

CHAPTER: IV

The Freedom of Religion under the Indian Constitution

4.1 Right to Freedom Religion

In Western political history the concept of secular State and granting of religious freedom developed out of many different historical situations and philosophical impulses. In particular, they have been shaped by the process of secularizations of the State and sundering of the medieval fusion between the Church and the State. In practice, this separation hasn't been always complete as seen earlier in chapter one. The question, however, may be raised whether the separation between religion and the State in the absolute sense can ever be maintained in this age of ours, when political decisions affect every aspect of human life, especially moral and religious issues, which people hold important in their lives.

This chapter Researcher studies the secular provisions of the Indian Constitution that regulate the manner of separation between religion and the State in the Indian polity. These provisions do not intend to create a State that marginalizes religion from society, or to follow a policy of strict neutrality towards religion. As we have seen in chapter two, India's historical antecedents, and the context in which secularism evolved as a political concept as well as its historical exigency do not warrant for such policies. The framers of the Indian Constitution envisaged a model of secular political system that protects all religions with equal regard (Sarva Dharma Samabhava) but under the framework of an egalitarian social order, informed by the principles of welfare State consistent with the progressive enhancement of human dignity.

The State's approach towards religion embedded in these constitutional provisions is one that maintains a 'principled distance' from religion. This, however, does not prohibit the State to intervene when practice of religion contravenes public order, morality, health, egalitarian social order and objectives of the welfare State intended for integrated development of the individuals and communities. State intervention or non-intervention in the practice of religion depends upon which of the two better promotes substantive values like religious liberty, egalitarian social order, social justice and religious harmony which are constitutive of a life worthy of human dignity for all.

In this context, the Courts in India have taken upon themselves the task of giving judicial definition to 'religion' protected under the secular provisions of the country's Constitution. They also have the burden of doing the sensitive job of differentiating 'matters of religion' protected under the same provisions from matters of secular interest added or associated with religious practices, which may be liable to the action of the State when needed to maintain common good and to promote social welfare and reform. Hence, in this chapter our study is directed towards the contribution of the Indian judiciary by way of judgments issued by the Courts on several cases associated with religion allegedly affected by State intervention. The contributions of the Courts are very useful for us to understand the fundamental principle underlying the political philosophy of Indian secularism. Most of the cases selected for our study appeared before the Supreme Court of India in the 1950s and 1960s. These are of historic importance, because those were the important times in the history of the young nation in setting up the road map for public life regulated by secular laws governing people's everyday life. Articles 25 to 30 and 325 of the Constitution contain the secular provisions. The central provisions are given in articles 25 and 26, which deal with individual and corporate freedom of religion. Most of our research would revolve around these 25 to 30 articles. Researcher studies these articles and other allied articles by going through the judicial decisions on important cases appeared before the Supreme Court of India. We also substantiate our study by researching through the documents of the Constituent Assembly Debates, the commentaries of the Constitution, and opinion of the scholars. We limit our material for investigation only to those provisions dealing with the free exercise of religion and state restriction, state's assistance to religion, and religion and the welfare state. These are directly connected with a set of substantive values that protect equal dignity for all.

4.1.1 The Need and Basis of Religion

The Concept of secularism has been discussed in the previous chapter. Let us now find out if there is any correlation between religion and secularism and if there exists any correlation, then what is its nature. Before one can establish whether or not any correlation ship exists between religion and secularism, it is desirable to have a clear understanding of the two concepts. The concept of secularism has already been dealt with in the preceding pages. Let us now explore the concept of religion both in the Western and the Indian context.

One of the rights guaranteed by the Indian Constitution is the right to Freedom of Religion. As a secular nation, every citizen of India has the right to freedom of religion i.e. right to follow any religion. As one can find so many religions being practiced in India, the constitution guarantees to every citizen the liberty to follow the religion of their choice. According to this fundamental right, every citizen has the opportunity to practice and spread their religion peacefully. And if any incidence of religious intolerance occurs in India, it is the duty of the Indian government to curb these incidences and take strict actions against it. Right to freedom of religion is well described in the Articles 25, 26, 27 and 28 of Indian constitution.

THE RIGHT TO FREEDOM OF RELIGION

- All religions are equal before the State and no religion shall be given preference over the other.
- Citizens are free to preach, practice and propagate any religion of their choice.
- The objective of this right is to sustain the principle of secularism in India.



The Constitution of India guarantees the protection of certain fundamental rights. They are given in articles 12 to 35, which form Part III of the Constitution. Among them articles 25 and 26 are the two central articles guaranteeing religious freedom.

Article 25 reads:

- (1) Subject to public order, morality and health and to the other provisions of this Part, all persons are equally entitled to freedom of conscience and the right freely to profess, practice and propagate religion.
- (2) Nothing in this article shall affect the operation of any existing law or prevent the State from making any law - (a) regulating or restricting any economic, financial, political or other secular activity which may be associated with religious practice; (b) providing for social welfare and reform or the throwing open of Hindu religious institutions of a public character to all classes and sections of Hindus¹.

Explanation I. - The wearing and carrying of kirpans shall be deemed to be included in the profession of the Sikh religion.

¹ P.B. Gajendragadkar, The Constitution of India, op.cit.13-14/40-41

Explanation II. - In sub-clause (b) of clause (2), the reference to Hindus shall be construed as including a reference to persons professing the Sikh, Jain or Buddhist religion, and the reference to Hindu religious institutions shall be construed accordingly. **Article 26 reads:**

Subject to public order, morality and health, every religious denomination or any section thereof shall have the right –

- (a) To establish and maintain institutions for religious and charitable purposes;
- (b) To manage its own affairs in matters of religion;
- (c) To own and acquire movable and immovable property; and
- (d) To administer such property in accordance with law.

The religious freedom of the individual person guaranteed by the Constitution of India is given in clause (1) of article 25 that reads: Subject to public order, morality and health and to the other provisions of this Part, all persons are equally entitled to freedom of conscience and the right freely to profess, practice and propagate religion. In precise terms, the Constitution makes it clear that the rights provided in clause (1) of article 25 are subject to public order, morality and health and to the other provisions of Part III of the Constitution that lays down the fundamental rights. Clause (2) of article 25 is a saving clause for the State so that the religious rights guaranteed under clause (1) are further subject to any existing law or a law which the State deems it fit to pass that (a) regulates or lays restriction on any economic, financial, political or other secular activity which may be associated with religious practices, or, (b) provides for social welfare and reform or the throwing open of Hindu religious institutions of a public character to all classes and sections of Hindus.²

Similarly Article 26 is the main article that provides the corporate freedom of religion governing the relation between the State and Subject to public order, morality and health every religious denomination or any section thereof shall have the right,

- (a) to establish and maintain institutions for religious and charitable purposes;
 - (b) to manage its own affairs in matters of religion;
 - (c) to own and acquire movable and immovable property; and
 - (d) to administer such property in accordance with law.
- Clause (b) of article 26 guarantees to every religious denomination or any section thereof the right to manage its own affairs in matters of religion and clause (d) gives them the right to administer their property (institutions) in accordance with laws

² V.D.Mahajan, Constitutional law of India p.232-241.

passed by the State. It is obvious from the language of the clauses (b) and (d) of article 26 that there is an essential difference between the right of a denomination to manage its religious affairs and its right to manage its property.

This means that a religious denomination's right to manage its religious affairs is a fundamental right protected by the Constitution. No legislation can violate it except for health, morality and public order. But the right to administer property associated with religion can be exercised only "in accordance with law". In other words, the State can regulate the administration of religious property by way of validly enacted laws. Hence, in the exercise of individual and corporate freedom of religion as guaranteed in articles 25 and 26 of the Constitution of India, it is necessary to understand the judicial definition of 'religion' as given in article 25(1) and 'matters of religion' as provided in article 26(b). To define religion for judicial purposes has been an onerous job for the judiciary both in the Western countries and in India.

4.1.2 Judicial Perception of the Right to Freedom of Religion

The term 'religion' has not been defined in the Constitution and it is hardly susceptible of any rigid definition. The Supreme Court has defined it in number of cases.³ A religion is certainly a matter of faith and is not necessarily theistic. Religion has its basis in "a system of beliefs or doctrines which are regarded by those who profess that religion as conducive to their spiritual well being", but it would not be correct to say that religion is nothing else but a doctrine or belief. A religion may not only lay down a code of ethical rules for its followers to accept, it might prescribe rituals and observances, ceremonies and modes of worship which are regarded as integral part of religion and these forms and observances might extend even to matters of food and dress.⁴ Subject to certain limitations, Article 25 confers a fundamental right on every person not merely to entertain such religious beliefs as may be approved by his judgment or conscience but also exhibit his beliefs and ideas by such overt acts and practices which are sanctioned by his religion. Now what practices are protected under the Article is to be decided by the courts with reference to the doctrine of a particular religion and include practices regarded by the community as part of its religion.⁵ The courts have gone into religious scriptures to ascertain the

³ Commissioner of H.R.E. v. Lakshmindra, A.I.R. 1954 S.C. 282; Ratilal v. State of Bombay, A.I.R. 1954 S.C. 388; Taher Saifuddin Saheb v. State of Bombay, A.I.R. 1968 S.C. 662.

