamental rights, it was noted that all other fundamental rights except religious rights have expanded in their respective scope. For instance; scope of right to life has expanded to include right to have dignified life, right to live for unborn life; scope of right to privacy, equality and freedom of speech and expression has been significantly expanded. However, conversely, the scope of religious rights have been narrowed significantly and strangled to greater extent by making restrictive interpretations. This was evident in Sabrimala judgement of November 2018.

I highly appreciate your prompt endeavor for forming a larger bench presided by you for the review of not only this judgment but also to consider fundamental religious issues at large. Such a large constitutional bench is formed after seven decades for evaluating wider issues regarding religion. In this scenario, I hope that many unanswered issues that further makes religions defenseless and unsafe are taken up appropriately.

¹⁴ AIR 2001 Guj. 208



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One such unanswered issue is that even without defining '*religion*', the laws are enacted to control, restrict, and regulate the same. Despite that it is claimed that '*religious rights*' are protected under Article 25 and 26 of the Indian constitution. There is a necessity of harmonious interpretation of the terms (i) '*religion*' mentioned in '*matters of religion*' in Article 26 as well as mentioned in Article 25 and (ii) '*religious denomination*', keeping with the fact that it will be used mostly in relation to Indian Oriental Religions. This will help appropriate, unambiguous and distinguished interpretation of Article 26 as a whole including the '*matter of religion*'.

In the above context, I will be happy to provide you with the independent and distinguished research done by a research organization conducting research under my guidance for last 27 years with a strength of more than 50 fee earners, more than 50 honorary volunteers and around 108 learned monks for your consideration in this matter. This research organization has carried out comprehensive research on more than 10008 subjects based on more than 2000 scriptures from oriental religions, including that of Vyas Mahabharata, Ramayana, Kalpsutra, Kautilya Arthashastra and many more. These references are linked with national and global current affairs to get an all-round perspective of the world. The subjects include the constitution, politics, international politics, old judicial system, the current judiciary system, and many more.

The religions and traditions are at the core of Indianness. I heartily appreciate that you respect religions and I firmly believe that the outcome of this matter will dignify all religions being practiced in India and the ancient traditions of India for the well-being of the entire nation and the world at large.

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