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Freedom of Conscience & the Right Freely to Practice of 'Dharma' under the Constitution of 'Bharat': A Critical Study

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ABSTRACT

Since the inception of human civilization, spirituality has been one of the essential attributes of the dignified life. Physical means alone would not be sufficient for attainment of pious goal of the life. India that is 'Bharat' is the country known for its peculiarity of spiritualism since the very inception of human civilization, where there is freedom and respect for conscience of individual as well as group of persons. Bharat is a politically organized society which paves the way for flourishing all kind of freedom of belief, faith and worship. Individual's personality cannot evolve positively unless there is inculcation of spiritual values which is nothing but 'Dharma.' Freedom of conscience creates an opportunity to explore the maximum width and dimension human personality. The conscience is consciousness of any people for satisfying the spiritual aspect of life which is intangible in the form and manifested through belief and faith which is actually 'Dharma.' Bhartiya Constitution has conferred fundamental rights on every person in the form of freedom of conscience and the right freely to profess, practice and propagate 'Dharma.' or religion of his own choice. In this research paper, there is an endeavour to have critical study on Freedom of Conscience & the Right freely to practice of Dharma under the Constitution of Bharat.

I. INTRODUCTION

Bharat as a civilisation has its existence since time immemorial. The Indus-Saraswati Civilization has been in existence at least 12000 years back² which has been recognized as foundation and basic substratum of indigenous socio-cultural identity of the Bharat. The Bhartiya culture and civilization had been founded by the indigenous inhabitants of the Bharat known as 'Araya' who were originally, born on the land of Bharat. The Aryan invasion theory is absolutely false narrative, which has been conclusively proved beyond reasonable doubt by a published scientific research paper.³ It is inherent, inalienable human right of every individual

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² <https://organiser.org/2019/09/06/124848/bharat/aryan-invasion-migration-theory-receives-a-body-blow/> (Last Accessed on 4th May 2024).

³ Id. and also refer: The KGP Chronicle, the official News Platform of IIT- Kharagpur, India;

of any society to protect his indigenous socio-cultural identity.⁴ The jurisprudence of any politically organized society should have its relevance to the deeply rooted civilizational, cultural, social and moral values of such society. Since the early Vedic period of the Bhartiya civilisation, there had been a system of governance in the Bharat which had its roots from the basic values of the socio-cultural identity of the Bhartiya society. From early 8th Century onwards till the end of 16th Century, many parts of the Bhartiya territory had been invaded and ruled by many foreign invaders belonging to middle-East Asian politico-cultural origin, who had committed barbarous, inhuman and cruel acts to destroy the indigenous socio-cultural identity and values by causing destructions to the places of worship, places of education, libraries, by taking the recourse of forcible conversions of the people who were practicing Sanatan Dharma into Islamic faith, rapes against women, selling of women as slaves and commission of mass genocide of the people belonging to the indigenous community⁵ (hereinafter will be referred as ‘Middle East Coloniality’). From early 17th Century to 1946 AD, the Bharat was dominated and ruled by the people belonging to European politico-cultural origin who had promoted conversions of the people practicing Sanatan Dharma into Christianity by allurements, misrepresentation and deceitful means.⁶ They ruled in accordance with the imported jurisprudence of European-politico-cultural norms. Such norms were substantially extraneous to the indigenous jurisprudence of the original inhabitants of the Bharat (hereinafter will be referred as ‘European Coloniality’). Both of the aforesaid colonialities which were based on Abrahamic religion had deliberately, neglected the jurisprudence based on indigenous socio-cultural norms in the Bhartiya legal system rather they incorporated and imposed their own jurisprudence based on their socio-religious cultural ethos which was totally extraneous to the legal norms of the Bhartiya society and may not be treated as just and fair. Injustices were carried on by the aforesaid colonialities against the original inhabitants by executing political, socio-cultural and economic mode of exploitations. Since the very inception of Bhartiya civilization the indigenous society was adept to naturally evolved customary legal norms which was closely associated with indigenous culture and civilization. Such naturally evolved norms through many centuries of the Bharat, had been the basis of political governance and fabric of

<https://kgpchronicle.iitkgp.ac.in/tag/ilya-prigogine/> (Accessed on 19th June 2023).