⁴ Commissioner of H.R.E. v. Lakshmindra, A.I.R. 1954. S.C. 282 at 290.

⁵ Seshammal v. State of Tamil Nadu (1972) 2 S.C.C. 11.

status of a practice in question.⁶ In numerous cases the courts have commented upon, explained and interpreted the provisions of the Constitution on equality, non-discrimination and religious freedom. The decisions in most of these cases have been given in the contexts of the rights of particular religious communities or under special laws relating to such communities. A brief on major decisions follows.

In India the need to define religion was raised for the first time by Dr. B.R. Ambedkar when the matter pertaining to personal law and its relation to religion came for discussion in the Constituent Assembly. He pointed out: The religious conceptions in this country are so vast that they cover every aspect of life from birth to death. There is nothing which is not religion and if personal law is to be saved I am sure about it that in social matters we will come to a standstill... There is nothing extraordinary in saying that we ought to strive hereafter to limit the definition of religion in such a manner that we shall not extend it beyond beliefs and such rituals as may be connected with ceremonials which are essentially religious. It is not necessary that the sort of laws, for instance, laws relating to tenancy or laws relating to succession should be governed by religion... I personally do not understand why religion should be given this vast expansive jurisdiction so as to cover the whole of life and to prevent the legislature from encroaching upon that field.⁷

In the opinion of Dr. B.R. Ambedkar, what constitutes a 'religion' or 'matters of religion' is to be ascertained by limiting to religious beliefs and ceremonials, which are held as essentially religious in a particular religion, which is under judicial review. The Indian Constitution has no explicit definition of 'religion' or 'matters of religion'. Under the directive of article 32 of the Constitution, which provides the right to constitutional remedies, it is left to the Supreme Court to decide on the judicial meaning of such terms. In the early 1950s in a number of cases the Courts in India had been faced with the problem of defining 'religion' as given in article 25 (1) and 'matters of religion' as provided in article 26 (b). Researcher shall now proceed to examine some of those specific cases, which were appealed before the Supreme Court of India for judicial classification.

Researcher study some of cases of historical importance where need arose to give judicial definition to "religion" and "matter of religion." These are (1)

⁶ In *Rajasthan v. Sajjanlal*, A.I.R. 1975 S.C. 706, the Supreme Court surveyed the Jain religious tenants as regard to the management of Jain religion endowments.

⁷ Constitutional Assembly Vol,7,p.781

Commissioner, Hindu Religious Endowments, Madras v. Shri Lakshmindra Tirtha Swamiar of Shri Shirur Matt (2) Ratilal Panachand Gandhi v. State of Bombay, (3) Mohammad Hanif Quareshi v. State of Bihar. (4) Durgah Committee, Ajmer v. Syed Hussain Ali, and (5) Tilkayat Shri Govindlalji Maharaj v. State of Rajasthan,

(1) Commissioner, Hindu Religious Endowments, Madras v. Shri Lakshmindra Tirtha Swamiar of Shri Shirur Matt. (Hereafter Researcher will be referred to as the Shri Lakshmindra case);

The Shri Shirur matt case⁸ arose out of the Madras Hindu Religious and Charitable Endowments Act 1951⁹ passed by the Madras legislature in 1951. The object of the Act, as stated in its preamble, was to amend and consolidate the law relating to the administration and governance of Hindu religious and charitable institutions and endowments in the State of Madras. The Act contained sections dealing with the powers of the State with regard to the general administration of the Hindu religious institutions, their finances and certain other miscellaneous subjects.

Section 20 of the Act dealt with matters pertaining to the administration of Hindu religious endowments that were to be placed under the general superintendence and control of the Commissioner. The Commissioner was authorized to pass orders, which he deemed necessary, for the proper administration of these religious endowments. He was to ensure that the income from these endowments was spent for the purposes for which they were founded. Section 21 of the Act gave the Commissioner, the Deputy and Assistant Commissioners, and such other officials as might be authorized, the power to enter the premises of any religious institution or any other place of worship for the purpose of exercising any power conferred, or discharging any duty imposed by or under the Act, provided that the concerned officer exercising such power was a Hindu.

Section 23 of the Madras Hindu Religious and Charitable Endowments Act of 1951 provided that the trustee of a religious institution was to obey all lawful order issued under the Act by the Government, the Commissioner and other such officials. Section 56 stated that the Commissioner was empowered to ask the trustee to appoint a manager for the administration of the secular affairs of the institution and in default of such an appointment he could make the appointment himself. The rest of the sections dealt with the financial aspects of the religious bodies.

⁸ Commissioner, Hindu Religious Endowments, Madras v. Shri Lakshmindra Tirtha Swamiar of Shri Shirur Mutt, AIR 1954 SC 282.

⁹ Madras Hindu Religious and Charitable Endowment Act, 1951 (Madras Act 19 of 1951).

On constitutional grounds, the validity of the Act was challenged by Shri Lakshmindra Tirtha Swamiar, the mathadhipati of Sirur math¹⁰ who assumed also the office of mathadhipati of Udipi math at a time when it was under financial crisis. The Hindu Religious Endowment Board stepped in at this point to assist the Udipi math in getting out of its financial problems. Apparently the Mathadhipati, Shri Lakshmindra Tirtha Swamiar, consented to the intervention as he signed over power of attorney to the manager appointed by the Board. But it seemed that the manager wanted his own way in all affairs of the math. This caused the mathadhipati to retract his power of attorney and to ignore the efforts of the Board, which filed a case against the mathadhipati. The mathadhipati appealed to the Supreme Court on the ground that the Board, whose powers were alleged to be unconstitutional, had violated his constitutional guarantees under articles 25 and 26 of the Constitution.

The Supreme Court found the case in favour of the math. While giving the judgment, it seems that the Court has taken a thoughtful approach to the meaning of “religion.” Besides the Supreme Court seemed to have given an indigenous meaning to what includes into the category of “secular activities” associated with religion. This ruling of the Supreme Court has been considered as one of the most important decisions in Indian jurisprudence with regard to the definition of religion.¹¹ Mr. Justice Mukerjea who spoke for the unanimous decision of the Court pointed out that the resolution of the dispute hinged on the clarification of what ‘matters of religion’ are. He said:

The word “religion” has not been defined in the Constitution and it is a term which is hardly susceptible of any rigid definition. In an American case (vide Davis v. Benson, 133 U.S. 333 at 342), it has been said “that the term ‘religion’ has reference to one’s views of his relation to his Creator and to the obligations they impose of reverence for His Being and character and of obedience to His will. It is often confounded with cult us of form or worship of a particular sect, but is distinguishable from the latter.” We do not think that the above definition can be regarded as either precise or adequate. Articles 25 and 26 of our Constitution are based for the most part upon article 44(2) of the Constitution of Eire and we have great doubt whether a definition of “religion” as given above could have been in the minds of our

¹⁰ V.P. Luthera, op.cit. p. 129.

¹¹ Richard W. Lariviere, “The Indian Supreme Court and The Freedom of Religion”, in Journal of Constitutional and Parliamentary Studies, vol. IX, no.2 (1975), p. 176

Constitution-makers when they framed the Constitution. Religion is certainly a matter of faith with individuals or communities and it is not necessarily theistic. There are well known religions in India like Buddhism and Jainism, which do not believe in God or in any Intelligent First Cause. A religion undoubtedly has its basis in a system of beliefs or doctrines that are regarded by those who profess that religion as conducive to their spiritual well being, but it would not be correct to say that religion is nothing else but a doctrine or belief. A religion may not only lay down a code of ethical rules for its followers to accept, it might prescribe rituals and observances, ceremonies and modes of worship which are regarded as integral parts of religion, and these forms and observances might extend even to matters of food and dress.¹² This passage, which has been frequently quoted by judges and jurists, broadened the protection guaranteed in the Constitution 'to practice religion' as given in article 25 (1). Commenting on clauses (b) and (d) of article 26, the Supreme Court held in the instant case:

Under Article. 26 (b), therefore, a religious denomination or organization enjoys complete autonomy in the matter of deciding as to what rites and ceremonies are essential according to the tenets of the religion they hold and no outside authority has any jurisdiction to interfere with their decision in such matters.

