Source : www.thehindu.com Date : 2023-02-13

THE SPIRIT OF THE LAW LIES IN THIS DISSENTING JUDGMENT

Relevant for: Indian Polity | Topic: Judiciary in India: its Structure, Organization & Functioning, Judges of SC & High Courts, Judgments and related Issues

February 13, 2023 12:16 am | Updated 12:16 am IST

‘History has repeatedly shown us that discrimination within religious boundaries often breaches those frontiers and tends to impinge on a person’s relationship with the wider world’ | Photo Credit: Getty Images

How must the rights of religious groups be balanced with the rights of its adherents? This question has long plagued India’s courts. When one such clash arose in 1962, the Supreme Court of India, through a 4:1 ruling, firmly placed group rights over individual freedom. There, in Sardar Syedna Taher Saifuddin vs The State Of Bombay, a challenge was mounted by the leader of the Dawoodi Bohra community, the Dai-ul-Mutlaq, to the Bombay Prevention of Excommunication Act, 1949. The law prohibited religious communities from expelling individuals from a group’s membership. The petitioner claimed that he served not only as a trustee of the community’s properties but that he had also been vested with a power to excommunicate from the denomination any member of his choice. In his belief, this power was integral to the Dawoodi Bohras’ collective right to religious freedom.

The Court, with Chief Justice of India B.P. Sinha dissenting, declared the law unconstitutional. It held that the Dai’s power to excommunicate was so essential to the group’s faith that a legislation, in the name of social welfare, cannot be allowed to reform a religion out of its existence. The verdict has long been a subject of critique. On February 10, 2023, the Court, through Justice A.S. Oka’s judgment (Central Board of Dawoodi Bohra Community vs The State Of Maharashtra), agreed that it merited reconsideration, for at least two reasons.

First, the original ruling had failed to examine whether the rights of religious denominations ought to be balanced with other fundamental rights, particularly the rights of its individual members to be treated with equal care and dignity.

Second, in the years since Sardar Syedna, Indian jurisprudence has evolved to a point where any act of excommunication ought to be tested on a touchstone of constitutional morality. Given these failures, the Court believed that the issues involved ought to be resolved by a larger Bench, in this case by a nine-judge Bench, where questions emanating out of the Sabarimala dispute are already pending consideration.

There is, in the words of the former Chief Justice of Canada Beverly McLachlin, no “magic

barometer” to measure limits on religious freedom. But given the inextricable link between religion and social life — especially stark in India — denominational rights invariably come into conflict both with laws of general application and with the individual rights of a group’s adherents.

Resolving one such battle, the Court, in Shirur Mutt (1954) held that it was only those aspects of religion which are “essential” to faith that deserve constitutional protection. Determining what is essential, the Court ruled, would depend on what devotees to the faith deem as integral to that religion. This exercise was meant to be narrowly tailored. But the carefully drawn-out distinction between the religious and the secular soon collapsed, and soon the Court, through a series of rulings, assumed theological authority and interpreted religious scriptures to determine which practices were, in fact, central to faith.

Over time, this “essential practices” doctrine began to border on the absurd. In one instance, the Court found that the Tandava dance practised by the Anandi Margis was inessential to religion even though the sect’s founder expressly mandated the performance of the dance. The upshot was this: judges, quite contrary to deciding when the state must be allowed to legitimately intervene in matters of religion, were sketching out boundaries to determine which rites and rituals were deserving of constitutional protection in the first place.

This approach undermined the elementary rationale behind the guarantee of religious freedom: that members of religious groups must enjoy an ethical autonomy to determine for themselves how best to lead their lives. But equally, as the judgment in Sardar Syedna attested, the essential practices doctrine also meant that the Court was sometimes unwilling to strike down a practice that impinged on individual rights merely because the practice in question as essential to faith. It was for this reason that Justice D.Y. Chandrachud suggested in his concurring opinion in the Sabarimala case that we look towards alternatives.

One choice can be found, as it happens, in Sardar Syedna. There, in a rousing dissent, CJI Sinha held that it was immaterial whether the practice of excommunication was essential to religion. What the Court had to see was the effect that the practice had on the expelled adherent. As the judgment recognised, a person who had been excommunicated would be disentitled from using the communal mosque and burial ground, and would practically be regarded an outcast. What is more, because of the expulsion, no other person from the community could have any contact, social or religious, with the excommunicated member. Thus, the law in question, as the CJI wrote, merely carried out the “strict injunction of Article 17” — through which untouchability in any form stood abolished.

There is a clear logic to this opinion. Religious groups are vested with rights so that independent members can come together to fulfil collective desires. At the heart of this guarantee is the individual. Therefore, howsoever essential a practice might be to faith, it cannot be allowed to undermine the dignity of the individual.

Article 26, which recognises the rights of religious denominations, begins with a dictate that its promise would be “subject to public order, morality and health”. What might morality mean? In referring Sardar Syedna to a larger Bench, Justice Oka makes clear that morality today must be understood to mean “constitutional morality”. It must subsume within it the fundamental values supporting the Constitution: among them, the ideas of liberty, equality, and fraternity. Justice Oka wrote, “Even assuming that the excommunication of members of the Dawoodi Bohra community is always made on religious grounds, the effect and consequences thereof, on the person excommunicated needs to be considered in the context of justiciable constitutional rights.” He found, on the face of things, that excommunication brought with it serious civic consequences, affecting a person’s right to lead a meaningful life.

History has repeatedly shown us that discrimination within religious boundaries often breaches those frontiers and tends to impinge on a person's relationship with the wider world. If autonomy vested in groups over matters of religion is allowed to trump the rights guaranteed to individual members (to be treated with dignity and equal care and concern) the central tenets underlying the Constitution will cave in.

The anti-exclusion principle rests on a further axiom: that power equations within religious denominations mean that rules are often enforced by dominant community leaders. This leaves little scope for what the professor of law, Madhavi Sunder, described as "cultural dissent". In her words, a law that favours autonomy of the group over the autonomy of the individual will have "the harmful effect of favouring the view of the association proffered by the powerful over the views proffered by less powerful members of the group that is, traditionally subordinate members such as women, children, and sexual minorities".

The dissenting judgment in Sardar Syedna rests on similar foundations. When the nine-judge Bench searches for answers to the questions posed to it, it will do well to turn to CJI Sinha's opinion, for in it lies the brooding spirit of the law.

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