Constitutional Law and Public Administration in India

Prof. (Dr) Sairam Bhat

Centre for Environmental Law, Education, Research and Advocacy (CEERA)

National Law School of India University, Bengaluru

Week- 05

Lecture-06

Right to Freedom of Religion

The Constitution of India provides for the right to freedom of religion. The preamble talks about secularism, or a secular state, which means the state shall not have a religion of its own, and citizens are free to exercise their own religious freedoms under the Indian Constitution. So, Article 25 says that freedom of conscience and free profession, practice and propagation of religion is allowed. However, this is subject to public order, morality, and health. Since India has had a great heritage for religious harmony, people from different religions have lived peacefully and harmoniously for many years now in this country and this country has welcomed all forms of religion. With the refugee status given to the Dalai Lama, Buddhism also has now become an integral religious part of the Indian country. Religion is usually a matter of belief or faith. And the Constitution of India recognizes that this belief or faith must be protected, and one should get the freedom of religion. Hence, there are four Articles that are dedicated, from Article 25 to Article 28, that deal with ensuring or securing the secular model of governance in the Constitution.

The Indian Supreme Court has time and again come in terms of trying to interpret these freedoms and the apex court has in *Kesavananda Bharati* said that secularism is a basic feature of the Constitution and hence, the state will protect the rights of citizens in all religion. A reading of Article 25, says that nothing in this Article shall affect the operation of any existing law or prevent the state from making any law, which may regulate or restrict any economic, financial, political or other secular activity which may be associated with religious practices, which means the state can make law in the matters of religion, especially in trying to regulate or restrict economic, financial, political or other secular activities. So, the state can also go ahead in providing social welfare and trying to reform or in trying to open Hindu religious institutions of a public character to all classes and sections of humanity. So, in terms of caste, religious institutions cannot regulate.

So, the state can make a law. The rule of equality applies over here because the state shall treat all religions equally as a principle and all persons are equally entitled to the freedom of conscience and the right to freely profess, practice, and propagate their own religion. However, to propagate would not mean conversion. Explanation 1 to Article 25 says that

the wearing and carrying of Kirpan, which the Sikh do shall be deemed to be included in the profession of the Sikh religion. So as a matter of Constitutional recognition Kirpan can be carried by Sikh as a part of professing their religion. Explanation 2 says that the reference to Hindus shall be construed as including a reference to a person professing the Sikh, Jain or Buddhist religion and the reference to Hindu religious institutions shall be construed accordingly. So, Sikhism, Jainism and Buddhism are an integral part of Hinduism under the Constitution of India. So, why we talk about the requirement of a uniform civil code in this country has been a debate. Article 44 of the Constitution of India requires us to make such a law called the Uniform Civil Code, because it is a religious law that determines your personal space, your personal life, your family life, including inheritance and succession. While there is a rule of equality that the state must treat all religions equally, this obligation of the state is to also ensure that every citizen within that religion is also treated equally.

There are some very interesting issues that were addressed under Article 25, regarding an institution called the Ananda Marga. Ananda Margis have the right to perform tandava as was held in this case of 1984. It was considered part of their essential religious practice. This is a doctrine that the Supreme Court has evolved, that if it is an essential religious practice, it can be protected under the right to freedom of religion. If it is not a very essential religious practice, then it cannot be protected under the right to religion. The best-case scenario to explain this is the use of loudspeakers. There is a case called the *Church of God (Full Gospel) v. KKR Majestic Colony Welfare Association*, a case decided by the Supreme Court in 2000, wherein the court said that no religion prescribes that the prayers should be performed by disturbing the peace of others. Nor does any religion preach that they should be using during the religious activity, voice, amplifiers, or the beating of the drum. So that kind of practice, which adversely affects the rights of others cannot be included as essential religious practice, getting protection under Article 25. Use of loudspeakers under the ambit of right to religion, profession, practice and propagation will not be permitted. Generally, the state is not allowed to interfere into someone's religious belief by any chance, but it may be required on the grounds of public order, morality and health and environment.

Article 28 clearly says about freedom as to attendance at religious instructions or religious worship in certain educational institutions. No religious instructions shall be provided in any educational institutions only maintained out of state funds. No person shall be forced into any kind of religious practices in state aid institutions. In a case called the *Bijoy Emmanuel v. State of Kerala*, popularly called as the national anthem case, there were three children belonging to a sect called the Jehovah’s Witness worshipping Jehovah who was worshipped as the creator, and they refused to sing the national anthem. According to these groups, singing Jana Gana Mana was against the tenets of the religious faith. These children stood up respectfully when the national anthem was being sung daily. They stood in silence, but they did not sing because they believed this as per their religion and in honest