Of course, the scale of expenses to be incurred in connection with these religious observances would be a matter of administration of property belonging to the religious denomination and can be controlled by secular authorities in accordance with any law laid down by a competent Legislature; for it could not be the injunction of any religion to destroy the institution and its endowments by incurring wasteful expenditure on rites and ceremonies. It should be noticed, however, that under Art.26 (d), it is the fundamental right of a religious denomination or its representative to administer its properties in accordance with law; and the law, therefore, must leave the right of administration to the religious denomination itself, subject to such restrictions and regulations as it might choose to impose.

A law which takes away the right of administration from the hands of a religious denomination altogether and vests it in any other authority would amount to a violation of the right guaranteed under cl. (d) of Art.26.¹³

¹² Commissioner, Hindu Religious Endowments, Madras v. Shri Lakshmindra Tirtha Swamiar of Shri Shirur Matt, AIR 1954 SC 282, at 290.

¹³ Ibid., at 292.

[2] Ratilal Panachand Gandhi v. State of Bombay. (Hereafter Researcher will be referred to as the Ratilal case);

The Ratilal case,¹⁴ the Supreme Court was once again appealed to decide on the judicial application of ‘religion’ and ‘matters of religion’ as implied in the right to exercise of religion protected under articles 25 and 26 of the Constitution. The case arose out of the Bombay Public Trust Act, 1950,¹⁵ passed by the Bombay State Legislature. Similar to the Madras Act of 1951,¹⁶ the object of the Bombay Act as stated in its preamble was to regulate and to make better provision for the administration of public religious and charitable trusts in the State of Bombay.

Section 18 of the Bombay Public Trust Act, 1950, declared that it was obligatory upon the trustee of every public trust to which the Act applied, to make an application for the registration of the trust. Like section 21 of the Madras Act of 1951, section 37 of the Bombay Act also authorized the Charity Commissioner and his subordinate officers to enter and inspect any property belonging to a public trust. Section 44 of the Act provided that the Charity Commissioner might be appointed by a Court of competent jurisdiction or by the author of the trust to act as a sole trustee of a public trust. Section 74 gave powers to the Court to appoint a new trustee or trustees and the Court, after making inquiries, could appoint the Charity Commissioner or any other person as a trustee to fill up vacancies.

The Manager of a Jain public temple and Trustees of Parsi Panchayat Funds and Properties in Bombay challenged before the Bombay High Court¹⁷ the constitutional validity of the Bombay Public Trust Act of 1950. It was done on the ground that the provisions of the Bombay Act of 1950 contravened freedom to practice religion as guaranteed in article 25 (1) and freedom to manage matters of religion as protected by article 26 (b) of the Constitution. The Bombay High Court denied the petition in the light of sub- clause (c) and (d) of article 26 of the Constitution, which provides the State with authority to enact the legislation as given in the Bombay Act¹⁸ Therefore, the Bombay High Court resolved the case in favour of the State on the basis of the definition that the Court gave to religion in the instant case. This definition reduced religion to spiritual and moral aspects only and

¹⁴ Ratilal Panachand Gandhi v. State of Bombay, AIR 1954 SC 388.

¹⁵ Bombay Public trust Act, 1950 (Bombay Act 29 of 1950).

¹⁶ Madras Hindu Religious and Charitable Endowments Act, 1951 (Madras Act 19 of 1951).

¹⁷ Ratilal Panachand Gandhi v. State of Bombay, 1953 ILR, Bombay 1187.

¹⁸ Bombay Public trust Act 1950 (Bombay Act 29 of 1950).

eliminated secular activities, like the property ownership and expenditure associated with religious practices, from the protection guaranteed in the Constitution. The Chief Justice, Mr. M.C. Chagla who delivered the judgment of the Bombay High Court said: "Religion" as used in arts. 25 and 26 must be construed in its strict and etymological sense. Religion is that which binds a man with his Creator, but Mr. Sommaya on behalf of his client (Panachand) says that as far as Janise are concerned they do not believe in a Creator and that distinction would not apply to the Jains. But even where you have a religion which does not believe in a Creator, every religion must believe in a conscience and it must believe in ethical and moral precepts. Therefore whatever binds a man to his own conscience and whatever moral and ethical principles regulate the lives of men that alone can constitute religion as understood by the Constitution. A religion may have many secular activities, it may have secular aspects, but these secular activities and aspects do not constitute religion as understood by the Constitution. There are religions which bring under their own cloak every human activity. There is nothing which a man can do, whether in the way of clothes or food or drink, which is not considered a religious activity. But it would be absurd to suggest that a Constitution for a secular State ever intended that every human and mundane activity was to be protected under the guise of religion, and it is therefore in interpreting religion in that strict sense that we must approach arts. 25 and 26¹⁹

In the Shri Lakshmindra and the Ratilal cases, the Supreme Court of India has given a liberal approach to the meaning of religion which includes not only faith, belief, doctrines, code of ethical rules but also rituals, ceremonies and observances done in pursuance of religious belief, which are regarded conducive to spiritual well being. It is surprising, however, that in two subsequent cases, Quareshi and Durgah Committee, the Supreme Court had given a guarded interpretation when it had to decide on 'matters of religion' as referred to in article 26 (b).

[3] Mohammad Hanif Quareshi v. State of Bihar. (Hereafter Researcher will be referred to as the Quareshi case);

The Quareshi case²⁰ is about prohibiting the slaughter of cows. It has got long constitutional history. The Constitution of India has certain Directives to the States that they expect to keep in view in the conduct of their policies. These Directives are

¹⁹ Ratilal Panachand Gandhi v. State of Bombay, 1953 ILR, Bombay, 1187, at 1193.

²⁰ Mohammad Hanif Quareshi V. State of Bihar, AIR1958 SC.731.

listed in Part IV of the Constitution under the heading 'Directive Principles of State Policy'. The Directive Principles are different from the rest of the articles of the Constitution in the sense that they are non-justifiable because they don't have a legal force to bind them. That is, if the State acts in a way contrary to the Directives laid down in Part IV of the Constitution; its action cannot be challenged in the Court.²¹

It is held that the Directive principles are, nevertheless, important. Their importance consists, as commented by **M.C. Setalvad, a former Attorney-General of India**, that "they appear to be like an instrument of instructions, or general recommendations addressed to all the authorities in the Union reminding them of the basic principles of the new social and economic order, which the Constitution aims at building."²² Hence, article 48 of the Constitution of India is one of the Directive Principles. The objectives of this article are for the development of agriculture and animal husbandry on modern and scientific lines as well as for the preservation and improvement of the breeds of cattle, and prohibition of the slaughter of .cows and calves and other milch and draught cattle. Article 48 reads:

The state shall endeavor to organize agriculture and animal husbandry on modern and scientific lines and shall, in particular, take steps for preserving and improving the breeds, and prohibiting the slaughter of cows and calves and other milk and draught cattle.

It may be appropriate here to point out that the directive for the prohibition of cow-slaughter as referred to in article 48, was made mainly out of respect for the religious sentiments of the majority community, the Hindus. As it is well known in India, cow has great religious significance for them. This article did not find a place in the Draft Constitution but was incorporated during the debates in the Constituent Assembly. Most of the members of the minority communities, the non-Hindus, who were in the Constituent Assembly, seemed to have consented to the Hindu religious sentiments associated with the provision against cow-slaughter²³ However; some held that the Hindu sentiments predominated in the Constitution.²⁴

²¹ V. D. Mahajan, Constitutional Law of India, op.cit. pp. 298-309.

²² Ibid., p. 301.

²³ CAD, vol. 7, pp. 577-578.

²⁴ Austin Granville, The Indian Constitution: Cornerstone of a Nation (Oxford, Clarendon Press, 1966) p..