⁴ Universal Declaration of Human Rights, 1948.

⁵ The Bloody History of Islamic Conquest of India: Vikram Sampath; The Jaipur Dialogues- Annual Event-2022; <https://youtu.be/yUmTYSU5Cc4>. (Accessed on 9th July 2023).

⁶ How did Missionaries in colonial India communicate with the people for conversion; <https://history.wisc.edu/wp-content/uploads/sites/202/2021/04/ask-a-historian-transcript-s2e8.pdf> (Accessed on 25th December 2023) and Peasants, Colonialism & Sovereignty: The Garo Rebellions in Eastern India https://web.archive.org/web/20210410091731id_/https://www.cambridge.org/core/services/aop-cambridge-core/content/view/1D423DFD09FC6A7EA78DF4E580437C99/S0026749X20000426a.pdf/div-class-title-peasants-colonialism-and-sovereignty-the-garo-rebellions-in-eastern-india-div.pdf (Accessed on 25th December 2023).

the socio-cultural values of the society but the aforesaid coloniality never recognised such values and also had not applied such indigenous norms while governing Bharat. The Government of India Act, 1935 was enacted by British Parliament for providing administrative framework to govern subjugated Bharat under the British regime which was modified version of the Government of India Act, 1919. The Act of 1935 was made as a basic framework of the Indian Constitution.⁷ The 1935 Act had incorporated the jurisprudential principles which had its origin from the sources infested with European Colonial mindset. The European coloniality had nothing to care about Bharat's cultural and civilizational identity of indigenous people of India rather they incorporated the English colonial jurisprudence under the said Act.

Bharat got independence from colonial regime in the year 1947 and the Constituent Assembly accomplished the task of making of the Constitution of India. As stated earlier, the Constitution had adopted the basic framework from the Government of India Act, 1935 which was dominated by English colonial jurisprudence. Being a Sovereign State, the Constituent Assembly should incorporate the indigenous jurisprudence based on deeply rooted socio-cultural identity of the people of Bharat but unfortunately nothing was recognised in accordance with the indigenous jurisprudence under the Constitution of Bharat.

Under the Constitution of Bharat, subject to public order, morality, health and other fundamental rights, all persons are equally entitled to freedom of conscience and right freely to practice religion / *Dharma*.⁸ Subject to public order, morality and health, every religious denominations / *Dharmic Sampradaya* or any section thereof shall have right to establish and maintain religious / *Dharmik* and charitable purposes, to manage its own affairs in matters of religion / *Dharma*, to own and acquire as well to administer properties in accordance with law.⁹ The true interpretation of the Constitutional Law of any politically organized society shall be done for the purposes for which such State is constituted by taking cognizance of the deep rooted, established, essential and integral part of socio-cultural values of such society. As stated earlier that Bhartiya indigenous society had been founded on naturally evolved customs through ages. The practices and conduct of such society which are reasonable as well as certain and became an essential and integral part of such customary practices should be recognised and applied in true letter and spirit by the State in the administration of justice and obviously, interpretation of such law should be done accordingly. We have fundamental right under the Constitution of India, regarding freedom of conscience and right freely to practice our Dharma.

⁷ Dr. Ambedkar in Constituent Assembly Debates, 4th November 1948; <http://164.100.47.194/Loksabha/Debates/cadebatefiles/Co4111948.html>.

⁸ Article 25 (1); the Constitution of India.

⁹ Article 26; the Constitution of India.

The word 'Dharma' is not synonymous to the word Religion. 'Dharma' is absolutely different concept than Religion. 'Dharma' has its origin in indigenous jurisprudence of the Bharat whereas the 'Religion' has its origin in the Abrahamic ethos of the European and middle east Colonialities. We will discuss in detail in this paper regarding the distinctions between 'Dharma' and Religion. In this paper researcher's endeavour is to have a critical study of the fundamental right to freedom of conscience and the right freely the practice of 'Dharma'.