belief that they cannot sing the same. A commission was appointed to enquire into the matter and in the report the commission stated that these children were law abiding and did not show any disrespect. However, the headmistress under the instruction of the deputy inspector of school expelled the students. The Supreme Court held that expelling the children for not singing in the national anthem violates the freedom of religion. Fundamental rights guaranteed under Article 19(1)(a) which is a freedom of speech and expression [which includes the freedom to remain silent] and Article 25(1) has been infringed in this case. It was further held that no provision of law must compel or obligate anyone to sing the national anthem and it is also not disrespectful if a person stands during the singing of the national anthem. The singing of the national anthem has been an issue quite recently as well. There was a Supreme Court judgment which said that a national anthem should be played at the beginning of every movie that is being screened and it expected citizens who went to the theatres to stand during that national anthem so that some kind of patriotism can be shown during such public assemblies or public gatherings. So, this has been an issue under the right to religion like where do you balance the interest of the right to religion and the right of patriotism, national security, integrity.

Under Article 25, there can be some restrictions that can be imposed. Public order as a restriction appears in two parts of the Constitution and they should mean one and the same thing. It appears in Article 19(2) of the Constitution. So public order means your freedoms under 19(1) are subject to the restrictions given under Article 19(2). So, the freedom of speech and expression, the freedom of movement, are subject to public order. And here also the right to religion is subject to public order. So, in your religious practices if you are going to infringe any kind of public order, to that extent your right to religion will be subservient and it can be curtailed, restricted, and regulated as well.

Communal violence in our country has been a kind of a challenge for the state to address. The frequency of communal violence has reduced in the last couple of decades, but this was quite a prevalent issue for the state to manage. When temples and other religious institutions are affected by frequent communal violence, the state is duty bound to maintain public order. This is something that religious institutions can claim as a matter of their freedom of religion. Because communal violence affects one's religious practice, religious faith, and religious ceremonies and if the state does not maintain law and order, freedom of religion itself becomes completely redundant and irrelevant.

While the courts have said that religion is a matter of faith, but the belief in God is not essential to constitute a religion, they have also said that the doctrine in each religion, what is so essential and what is not, is left to different religions for them to determine. Also, the courts have said that the philosophy of the religion is different from the religion itself. Time and again the courts have tried to look at the various dimensions to religion. If faith, philosophy, and religion are essentially different, then it can be so. One of the issues that

have been is about gender equality or gender equity that religious institutions are expected to follow.

When you are talking about a public premise or a public temple, then you cannot have the right of admission to serve, you cannot take matters into your own hand and determine who can enter and cannot enter a temple. There were controversies of Yesudas trying to enter the Gurvuyaur temple. There were controversies about whether women can be priests in Hindu temples. There was controversy about whether women can enter Sabarimala temple as well. So, this essential religious doctrine now has become a very important doctrine for the Supreme Court to determine what should be protected or what should be excluded under the garb of freedom of religion and what should be permissible in terms of the public character of such places and institutions. In *Adithayan v. Travancore Devasthanam* board was a case about a non-Malayali Brahmin to be appointed as a priest in a temple in Kerala. The court held that if a person is well versed, properly qualified and trained to perform the puja in any appropriate manner and worship the deity, then such person shall be appointed as the pujari of the temple despite his caste. So, caste cannot be the basis of determining who the priest in the temple is.

And hence, it was observed that a temple is not a denomination where there is a specific form of worship that is required by a particular caste and hence a qualified, well versed and trained pujari should be permitted to perform puja in the temples as well. Of course, taking over certain Hindu temples has been challenged as being Constitutionally valid or not. In certain places, the right to perform puja by a particular kind of community was abolished. For example, in Kashmir, Mata Vaishno Devi Shrine Act of 1988, was enacted and the administration governance and the management of the shrine was vested in a board instead of a family that was managing that kind of a shrine. So, the Supreme Court held that such an act where the state breaks over and denies a particular family or a group of individuals from managing a shrine or a temple can be considered to be Constitutionally valid and that family after the temple has taken over cannot claim the right to do the puja. So, the state in public interest can always take over that.

A question arose whether Triple talaq has an essential religious practice connotation in Muslim law and can be protected under Article 25 as the freedom of religion, practice, profession, and propaganda. The courts very clearly have said that this is a practice in the Muslim community and in a 3:2 majority, the court ruled that the practice is illegal and unconstitutional. The court held that an injunction would continue to bar Muslim men from practicing Triple Talaq till a legislation is enacted for this purpose. The government did formulate a law for protection of rights of women in marriage, especially in Muslim law and Triple Talaq now has become an offence.