As follow-up to these Directives, some State Governments²⁵ have enacted legislation banning the slaughter of cows. Shortly after these enactments, three cases were petitioned before the Supreme Court challenging their constitutional validity.²⁶ The petitioners were Muslims, mostly of the Quareshi community, who were traditionally engaged in the butcher's trade. The first among the three was the Quareshi case that challenged the legislations of the all three States, namely Bihar, Uttar Pradesh and Madhya Pradesh on the ground that they violated the constitutional right of the petitioners to carry out their trade.²⁷

The petitioners also contended that these legislations infringed on their right to practice religion because Islam enjoined on every Muslim to sacrifice one goat on the Bakr-Id day (the festival of sacrifice) or seven persons together may even sacrifice one cow. They claimed that cow sacrifice was customary among Indian Muslims on Bakr-Id day and the practice was "certainly sanctioned by their religion."²⁸ Therefore, cow sacrifice was part of their practice and profession of religion protected by article 25 of the Constitution.²⁹ The Bihar Act placed a total ban on slaughter of all types of animals of the species of bovine cattle while the Uttar Pradesh Act did not protect the slaughter of buffaloes and the Madhya Pradesh Act allowed such slaughter under a certificate issued by certain authorities as mentioned in the Act. In dealing with this case, the Supreme Court traced the history of cow slaughter in India and indicated that in the past many Muslim kings prohibited cow slaughter even on the Bakr-Id day.³⁰ Chief Justice Mr. Das who delivered the judgment of the Court stressed that the Islamic law gives option to sacrifice a camel instead of a cow or even permits to give gifts of charity as a substitute for animal sacrifice on the Bakr-Id day. Chief Justice Mr. Das argued further, as claimed by the State, that many Muslims do not sacrifice a cow on the Bakr-Id day. He, moreover, pointed out that three members of the Gosamvardhan (cow protection) Enquiry Committee appointed by the Government of

²⁵ The Bihar Preservation and Improvement of Animal Act, 1956 (Bihar Act 2 of 1956); Uttar Pradesh Prevention of Cow Slaughter Act, 1955 (U.P. Act 1 of 1956); Central Province and Bihar Animal Preservation Act, 1949 (C.P & Bihar Act 52 of 1949) as amended by Madhya Pradesh Acts 32 of 1951 and 10 of 1956. etc.

²⁶ Mohammad Hanif Quareshi v. State of Bihar, AIR 1958 SC 731;

²⁷ Clauses (1) g and (6) of article 19, The Constitution of India.

²⁸ Mohammad Hanif Quareshi v. State of Bihar, AIR 1958 SC 731, at 740.

²⁹ Ibid., at 740.

³⁰ Ibid., at 740.

Uttar Pradesh were Muslims. All the three concurred with the unanimous recommendation of the Committee for total ban on cow slaughter³¹

Mr. Das, C.J., who issued the judgment of the Court in the Quareshi case, stated that the Islamic law sanctioned cow sacrifice on the Bakr-Id day but did not enjoin it as an obligatory overt act in the practice and profession of Islamic faith and therefore, cow sacrifice was not essential. He said: We have, however, no material on the record before us which will enable us to say, in the face of the foregoing facts, that the sacrifice of a cow on that day is an obligatory overt act for a Mussalman to exhibit his religious belief and idea.³² In examining this case, the Court acknowledged that Islam sanctioned cow sacrifice. Nevertheless, Mr. Chief Justice Das ascertained that it was not “an obligatory overt act for a Mussalman to exhibit his religious belief”³³ because Islamic law provides alternatives. The Supreme Court noted that instead of a cow, Muslims could sacrifice a camel or do acts of charity on the day of Bakr-Id. The petitioners of the instant case pleaded that the impugned laws, if enforced, would affect adversely their trade and, therefore, violated the constitutional protection guaranteed under article 19(1) (g). The Court ruled that the laws only regulated and restricted these occupations, but did not deprive the petitioners of their right to practice them because butchers could still slaughter certain classes of bulls, bullocks, buffaloes, as well as sheep and goats.³⁴

It seems that the Supreme Court’s ruling on this case (Quareshi case) had taken into consideration the Hindu religious sentiments attached to the legislation of banning cow slaughter as one of the reasonable elements. Certainly, the Court was equally concerned with communal riots often arising on account of cow slaughter. The honorable judges of the Quareshi case acknowledged, “While we agree that the constitutional question before us cannot be decided on grounds of mere sentiment, however passionate it may be, we, nevertheless, think that it has to be taken into consideration, though only as one of many elements, in arriving at a judicial decision as to the reasonableness of the restrictions”³⁵

³¹ Ibid., at 740.

³² Ibid., at 740

³³ Ibid., at 740.

³⁴ Ibid at, 745.

³⁵ Donald E. Smith, op.cit., pp. 483-489; C.P. Jain, op.cit., pp. 282-294; CAD, vol. 7, pp. 568-581.

[4] **Durgah Committee, Ajmer v. Syed Hussain Ali.** (Hereafter Researcher will be referred to as the Durgah Committee case);

In the Durgah Committee case,³⁶ an appeal was made once again to decide on “the matters of religion” which is protected under clause (b) of article 26. The history of the present case is as follows: In 1955, the Parliament had passed the Durgah Khawaja Saheb Act,³⁷ to administer the Durgah and the endowment of the Durgah Khawaja Moinuddin Christi at Ajmer. This Durgah, which is a Muslim pilgrim centre built at the tomb of Khawaja Moinuddin Saheb who is a Christi saint, has been visited by both Muslim and Hindu pilgrims.

Sections 4 and 5 of the Durgah Khawaja Saheb Act of 1955, provided for the appointment of a Durgah Committee by the Central Government to administer and manage the Durgah endowment According to the terms of sections 4 and 5 of the Act, the members of the committee nominated by the Government were to be Hanafi Muslims. Section 15 of the Act laid down the instruction that the Committee should follow the Muslim rules and tenets of the Christi saint in performing and conducting the established rites and ceremonies at the tomb of the Christi saint.

The Khadims (the traditional custodians of the tomb) challenged the constitutionality of the Act on the ground that it infringed upon their rights guaranteed in article 26(b), (c) and (d). Their challenge succeeded in the High Court of Rajasthan.³⁸ In issuing the judgment, the Rajasthan High Court observed that the provisions for the appointment of the Committee members were ultra vires to the extent that the appointment of the Committee members avoided members of the Chisti order who have the faith in the religious practices and rituals associated with the Chisti saint shrine. Other provisions of the Act affecting the privileges and duties of the functionaries of the shrine were also declared violative of articles 19 and 25 of the Constitution.

On appeal,³⁹ the Supreme Court found that the provisions of the said Act were not violative of the Constitutional rights guaranteed to religious communities. The Court observed that the Act regulated only the secular practices associated with religion, which were not essential or integral part of religion. Mr. Justice P.B.

³⁶ Durgah Committee, Ajmer v. Syed Hussain Ali, AIR 1961 SC 1402.

³⁷ Durgah Khawaja Saheb Act, 1955 (Act 36 of 1955).

³⁸ Syed Hussain Ali v. The Durgah Committee, AIR 1959 Raj 177.

³⁹ Durgah Committee, Ajmer v. Syed Hussain Ali, AIR 1961 SC 1402, at 1417

Gajendragadkar who delivered the unanimous judgment of the Court said: Whilst we are dealing with this point it may not be out of place incidentally to strike a note of caution and observe that in order that the practices in question should be treated as a part of religion they must be regarded by the said religion as its essential and integral part; otherwise even purely secular practices which are not an essential or an integral part of religion are apt to be clothed with a religious form and may make a claim for being treated as religious practices within the meaning of article 26. Similarly even practices though religious may have sprung from merely superstitious beliefs and may in that sense be extraneous and unessential accretions to religion itself. Unless such practices found to constitute an essential and integral part of a religion their claim for the protection under Article 26 may have to be carefully scrutinized; in other words, the protection must be confined to such religious practices as are an essential and an integral part of it and no other.⁴⁰

In delivering the judgment of the instant case, Mr. P. B. Gajendragadkar, J., who spoke for the Court, stressed that ‘matters of religion’ protected under article 26 (b) are those acts which are treated as essential and integral part by the religion. He cautioned that otherwise things that are not of religious concern can be brought under its ambit in such a way that religion can be used or manipulated to legitimate superstitious beliefs and practices which may harm instead of enabling human well being. This is the reason for the learned judge to strike a note of caution to differentiate ‘matters of religion,’ whose protection is guaranteed by the Constitution of India, from secular activities attached to religious practices. **[5] Tilkayat Shri Govindlalji Maharaj v. State of Rajasthan, (hereafter researcher will be referred as the Govindlalji case).**

When cases have been brought before the Courts in India on contentious issues regarding ‘matters of religion’ as referred to in clause (b) of article 26 of the Constitution, judges have relied on literary sources as well as traditional usages and practices of the religion which was under scrutiny to ascertain its essential aspects as claimed by the petitioners or the contending parties. In this regard, it is informative for our purpose to study the Tilkayat case,⁴¹ which throws more light on the Indian

⁴⁰ Ibid., at 1415.

⁴¹ Tilkayat Shri Govindlalji Maharaj v. State of Rajasthan, AIR 1963 SC 1638. 51 Nathdwara Temple Act, 1959 (Rajasthan Act 13 of 1959).

judicial position on ‘matters of religion’ as given in articles 25 and 26 of the Constitution.