II. MEANING OF 'DHARMA' & HOW IT DIFFERS FROM RELIGION

'Dharma' (धर्म) means the righteousness in conduct. The object of the law is to control the conduct of the of the people. Dharma is based on reason and intellect. 'Dharma' provides the code of conduct for the people in a civilized society. 'Dharma' is an inherent attribute of human being which makes him a distinct living creature on the earth. Like an animal, a human being has need to satisfy all biological needs which are essential for its survival such as food, sleep and sex for procreation of progeny but there is a distinctive quality specifically associated with a civilized human being, which is 'Dharma.' 'Dharma' is the philosophical and spiritual way of life which encourages to make inquiry and observations of the spiritual dimensions of the virtuous aspect of life which is based on true and reasonable facts of the meaningful life. 'Dharma' would enable him to make opinion regarding the philosophical and spiritual aspect of the life.

According to *Manu Smriti*, there are ten important characteristics of the 'Dharma'¹⁰ viz. (1) धृति- means to bear patient or having perseverance (2) क्षमा- means forgiveness (3) दम- means control of passions and ideas (4) अस्तेय- means truthfulness (5) शौच- means cleanliness of body, mind and spirit (6) इन्द्रिय-निग्रह- means control of the senses (7) धी- means cultivation of reasonableness (8) विद्या- means knowledge (9) सत्य- means truthfulness (10) अक्रोध- means absence of anger.

According to *Manu Smriti* 'Dharma' means dharma means law, usage or customs. The aforesaid attributes of the 'Dharma' are in consonance with the Natural Law School of Jurisprudence, which advocates that laws are naturally existing as an inherent attribute of a human being as reason and morality guided by divine wisdom. The legal system in the ancient Bharat (before the advent of middle east coloniality), was based on 'Dharma' which was inherent and essential component of the governing system. The king had to govern the administration of justice in accordance with the established principle under 'Dharma.' The

¹⁰ धृतिः क्षमा दमोऽस्तेयं शौचमिन्द्रिय निग्रहः । धीर्विद्या सत्यमक्रोधो दशकं धर्मलक्षणम् ॥

supreme belief of the Supreme Court of India is “*Yato Dharmastato Jyaah*” means where is ‘*Dharma*’ there is victory. In other words, the party who would rely on the jurisprudence based on ‘*Dharma*’ shall be victorious. Therefore, the ‘*Dharma*’ has been recognized as legal substratum of the Bhartiya jurisprudence since time immemorial.

It is absolutely, misnomer to use the word ‘*Dharma*’ as a synonymous to that of ‘*Religion*.’ ‘*Dharma*’ is exclusively different and broader term as well as omnipresent and self-contained concept than the ‘*Religion*’ which is extremely narrower concept. ‘*Dharma*’ is exclusively a Bhartiya concept in the context of its origin and also it is solely existing in Bhartiya geographical region of the world with its exclusive and unique features whereas ‘*Religion*’ has its origin in Middle East and European geographical regions of the world. ‘*Dharma*’ has its natural genesis based on inquiry and observations which has its relevance with ‘*Veda*’ which has been the source of eternal knowledge regarding the philosophy of life in the most ancient Bhartiya Civilization since the time immemorial. ‘*Religion*’ has its relevance with Abrahamic concept based on belief system as propounded by prophets of the concerned religions. Such practices to use word ‘*Dharma*’ as a ‘*Religion*’ was started during British regime as they had no idea to understand the broader concept of the word ‘*Dharma*’, as their spiritual belief was based on the tenets of Abrahamic Religions. The word ‘*Religion*’ implies to follow certain belief or tenets without questioning the truthfulness or authenticity of such tenets or belief. The word ‘*Religion*’ implies a particular way of worship to particular almighty whereas the word ‘*Dharma*’ is omnipresent way of life in pursuit of the real truth. Judaism, Christianity, Islam etc. is Religion. They are followers of certain prophet, certain holy book and certain almighty power. There is various ‘*Religion*’ but only one ‘*Dharma*’ which is also known as ‘*Sanatan Dharma*’ which is naturally existing concept. The word ‘*Religion*’ is based on system of belief as propounded by certain prophets of certain ‘*Religion*’ whereas the ‘*Dharma*’ is based on inquiry and scientific observations of the facts pertaining to the philosophical and spiritual aspect of the life which are true and naturally existing.