Morality and health were part of the restriction that you can exercise on freedom of religion. So, in the name of religion, any kind of atrocity, any kind of discrimination, any kind of

harsh, illegal, irregular treatment of women can be regulated by the state. Very recently, in a case called *In Re noise pollution* case, and one arising time and again, especially in the month of November was whether firecrackers can be used during the valley. Now, in a city of Delhi, which has had a very long history, more than three decades of history of very bad air pollution, the government of Delhi has banned firecrackers. Initially, they regulated it, then they banned it. In between there were green firecrackers, but still they were polluting and affecting health. So, in general, when the state makes a law in larger public images, and they may want to ban a particular kind of activity, seize certain kinds of equipment or certain kinds of issues, this is largely done in terms of controlling air and mass pollution. Now, during your essential freedom of religion, if that practice of religion is affecting the larger community and the larger environment, then a complete ban on firecrackers can be justified.

So, public order, morality, and health. Now health is critical. Firecrackers affect the right to health and the right to clean air and environment. Burning firecrackers or killing the effigy of Raavana during some of the Indian festivals can be controlled and restricted. Or you can look at certain kinds of eco practices to exercise your freedom of religion. The courts have come down heavily on these kinds of management of religious affairs by the community. And they have very clearly said that religious denominations have to adhere to the guidelines of the Supreme Court, because the larger health of the community is something they are bound to respect and follow.

Now, of course, there has been some criticism saying, why only Hindus have to have these restrictions and why not other religions, it is better to look at the objectivity of the intervention of the court. The objectivity of the court is very well established, saying that there can be a ban, complete ban on firecrackers, especially at peak air pollution time. And that is the time when Diwali comes. The right to health of communities and people must be given paramount protection under the Indian law.

Article 26 of the Constitution of India does allow for freedom to manage religious affairs to any section of the community and the right to establish, maintain institutions for religious and charitable purposes. As a religious institution, you can have your own, you can do your own affairs, you can own and acquire movable and immovable property and you have the right to administer such property in accordance with law. So, while Article 25 guarantees the right of individuals to practice professing religion, Article 26 allows institutions to have the freedom of religion. So, that is the difference mainly between Article 25 and Article 26. So, Article 26 is protecting what we would call as the collective right of a particular denomination of religious people or citizens. While Article 26 is for collective exercise or right to religion, it is also subject to public order, morality, and health. And that is why the Supreme Court has always said that there are three conditions to be completed before the freedom under Article 26 can be exercised first. That the collection of Individuals who have a particular kind of a belief or who believe that they are in one spiritual congregation,

so they must have that kind of a belief that they belong to one sect or one community or one kind of religious belief, they should have a common organization and they must have a distinctive meaning. And for example, the Supreme Court has said that Ram Krishna Nishan can be exercising the right under Article 26. The Ananda margis are also religious denominations within the Hindu religion itself. And the Aurobindo society, unfortunately, has been held not to be a religious institution. So, while Ramakrishna Ashram and Ananda margis have been given the protection under 26, Aurobindo society is not considered as a religious denomination.

Article 27 clearly lays down that no person shall be compelled to pay any tax for the promotion and maintenance of any religion. So, there is a kind of a tax exemption. While we look at maintaining secular order, we should also maintain the fact that while religious denominations need not be taxed, the state shall not spend public money for the promotion and maintenance of a particular religion. That is also something that must be clearly looked into. Article 27 of the Constitution says that it prohibits the levy of tax, but not fees. So, which means there is a difference between tax and fee. And sometimes to look at what we call a secular administration, a fee may be part of what can be levied to say those who are attending the religious event. For example, if you are taking a yatra to the Amarnath caves, then can the government charge a particular kind of fee. That cannot be considered as a tax, if there is an expenditure that is involved by the state to take the pilgrims from one destination to another to take them safely and to see that the yatris don't suffer any kind of harsh weather or harsh conditions. The government must take certain kinds of steps and measures for which a fee can be levied on the pilgrims. And it is important to give them some services. It could be medicine, hospitals, food and or it could be taking such safety measures to reach the holy place or holy cave as in the case of Shiv Linga, which exists in the Amarnath caves.

Under Article 28 no religious instruction should be provided in any educational institution, which is maintained only out of state funds, which is also a very important declaration under the Constitution of India. And it clearly says that state aided institutions must be secular, and they shall not have religious instructions, to increase the rights of students from other religions as well. There are religious institutions which are managed by endowment trust. And endowment trusts are not necessarily the ones that receive state aid or state funding. So, in such kinds of institutions, religious instructions can be imparted. But when state funds are received, the secular character of the educational institution shall be maintained at all instances.

Article 28 makes a distinction between four types of educational institutions. First and foremost, it says those institutions wholly maintained by the state, institutions that are administered by the state, but established under the endowment of a trust, institutions recognized by the state and institutions that receive aid from the state. So, you can make a

distinction where Article 28 applies. You cannot administer religion to a minor without his consent, or without the consent of a guardian. So, these schools must refrain from religious instructions, unless they have been permitted to do the same as a private endowment or a private trust. The private endowment and private trust have been established for imparting religious instruction itself. So that is the main purpose. So, once you have that kind of recognition, then you can go ahead and impart such kinds of instructions. In India, it is not only about religious instructions in state institutions that is to be looked at in schools, but also in terms of universities as well. So, for example, we have an institution called the Aligarh Muslim University. Aligarh Muslim University was established under a legislation in 1920. And while we say that Aligarh Muslim University is for Muslims, that is not the exact purpose of the university itself. So being brought to legislation, this is not an institution that can promote only one religion, it is not an institution where religious instructions can be imparted.