The Tilkayat case arose out of the Nathdwara Temple Act of Rajasthan⁴² enacted for the management of the Nathdwara temple through a Board. Section 16 of the Act provided that subject to the provisions of the Act and of the rules made there under, the Board was to manage the properties and “affairs of the temple”⁴³ and arrange for the conduct of daily worship and ceremonies and of festivals in the temple “according to the customs and usages of the denomination”⁴⁴ to which the temple belonged.

The custodians of the Nathdwara temple challenged the Nathdwara Temple Act of Rajasthan (Rajasthan Act 13 of 1959) before the Rajasthan High Court. The plaintiffs petitioned that section 16 of the Act violated the rights of the denomination to administer its property as protected by clause (d) of article 26 of the Constitution as well as infringed the denomination’s right to manage its own affairs in “matters of religion” guaranteed by clause (b) of the same article.⁴⁵

The Rajasthan High Court decided the case in favour of the plaintiffs. The High Court held that the expression “affairs of the temple” as referred to in section 16 of the impugned Act was too wide and could include religious affairs of the temple as guaranteed in article 26 (b) of the Constitution. Therefore, the Rajasthan High Court concluded that the impugned Act violated the constitutional protection given to religious denomination to manage its own affairs in matters of religion.⁴⁶

On appeal⁴⁷ the Supreme Court reversed the decision of the Rajasthan High Court and held that the expression “affairs of the temple” covered only the secular affairs of the temple and, therefore, could not be objected by law. The Supreme Court then pointed out two kinds of duties, which had been entrusted to the Board of managers: firstly, the Board had to manage the properties and secular affairs of the temple. Secondly the Board had to arrange for the religious worships, ceremonies and festivals in the temple in accordance with the customs and usages of the denomination

⁴² Nathdwara Temple Act, 1959 (Rajasthan Act 13 of 1959).

⁴³ Tilkayat Shri Govindlalji Maharaj v. State of Rajasthan, AIR 1963 SC 1638, at 1653

⁴⁴ Ibid., at 1655.

⁴⁵ Tilkayat Govindlalji Maharaj v. State of Rajasthan, AIR 1962 Raj 196.

⁴⁶ Ibid., at 213

⁴⁷ Tilkayat Shri Govindlalji Maharaj v. State of Rajasthan, AIR 1963 SC 1638.

to which the temple belonged.⁴⁸ Commenting on the customs and usages associated with religious practices, which were claimed as integral part of a particular religious denomination, Mr. Justice Gajendragadkar who delivered the judgment of the Supreme Court in this case made the observation:

In deciding the question as to whether a given religious practice is an integral part of the religion or not, the test always would be whether it is regarded as such by the community following the religion or not. This formula may in some cases present difficulties in its operation. Take the case of a practice in relation to food or dress. If in a given proceeding, one section of the community claims that while performing certain rites white dress is an integral part of the religion itself, whereas another section contends that yellow dress and not the white dress is the essential part of the religion, how is the court going to decide the question? Similar disputes may arise in regard to food. In cases where evidence is produced in respect of rival contentions as to the competing religious practices the court may not be able to resolve the dispute by a blind application of the formula that the community decides which practice is an integral part of its religion, because the community may speak with more than one voice and the formula would, therefore, break down. This question will always have to be decided by the court and in doing so, the court may have to enquire whether the practice in question is religious in character and if it is, whether it can be regarded as an integral or essential part of the religion, and the finding of the court on such an issue will always depend upon the evidence adduced before it as to the conscience of the community and the tenets of its religion.⁴⁹

4.2 The Nature of Freedom of Conscience, Free Profession, Practice and Propagation of Religion

Article 25 of the Indian Constitution provides that: Freedom of conscience and free profession, practice and propagation of religion.

4.2.1. The Free Exercise of Religion

Article 25[1] a person has a two -fold:-[a] freedom of conscience, [b] freedom to profess, practice and propagate religion. The preceding cases point out that the Supreme Court of India has held a principled approach towards religion when appealed for judicial definition of 'religion' and 'matters of religion' protected under articles 25 (1) and 26 (b) of the Constitution. As a general rule, it has maintained a

⁴⁸ Ibid., at 1662

⁴⁹ Ibid., at 1660-1661.

liberal definition of religion - as assumed in most of the liberal democratic States - covering in its ambit belief, doctrines and moral codes, rituals and observances, ceremonies and modes of worship.⁵⁰ However, in some cases, the Supreme Court did not hesitate to pass a strict definition of 'matters of religion' as protected under clause (b) of article 26 of the Constitution limiting them only to those essentials and obligatory overt acts necessary to express one's faith.⁵¹ These are the instances where the Court found that certain acts of rituals though sanctioned by a particular religion, if allowed to perform would violate, on reasonable grounds, social solidarity and even cause harm to life.⁵²

In the context of a religiously plural society like India, where conflicting value systems often compete with each other, the principled approach of the Supreme Court on religious matters is to promote religious freedom that secures human dignity. Therefore, the Court may apply a liberal or a conservative approach towards religion depending on which of the two better promotes religious liberty consistent with a set of values that protect the sanctity of human life and provide a life-affirming space for all to live in dignity.

Hence, the Indian judiciary tells in unambiguous language that the Constitution recognizes the importance of religion in people's life, and that it holds religious liberty as a fundamental value of the Indian political community but not at the cost of certain substantive principles which are necessary in the society for all to lead a life worthy of human dignity. Religion thrives in India and it remains an integral aspect of Indian ethos. Its popular practices are multifarious and often unrestrained as shown by Dr. B.R. Ambedkar during the debates in the Constituent Assembly⁵³ In this context, the principled approach founded on reason as held by the Indian Supreme Court regarding religion is an important requirement to keep religions to be authentic in their practices. Such an interpretation of religion would remind believers to shed away non-religious and, at times, even unreligious accretions added to religious practices. It would enlighten the followers of various faith traditions not to thwart the legitimate activities of the State to further the cause of human dignity. The

⁵⁰ Commissioner, Hindu Religious Endowments, Madras v. Lakshmindra Tirtha Swamiar of Shri Shirur Mutt, AIR 1954 SC 282, at 290.

⁵¹ Mhm. Hanif Qureshi vs. State of Bihar, AIR 1958 SC 731, at 739.

⁵² CAD, vol. 7, and pp.568-581.

⁵³ CAD, vol. 7, p. 781.

individual person's religious freedom as guaranteed by the Constitution of India is provided in clause (1) of article 25. Some say⁵⁴ that this part of the article seemed to have been based on the clause (1) of article 2 of the Constitution of Eire (1937).⁵⁵ Others say⁶⁵ that the tenor of article 25 resonates with the Karachi resolution on the fundamental right adopted by the Indian National Congress in 1931 that declared, "Every citizen shall enjoy freedom of conscience and the right freely to profess and practice his religion, subject to public order and morality."⁵⁶ **Dr. D.D. Basu**⁵⁷ commented that all the rights pertaining to religion provided in article 25 of the Indian Constitution appear to be included in the expression 'exercise' clause of the First Amendment to the U.S. Constitution.

The religious freedom guaranteed under article 25 is not limited to the citizens of India only but also applies to "all persons" as spelt out in clause (1) of the said article. Question was raised in the Ratilal case⁵⁸ whether the aliens and in particular, the foreign Christian missionaries who were exclusively engaged in propagating their religion, were also protected under clause (1) of articles 25 of the Indian Constitution. Mr. Justice Mukerjea who spoke for the Court said, "Article 25 of the Constitution guarantees to every person and not merely to the citizens of India, the freedom of conscience and the right freely to profess, practice and to propagate religion".⁵⁹ Hence in the next section, we shall discuss the different aspects of the religious freedom protected under article 25 (1).

4.2.2 Freedom of Conscience

Freedom of 'conscience' is absolute inter freedom of the citizen to mould his own relation with god in whatever manner he like. The Courts have defined freedom of conscience as the freedom of a person to entertain any belief or doctrine concerning matters, which are regarded by him or her to be conducive to his or her spiritual well

⁵⁴ Commissioner, Hindu Religious Endowments, Madras v. Lakshmindra Tirtha Swamiar of Shri Shirur Mutt, AIR 1954 SC 282, at 290.

⁵⁵ "Article 2 (1) of the Irish Constitution (1937) reads: "Freedom of conscience and the free profession and practice of religion are, subject to public order and morality, guaranteed to every citizen".

⁵⁶ Donald E. Smith, op.cit. p. 102

⁵⁷ D. D. Basu, Commentary on the Constitution of India, vol.2 (Calcutta, S.C. Sarkar & Sons, 1962), p. 144.

Sadiq Ali, ed., Congress and the problem of Minorities (Allahabad, Law Journal press, 1947), pp.119, 129.

⁵⁸ Ratilal Panachand Gandhi v. State of Bombay, AIR 1954 SC 388.