There is no freedom of speech or expression against the tenets of certain religious belief but unlike that, the ‘*Dharma*’ provides such freedom subject to certain reasonable restrictions. The ‘*Religion*’ has no such element of discretionary liberty, in the sense that the believer of a particular religion has to follow certain strict set of religious rules, tenets as well as practices as propounded by their prophets as authenticated in their holly books made by prophets. Certain ‘*Religion*’ mandates to follow strict set of beliefs, rules and tenets, as may be prescribed under particular Religion. Non-compliance of such rules would follow very serious consequences. As per certain religious ordinances, even there would be infliction of death punishment on such

fellow who violates or opposes such particular belief, tenets and rules of such religion.

There is illimitable discretionary liberty while being adherent to the path of '*Dharma*' by following certain way of life. There is also no binding obligation to follow any strict set of rules. The whole nature is over grown under the '*Dharma*.' '*Dharma*' is universal ruling element for whole nature which is dynamic and having consistency with naturally existing laws of the nature. '*Dharma*' provides an order for whole world. '*Dharma*' provides the code of conduct for human beings against the other fellows as well as against the whole ecological system in accordance with the order of nature. The '*Dharma*' obligates us to observe the path of righteousness by protecting and preserving our natural ecological system.

III. '*DHARMA*' & '*DHARMIK SAMPRADAY*' UNDER THE CONSTITUTION

All persons are equally entitled to freedom of conscience and right freely to practice Dharma or religion but subject to public order morality and health and other fundamental rights conferred under the Constitution.¹¹ In the Bhartiya society, the '*Dharma*' is essential and integral part of the life. '*Dharma*' is a quest for understanding the whole cosmic order of the universe and a personal commitment to adjust oneself in accordance with such order which is natural law of obligation.

In the Hindi version of the Constitution, the word '*Dharma*' has been used where as in the English version of the same the word 'Religion' has been used under our Constitution. The persons who exercise their freedom of conscience and being adherent to the path of '*Dharma*' by observing certain specific way of life are entitled to be protected under the Constitution. The Constitutional Courts while entertaining petitions for the enforcement of such freedom of conscience relating to any adherence to the path of '*Dharma*' by observing certain way of life and for practicing '*Dharma*,' should interpret the Constitutional Law according to true meaning of '*Dharma*' which has absolutely different concept and meaning than that of religion. The civilizational and cultural identity of the Bharat had never been intended to get distracted with the path of '*Dharma*' and the persons who are observing certain way of life are entitled to freedom of their conscience under our Constitution.

Similarly, the expression '*Dharmik Sampradaya*' or 'Religious denominations', have been conferred with fundamental right to establish and maintain institutions for '*Dharmik*' or Religious, purposes, to manage its own affairs relating to religion, to own, acquire and administer property in accordance with the provision of law.¹² The expression '*Dharmik*

¹¹ Supra in Note-8.

¹² Supra in Note-9.

Sampradaya’ has its origin in the Bharat and adherent to the word ‘*Dharma*’ whereas the phrase ‘Religious denomination’ has its origin in European coloniality and adherent to the Abrahamic religion. The tenets of Abrahamic religions are based on the principle of following of certain religious prophets, who had directed the followers to observe certain conducts as told to them by their religious gods. Whereas the ‘*Dharmik Sampradaya*’ has its affiliations with ‘*Dharma*’ which is not dictated by any prophet but such practices of ‘*Dharma*’ and conduct in our Bhartiya society are being observed by the society since time immemorial. Such practices have been crystalized into certain well recognized customs of the Bhartiya society.