Article 29 and Article 30 talks about protection of the interest of minorities, especially in managing their cultural and educational rights. Article 29 provides that any section of citizens residing in any part of India, and whatever distinct language, script or culture they may have of their own, shall have the right to conserve the same. Minorities are linguistic minorities, because they may be from a small region with a small language of their own. They may be cultural minorities, because they are a small sector of a community, which has a distinct culture within a given state already, because initially when states were made in India, they were made on linguistic lines. And then we subdivided it based on even cultural aspects like the hilly region as in the plains.

So, when Uttarakhand was crafted from Uttar Pradesh, it could be both based on cultural and other kinds of criteria that was required. But what Article 29 very clearly protects and provides is that you shall have the right to preserve your language, your script and your culture. And this is part of a citizen's right under the Constitution. Further, this Article also in one sense states that no citizen shall be denied admission into an educational institution maintained by the state or some institutions that receive aid from the state on the grounds of race, religion, caste, or language. So, there cannot be discrimination in state- aided institutions based on religion, race, caste, and language.

Educational institutions must open their doors and treat everyone equally. And hence discrimination on the ground of race or religion, or even caste or language cannot be made. Article 29 grants protection to both religious minorities as well as linguistic minorities, because religious minorities could differ from one state to another. For example, in the state of Jammu & Kashmir, which is now the Union Territories of Jammu & Kashmir and Ladakh, Hindus may be a minority. So, when you look at all over India, Hindus may be a majority, but if you look at one state, there could be one religion and people of that region who can be considered as minorities. So as soon as you come within that status of being a minority, you can claim the protection under Article 29. Further linguistic minorities can

also claim protection. And the Supreme Court has held that the scope of this Article is not necessarily restricted to minorities, as we commonly assume them to be. It must differ from state to state and from region to region. And if a minority committee wants to protect its language, there is a provision in the Constitution to recognize such kinds of languages. And the conservation of any language shall amount to the rights of the citizen under the Representation of People's Act 1951 as well.

Article 30 is the right of minorities to establish and administer education institutions. So, 29 is about protecting your culture and language. And to do so, can you establish and administer educational institutions? Article 30 grants this kind of right to both religious and linguistic minorities. So, they can establish and administer educational institutions of their choice. And they can look at acquisition of property, they can hold such property. And this is guaranteed to them in terms of what we call the protection of minority rights. And the state has a duty and an obligation not to discriminate against educational institutions that are specially managed by minorities. Under Article 30, the right to establish and administer educational institutions is not a general right. It is only a right given to minorities. The majority population cannot claim the right under Article 30. There is a distinction about those institutions that seek aid from the state and those institutions that seek recognition from the state. The kind of syllabus that are prescribed in some of these minority institutions can be a subject matter of the regulatory power of the state. So, the state can lay down standards of education, employment, prescribe the syllabus or the academic kind of curriculum in these minority institutions through its regulatory power.

The state shall not, in any way, issue guidelines, which could be guidelines such as guidelines on labour law, guidelines on taxation and so on. The state can lay down those kinds of rights while the citizens have the right to establish these educational institutions. There is some autonomy for institutions under Article 30. The autonomy is that these minority institutions can decide who their governing body should be, they can decide the rules and regulations and what kind of faith or confidence they should have in the management of the affairs of the institutions or who should manage it.

They have some autonomy in terms of appointment of teaching staff who should it be, and they can act against such kinds of staff that have shown dereliction of duty. They can admit students of their choice and set up reasonable fee structures and they can use their property and assets to benefit the institution. So, these are some kind of autonomous powers that are granted to institutions established under Article 30. While Article 30 gives this right, it is the duty of these educational institutions to ensure equality as far as possible within that minority community itself and they must provide the opportunity to give the disadvantaged citizens in that minority community. So, it is important that they understand that while there is a fundamental right given to establish, they should not violate social welfare, they ought to not create any law-and-order situation, health, and other national interest issues.

The character of minority institutions is that they must be subservient to the Constitutional goals and the welfare of students and teachers will be paramount and any kind of regulation that the state makes on the welfare of students and teachers must be adhered to by the minority institutions fully. If these institutions in some form have been getting aid from the state, then all the guidelines that the state imposes for such institutions must rigorously be followed. So, you can exercise all your rights, but this is the condition based on which these rights are to be exercised and reasonably enjoyed.