⁵⁹ Ibid., at 391.

being.⁶⁰ The wording of article 25 of the Indian Constitution, however, seems to suggest that the individual's right to hold such belief is subject to public order, morality and health and to the other provisions of part III of the Constitution.

Under the terms of article 25, it may be asked whether the State may claim any power over an individual's freedom of conscience. Dr. Donald E. Smith argued that the State could have no power over an individual's freedom of conscience, and, therefore, the wording of article 25 which apparently implied State's restriction was due to inaccurate drafting.⁶¹ It seems, nevertheless, the restrictions to which freedom of conscience may be submitted as implied in article 25 of the Constitution of India, are not resulting from such inaccuracy in drafting; rather the said article did not intend to protect freedom of conscience on religious scruples when it stands opposed to protect public welfare, because the protection guaranteed to religious freedom is at the same time subject not only to public order, morality and health but also to the other provisions of Part III of the Constitution.

Hence, in its operation, article 25 is subject to clause (2) of article 23 that is one of the articles in Part III of the Constitution. Let us look at this provision as given in article 23. This article states: (1) Traffic in human beings and beggar and other similar forms of forced labour are prohibited and any contravention of this provision shall be an offence punishable in accordance with law. (2) Nothing in this article shall prevent the State from imposing compulsory service for public purposes, and in imposing such service the State shall not make any discrimination on grounds only of religion, race, caste or class or any of them.

Clause (1) of article 23 protects individual persons against any form of forced labour or exploitation. It is designed to protect the dignity of the individuals not only against such actions of forced labour of any sort but also against perpetration of such actions by other private citizens. This clause has two declarations. The first is that traffic in human beings; beggar and other similar forms of forced labour are prohibited. The second is that any contravention of the first provision shall be an offence punishable according to law.⁶² Clause (2) of article 23 is an enabling provision for the State, which makes exception in favour of the State to impose compulsory service for public purposes provided that in imposing such services the

⁶⁰ V. D. Mahajan., op.cit. pp. 233-234.

⁶¹ Donald E. Smith, op.cit, pp. 103-104.

⁶² V. D. Mahajan, op.cit, p. 230.

State does not make any discrimination on grounds only of religion, race, caste or class or any of them.

It may be noted that conscription for military service neither amounts to traffic in human beings nor beggar nor other similar forms of forced labour violating a person's dignity. Consequently, it is not affected by the prohibition clause of article 23 (1). Conscription for military service is, nevertheless, a form of compulsory service imposed by the State for the security of the citizens' life and property. Hence, it follows that on occasion, when the State deems it necessary to impose compulsory military service or other services for the protection of the people, article 25 does not protect exceptions to persons on account of religious scruples.

It may be also recalled that when the question of conscription for military service was discussed at great length in the Constituent Assembly,⁶³ no one raised the question of granting exception from such services to conscientious objectors on religious grounds, though difference of opinion arose as to whether a conscription clause should be provided or not.⁶⁴ So far no case against conscription for military service has been brought before the Courts in India.

However, in a case regarding *State of Bihar v. Sir Kameshwar Singh*,⁶⁵ which appeared before the Supreme Court of India, the Court had the occasion to give judicial definition to the term "public purposes" as used in the Constitution. In this case, the appellant challenged the constitutional validity of compulsory acquisition of private property with due compensation by the State for "public purposes" on the ground that its objective was not for public purposes.

The Court held in its interpretation that whatever furthers the general interests of the community as opposed to the particular interests of the individual must be regarded as a public purpose.⁶⁶

Similarly, in the case of *Somavanti v. State of Punjab*.⁶⁷ The Supreme Court was called upon to define the application of "public purpose." Once again the Court in its definition of public purpose said, "Broadly speaking, the expression public purpose would, however, include a purpose in which the general interests of the community, as opposed to the particular interests of the individuals, is directly and vitally

⁶³ CAD, vol. 7, pp. 803-813.

⁶⁴ B. Shiva Rao, op.cit, vol. 2, p. 178..

⁶⁵ AIR 1952 SC 252

⁶⁶ V. D. Mahajan, op.cit, p. 231.

⁶⁷ AIR 1963 SC 151.

concerned.”⁶⁸ When article 25 is read with article 23, the intent of the Constitution is that the State stands to provide its citizens security of life and property and to promote human welfare with the object in view for the development of people’s life befitting to a life of dignity for all. This cannot be disturbed by religious belief. Hence, the types of religious practices or beliefs or even ideologies protected under article 25 are the ones, which support some of these fundamental humanistic objectives of the Constitution.

4.2.3 Freedom to Profess of Religion

To "profess" a religion means to declare freely and openly ones faith and belief. The constitutional right to profess religion means a right to exhibit one’s religion in such overt acts as teaching, practicing and observing religious precepts and ideals in which there is no explicit intention of propagation involved. Taking out religious processions, worship in public places, putting on specific garments include within the ambit of profession of religion.⁶⁹ The Constitution of India, for example, provides the wearing and carrying of kirpans⁷⁰ as part of the profession of Sikh religion. The phrase ‘profess a religion’ as given in article 25 means according to the Supreme Court “to enter publicly into a religious state.”⁷¹

In the Quareshi case⁷² the appellants contended that sacrificing a cow on Bakr-Id day amounted to profession and practice of Islam, which is protected by article 25 of the Constitution. Tracing the history of the custom of offering sacrifice of a cow on the Bakr-Id day, the Supreme Court ruled, “ We have, however, no material on the record before us, which will enable us to say... that the sacrifice of a cow on that day is an obligatory overt act for a Mussalman to exhibit his religious belief and idea.”⁷³

The right to take out religious processions and to have religious gatherings in the public places fall under the right to profess religion as guaranteed in article 25 (1). The exercise of this right is, however, subject to public order and morality. The police authorities, for instance, have been empowered to regulate such overt acts of religious

⁶⁸ V.D. Mahajan, op.cit. p. 251.

⁶⁹ P.C. Jain, op.cit. p. 177.

⁷⁰ “The wearing and carrying of kirpans shall be deemed to be included in the profession of the Sikh religion”. Article 25 (b), Explanation - I, The Constitution of India. Kirpan is a sword, one of the five emblems, which an orthodox Sikh must wear.

⁷¹ Punjab Rao v. D.P. Meshram, AIR 1965 SC 1179, at 1184.

⁷² Mohammad Hanif Quareshi v. State of Bihar, AIR 1958 SC 731.

⁷³ Ibid., at 740.

profession. Section 30 (1) of the police Act⁷⁴ authorizes the police to regulate assemblies and processions and to prescribe the routes and timings for such purposes. Under section 144 of the Code of Criminal procedure,⁷⁵ a magistrate can ban processions and meetings altogether where there is an apprehension of breach of peace. Such orders are done during the times of communal tension that is endemic in some parts of the country.

On some occasions of communal and public disturbances, the prohibitive orders can also include banning of the use of loudspeaker and such electronic devices employed in religious profession and practice. For instance, the Commissioner of Police in Calcutta prohibited the use of loudspeakers for prayer in Mosques located in some residential areas in the city. On challenge, his ban order was held constitutional⁷⁶The right to profess one's religion includes also the right to use all lawful means required for such acts provided they don't destroy public peace and order. The protection given under article 25 (1), however, does not divest the citizens from their duty to co-operate with the State to maintain public order so that people may live their ordinary life in dignity.

4.2.4 Freedom to Practice of Religion

To 'practice' religion is to perform the prescribed religious duties, rights and rituals, and to exhibit his religious belief and ideas by such acts as prescribed by religious order in which he believes. The freedom to practice religion is protected under article 25 (1) of the Indian Constitution. In the year 1952, the first case of this sort seeking protection under this constitutional right as guaranteed in clause (1) of article 25 appeared before the High Court of Bombay.⁷⁷

The case arose out of the Bombay Prevention of Hindu Bigamous Marriage Act,⁷⁸ passed by the State of Bombay. The Act prevented bigamy among Hindus alone who resided in that State while the Muslim community that practiced polygamy was left out of the operation of the said Act. Therefore, Shri Narasu Appa Mali appealed before the High Court of Bombay, because the Act infringed the plaintiff's religious freedom. The aggrieved plaintiff alleged that by enacting the Bombay

⁷⁴ Police Act, 1861 (Act 5 of 1861).

⁷⁵ Code of Criminal Procedure, 1898 (Act 5 of 1898).

⁷⁶ Masud Alam v. Commissioner of Police, AIR 1956 Cal. 9.

⁷⁷ State of Bombay v. Narasu Appa Mali, AIR 1952 Bom. 84.

⁷⁸ Bombay Prevention of Hindu Bigamous Marriage Act, 1946 (Bombay Act 25 of 1946) (as amended by Bombay Act 38 of 1948).