IV. FREEDOM OF CONSCIENCE AND FREELY PROFESS, PRACTICE AND PROPAGATE ‘DHARMA’ OR RELIGION

The entitlement to freedom of conscience and freely profess, practice and propagate ‘*Dharma*’ or religion is not absolute in nature. This fundamental right is inferior most right under Indian Constitution. Such freedom is subject to public order, morality, health and other fundamental rights conferred under the Constitution. No one shall be allowed to disturb public order in the name of ‘*Dharma*’ or religion. Public order envisages “that state of tranquillity which prevails among the members of political society as a result of internal regulations enforced by the government which they have established.”¹³ The slaughtering of animals at public place is an offence¹⁴ and also disturbs the public order and no one shall be allowed to slaughter any animal in the name of religious practices, on roads, streets and other public places. Offering prayers at public places like roads, streets and like places and thereby causing public nuisance is against public order and no one shall be allowed to do so in the name of freedom to ‘*Dharma*’ or religion. If someone offering prayers at public place, the same amounts to infringement of fundamental rights of others e.g., right to have free movement on public roads. Organising religious procession at public places after seeking due permission with competent administrative authorities will be permissible as per the procedure established under law. While considering applications for such permissions the administrative authorities shall ensure that the public order shall not be disturbed so as to causing annoyance to general public. The Shariat Law is against the shifting of graves but the order of the court for shifting properties connected with religious places in order to avoid clashes between two religious communities would be justified on the basis of public order as the religious rights of every person as well as religious denomination are subject to public order.¹⁵ *Tandav Nritya* in procession or at public places by

¹³ *Romesh Thapper v. State of Madras* AIR 1950 SC 124.

¹⁴ Section 34 of Police Act, 1861.

¹⁵ *Gulam Abbas v. State of U.P.* (1984) 1 SCC 81.

Ananad Margis carrying lethal weapons and human skulls was not religious rites and prohibition of such procession at public places was not violative of religious rights of any person and denominations under articles 25 and 26 respectively, rather such acts were against the public order and also against the Constitutional morality.¹⁶

Freedom of conscience and freedom freely to profess, practice and propagate religion are subject to morality. Morality means constitutional morality i.e., the moral values which are inherent in the Constitution for ascertaining true meaning of the Constitution and also for accomplishing its objective.¹⁷ Bharat is diverse country with many ‘*Dharma*’ or religions, sects, castes, creeds and they have their beliefs, faiths and distinctive practices. The constitutional morality should be inclusive to recognize the beliefs and faiths of diverse population in ‘*Panth Nirpekch*’ polity.¹⁸

The freedom of conscience and freedom freely to profess, practice and propagate ‘*Dharma*’ or religion are subject to health of the people i.e., no ‘*dharmik*’ or religious practices shall be permissible at the cost of the health of the general public. It has been established law that even essential integral practices of any religious community shall not be allowed if such practices cause adverse impact on public health.¹⁹ Azan may be essential and integral part of Islamic religion but the same cannot be allowed by loudspeaker, as the same disturbs the peace of the others and consequently, impact on public health.²⁰ No person may be allowed to disturb the peace of others by using loudspeakers in exercise of the right to religious freedom under Article 25 and 26.²¹

V. CONCLUSION

Freedom of conscience is entitlement under the Constitution to honour and respect towards liberty of individual and group of persons to act and think in particular way as they wish. The philosophy of spiritual aspects of the life of any person should be in concurrence of the his or her belief and faith. In the matter of belief and faith the individuals own thought and perception matters. Bhartiya spirituality has its root in ancient knowledge and quest for philosophy of life. The ancient sages called as “*Rishis*” devoted their life for the finding out the true objective of life. The quest for true philosophy of life had always been the core of Bhartiya version of

¹⁶ *Acharya Jagdishwaranand Avdhuta v. Commissioner of Police, Calcutta* (1984) 4 SCC 522.

¹⁷ *Indian Young Lawyers Association & Ors. V. State of Kerala & Ors.* Writ Petition (Civil) No. 373 of 2006; Supreme Court; Justice Indu Malhotra at para 11.5; Date of Judgement 28 September 2018.

¹⁸ *Ibid.* at para 11.2.

¹⁹ *Church of God v. KKR Majestic Welfare Colony associations & Others* (2000) 7 SCC 282.

²⁰ *Afzal Ansari v. State of U.P.*, MANU/UP/0995/2020.

²¹ *Church of God (Full Gospel) in India v. K.K.R.M.C. Welfare Association* AIR 2000 SC 2773.

spiritualism. We nurtured the concept of ‘*Dharma*’ which is core philosophy of our civilization since ages. Our Constitution makers had incorporated this great vision in the Constitution of Bharat. Every person has freedom of conscience and freedom to profess, practice and propagate ‘*Dharma*’ or religion of his/her choice.