Prevention of Hindu Bigamous Marriage Act of 1946, the State of Bombay discriminated between Hindus and Muslims residing in that State on the basis of religious practice and, therefore, pleaded that the enactment was void.

The Court upheld the impugned Act constitutionally valid. Mr. M.C. Chagla, the Chief Justice of the Bombay High Court, who gave the judgment of the Court in this case, indicated that the freedom to practice religion as provided under article 25(1) was not absolute, in the sense that if religious practices contravened to public order or to a policy of social welfare, then they said practices could not claim State protection. He also opined, “a sharp distinction must be drawn between religious faith and belief and religious practices. What the State protects is religious faith and belief.”⁷⁹

Subsequent to the Narasu Appa Mali case,⁸⁰ many cases came before the Supreme Court of India for constitutional protection to “religion” and “matters of religion” as guaranteed in articles 25 (1) and 26 (b) respectively against certain state statutes.⁸¹ In these cases, the Supreme Court had the occasion to deal with the question of “freedom of practice of religion” protected under article 25(1).

First among them was the Shri Lakshmindra case.⁸² The matter under dispute in the instant case was on the rights of the head of a religious institution in the management of the affairs of religious denominations in “matters of religion” given under article 26 (b) of the Constitution. In giving its judgment, the Supreme Court studied in great detail freedom of religious practice as protected under article 25 (1) of the Indian Constitution in comparison with similar cases brought before the Courts in the United States of America and Australia. The Supreme Court of India observed that the “practice of religion” as given in article 25 (1) and “matters of religion” as given in article 26 (b) of the Indian Constitution have the same scope.

Mr. Justice Mukerjea who spoke for the unanimous opinion of the Supreme Court said, “The guarantee under our Constitution not only protects the freedom of religious opinion but it protects also acts done in pursuance of a religion and this is made clear by the use of the expression ‘practice of religion’ in Art.25.”⁸³ He further

⁷⁹ The State of Bombay v. Narasu Appa Mali, AIR 1952 Bom. 84, at 86

⁸⁰ Ibid

⁸¹ Ibid

⁸² Commissioner, Hindu Religious Endowments, Madras v. Shri LakshmindraTirtha Swamiar of Shri Shirur Mutt, AIR 1954 SC 282

⁸³ Ibid., at 290.

observed that the freedom of religion in article 25 included not only the “freedom to entertain such religious belief, as may be approved of by his judgment and conscience, but also to exhibit his belief in such outward acts as he thinks proper.”⁸⁴

In some of the latter cases of this sort, the Supreme Court’s ruling seemed to have been rather strict regarding the practice of religion protected under article 25 (1) of the Constitution. For instance, Mr. Justice Mukerjea who once again delivered the judgment of the Supreme Court in the Ratilal case⁸⁵ said:

Thus, subject to the restrictions which this Article imposes, every person has a fundamental right under our Constitution not merely to entertain such religious belief as may be approved of by his judgment or conscience but to exhibit his belief and ideas in such overt acts as are enjoined or sanctioned by his religion and further to propagate his religious views for the edification of others.⁸⁶

So, we notice that the space granted for the protection of religious practice is getting restricted. In Shri Lakshmindra case⁸⁷ the court decided that a person had his \ her religious freedom protected in those overt acts of his \ her belief which he \ she thought proper; and it was not required that such overt acts should be enjoined or sanctioned by one’s religion. On the contrary, in the Ratilal case⁸⁸ the court held that such overt actions must be enjoined or sanctioned by one’s religion.

In the Quareshi case⁸⁹ the Supreme Court further held that the religious practice under question should not only be “enjoined or sanctioned”⁹⁰ by one’s religion but it must also be “an obligatory overt act”⁹¹ of the concerned religion to exhibit its tenet. As seen earlier, in this case the appellants pleaded for the sacrifice of a cow on Bakr-Id day.⁹² After going through the Islamic custom of animal sacrifice on Bakr-Id day and the tradition maintained by Muslim rulers in India, the Supreme Court observed that cow sacrifice was sanctioned by Islam but it was not an obligatory overt act to express Islamic faith and, therefore, it would not be protected under practice of religion as given in clause (1) of article 25. The criterion adduced to

⁸⁴ Ibid., at 289.

⁸⁵ Ratilal Panachand Gandhi v. State of Bombay, AIR 1954 SC 388.

⁸⁶ Ibid 391

⁸⁷ Commissioner, Hindu Religious Endowments, Madras v. Shri Lakshmindra Tirtha Swamiar of Shri Shirur Mutt, AIR 1954 SC 282, at 289.

⁸⁸ Ibid., at 739.

⁸⁹ Mohammad Hanif Quareshi v. State of Bihar, AIR 1958 SC 731.

⁹⁰ Ibid., at 739.

⁹¹ Ibid., at 740.

⁹² “The Quareshi Case”, pp. 142-146.

the practice of religion, which might claim State protection. In giving the judgment of the Court Dr. Justice P. B. Gajendragadkar observed:

In order that the practices in question should be treated as a part of religion they must be regarded by the said religion as its essential and integral part; otherwise purely secular practices which are not an essential or an integral part of religion are apt to be clothed with a religious form and may make a claim for being treated as religious practices within the meaning of Art.26. Similarly even practices though religious may have sprung from merely superstitious beliefs and unessential accretions to religion itself.⁹³

According to the criterion set by the Supreme Court an act is a religious practice, which deserves protection under clause (1) of article 25 of the Constitution of India, in so far as it is held by a particular religion as essential and integral part of its tenet. This criterion was proposed by the Court with the objective of saving true religious practices from non-religious accretions and even superstitions. By 1963, the Courts in India have followed this approach in dealing with matters related to the practice of religion, which is protected under right to religious freedom. The test is that a particular religious community must regard it as something essential of its religious tenet.

In the case of counter claims by competing individuals or groups on this matter, the court is the proper forum to resolve it. This was brought out in the Tilkayat case.⁹⁴ The approach pursued by the Courts in India towards matters pertaining to the practice of religion has come under severe criticism from Constitution experts. Dr. P.C. Jain has suggested⁹⁵ that in the matter of doubtful religious practices, the Courts in India should accept the contention of a believer who claims before the Court that certain practice has religious significance to the plaintiff instead of restoring to judicial prove into plaintiff's claim so as to see whether it is an essential and an integral part of a religion, and in some other instances to ascertain whether it is an obligatory overt act of a religious tenet.

4.2.5 Freedom to Propagate Religion

To 'propagate ' means to spread and publicize his religious view for the edification of others. But the word "propagation" only indicates persuasion and

⁹³ Ibid., at 1415.

⁹⁴ Tilkayat Govindlalji Maharaj v. State of Rajasthan, AIR 1963 SC 1638, at 1660-1661.

⁹⁵ P. C. Jain, op.cit., p. 21

exposition without any element of coercion. The right to propagate ones religion does not give a right to convert any person to one's own religion.

Unlike the Constitutions of many countries, article 25 of the Indian Constitution specifically provides the right to propagate religion.⁹⁶ However, the original draft of this article did not mention it explicitly that reads:

All citizens are equally entitled to freedom of conscience and to the right freely to profess and practice religion in a manner compatible with public order, morality or health: "Provided that the economic, financial or political activities associated with religious worship shall not be deemed to be included in the right to profess or practice religion."⁹⁷

The insistence from the Christian minority seemed to have largely contributed to the specific inclusion of this right. The joint Committee of the Catholic Union of India and the All India Council of Indian Christians passed a resolution in October 1945, which practice and propagation of religion should be guaranteed, and the change of religion should not involve any civil or political disability."⁹⁸

Clause (13) of the Interim Report on Fundamental Rights submitted to the Constituent Assembly in April 1947 included the right to propagate.⁹⁹ Nevertheless, clause (17) of the Report stated, "conversion from one religion to another brought about by coercion or undue influence shall not be recognized by law".¹⁰⁰ When clause (17) was debated on the floor of the Constituent Assembly, Mr. K.M. Munshi who composed the text, proposed a new amendment to the clause during the debate which read, "Any conversion from one religion to another of any person brought by fraud, coercion or undue influence or of a minor under the age of eighteen shall not be recognized by law."¹⁰¹

The Christian members of the Assembly opposed Mr. K.M. Munshi's amendment proposal, because they voiced that it would nullify in large measure the freedom of religion guaranteed under clause (13). Dr. B.R. Ambedkar, the Chairman of the Constituent Assembly, also strongly opposed Mr. K.M. Munshi's amendment proposal. The reluctance shown by some members of the Constituent Assembly for

⁹⁶ M.V. Pylee, India's Constitution (Bombay, Asia Publishing House, 1962), p. 113.

⁹⁷ Shiva B. Rao, op.cit. Vol. II, p. 76.

⁹⁸ See Donald E. Smith, op.cit. pp. 162-192.

⁹⁹ CAD, vol. 7, p. 427.

¹⁰⁰ Ibid., p. 428.

¹⁰¹ Ibid., p. 480.

the inclusion of the clause on the right to propagate religion was conditioned by their fear that this right would help Christian missionaries to convert Hindus and others to Christianity.¹⁰²

Some other Hindu members of the Constituent Assembly, however, emphasized India's spiritual heritage, which is inclusive and open to all faiths. Therefore, they had no misgiving to include the right to propagation under religious freedom. In his advocacy for the inclusion of propagation clause under religious freedom, Pundit Lakshmikanda Maitra, referred to the sayings of Swami Vivekananda and said: The great Swami Vivekananda used to say that India is respected and revered all over the world because of her rich spiritual heritage...If we are to educate the world, if we are to remove the doubts and misconceptions and the colossal ignorance that prevails in the world about India's culture and heritage, this right must be inherent, - the right to profess and propagate her religious faith must be conceded.¹⁰³

The Constitution when finally adopted, accepted only the positive statements related to religious freedom as we have it in article 25 of the Constitution. Article 25 provides to all persons the right to propagate religion and article 26, which guarantees collective freedom of religion to denominations, or any section thereof, does not explicitly refer to the right for propagation. In the Shri Lakshmindra case,¹⁰⁴ the Supreme Court held that the heads of religious institutions had liberty to propagate their respective religious tenets because institutions acted only through human agencies.¹⁰⁵ Similarly, in the Ratilal case,¹⁰⁶ the Court said that the right to propagate religion applied to a person in one's individual capacity as well as on behalf of an institution.¹⁰⁷

The right to propagate religion means the right to communicate one's religious tenets to others by way of preaching, teaching and writing with the explicit intention of convincing others about the goodness of one's religion. As propagation implies convincing others to one's point of view, it may involve underestimating others'

¹⁰² Ibid., pp. 818, ff.

¹⁰³ Ibid., vol. 7, p. 832.

¹⁰⁴ Commissioner, Hindu Religious Endowments, Madras v. Shri Lakshmindra Tirtha Swamiar of Shri Shirur Mutt, AIR 1954 SC 282.

¹⁰⁵ Ibid., at 289

¹⁰⁶ Ratilal Panachand Gandhi v. State of Bombay, AIR 1954 SC 388.

¹⁰⁷ Ibid., at 391.

religion. This may produce religious ill feeling and may lead to violence, which may place the maintenance of public order and safety at stake. Hence, the task of the State is to maintain a balance between the right to propagate religion and the right of the public for order and security of life. Article 25 of the Constitution, therefore, grants freedom to propagate religion “subject to public order.”

If propagation is done in any form to outrage the religious feelings of any section of the public, the same may be penalized. Section 295 A of the Indian Penal Code,¹⁰⁸ for example, punishes deliberate and malicious acts intended to outrage the religious feelings of any class of persons. In the case of Ramji Lal Modi v. The State of Uttar Pradesh,¹⁰⁹ the petitioner who was the editor, printer and publisher of Gaurakshak, a monthly journal devoted for the protection of cows, published an article, which the Supreme Court found deliberate and malicious in intent to outrage the religious sentiments of the Muslims. Under section 295 A of the Indian Penal Code he was fined and sentenced to imprisonment. Upon appeal to the Supreme Court, he challenged the constitutionality of the said section under article 19(1) (a) of the Constitution, which guarantees the right to freedom of speech.

Rejecting the petitioner’s contention, the Supreme Court held that clause (2) of article 19 of the constitution at the same time empowered the State to impose reasonable restrictions “in the interest of” and not only “maintenance of” public order and, therefore, the intent of clause (2) of article 19 covered section 295 A of the Indian Penal Code.¹¹⁰ In its judgment in the instant case, the Supreme Court emphasized: [T]he expression “in the interest of” makes the ambit of the protection very wide. A law may not have been designed to directly maintain public order and yet it may have been enacted in the interest of the public order ... Section 295-A does not penalize any and every act of insult to... the religious beliefs of a class of citizens but it penalizes only those acts of insult...which are perpetrated with the deliberate and malicious intention of outraging the religious feelings of that class...It only punishes the aggravated form of insult to religion.¹¹¹

These above observations enable us to conclude that the religious freedom protected under article 25 of the Constitution includes the right to propagate one’s

¹⁰⁸ Section 295 A, the Indian Penal Code as amended by the Indian Penal Code (Amendment) Act, 1961 (Act 41 of 1961).

¹⁰⁹ AIR 1957 SC 620.

¹¹⁰ Ibid., at 622

¹¹¹ Ibid., at 623.

religion by way of preaching, teaching and writing with the explicit objective of convincing others about the goodness of one's religion that may lead to conversion.

However, incidents of competing claims of religions may cause religious ill feeling and social unrest, which may jeopardize the life of ordinary people to live in dignity. As the Supreme Court of India ruled in Ramji Lal Modi v. State of Uttar Pradesh,¹¹² if religious propagation is done in any way with deliberate intention to outrage the religious feeling of others, the same can be penalized within the protection of clause (2) of article 19. Any act perpetrated with the intention of outraging the religious feelings of the people is an attack on their dignity in their self-identity because religious convictions are deep-seated values constitutive of one's self-identity. By protecting the people against such religious outrage, the State honours human dignity, which is one of the primary objectives of the secular State, as referred to in the Preamble of the Constitution of India.

4.2.6 An Originating Approach to Religious Freedom

The foregoing case studies regarding the free exercise of religion provide us the reason to conclude that the Constitution of India guarantees religious freedom, which is indigenous to Indian religious ethos and to its socio-cultural context so as to satisfy the multi-religious tradition of the country. Article 25 of the Constitution guarantees freedom of conscience. However, clause (2) of article 23 does not oblige exemption to conscientious objectors on religious scruples from compulsory service of the State when services of this sort are necessary for public welfare and for the security of the country.¹¹³

As interpreted by the Courts, article 25 (1) protects religious practices that are essential or integral to a religion. Owing to the delicate communal situation, which is endemic in some parts of the country, these practices are, however, subject to overriding regulatory process of the State under sub-clause (a) of clause (2) of article 25 that saves any State statutes to regulate and restrict secular transactions and activities associated with religious practices.¹¹⁴ Although religious practices protected under the provision of clause (1) of article 25 are free from State regulation unless detrimental to public order, morality, health and the fundamental rights guaranteed

¹¹² AIR 1957 SC 620.

¹¹³ Article 23 (2) of the Constitution of India.

¹¹⁴ Regulating or restricting any economic, financial, political or other secular activity which may be associated with religious practice." Article 25 (2) (a) of the Constitution of India.

under Part III of the Constitution, nevertheless these practices cannot be protected if they contravene social welfare and reform measures initiated by the State as provided under sub-clause (b) of clause (2) of the same article¹¹⁵

This dialectical process of freedom and regulatory measures amounting to the State's non-intervention and intervention associated with the practice of religion brings out clearly the fundamental dynamics of the philosophy of Indian secularism as enshrined in the secular provisions of the Constitution. It means that the Constitution is committed to protect values that enhance the flourishing of freedom of religion. Therefore, the free exercise of religion cannot supersede these objectives of the nation reposed in the Constitution.

4.3 The Exercise of Religion Subject to State Restriction

The Constitutions of the democratic States guarantee freedom of conscience and the right to manifest one's religious beliefs in overt ways. But this freedom is to be ensured in a balanced manner so as not to endanger the security and well being of the society, the maintenance of which is the prerogative of the State for the proper growth and progress of the people. Hence, Constitutions provide also the power to regulate and even to restrict this freedom. The manner and various reasons under which religious freedom comes under State restriction in India will be discussed in the proceeding sections.

The freedom of religion as restrictively guaranteed by Article 25 [1] is further subjected to the exceptions provided by sub-clauses {a} and {b} of clause 2 of the same article. Rea with clause [1] the grounds for restricting the freedom of religion guaranteed by clause {2} are,

4.3.1 Subject to Law

Article 25 (1) of the Constitution of India guarantees the individual's right to freedom of religion.¹¹⁶ The exercise of this freedom, however, is made explicitly subject to public order, morality, and health and to the other provisions of Part III of

¹¹⁵ Nothing in this article shall affect the operation of any existing law or prevent the State from making any law – (b) providing for social welfare and reform or the throwing open of Hindu religious institutions of a public character to all casts and sections of Hindus.” Article 25 (2) (b) of the Constitution of India.

¹¹⁶ “Subject to public order, morality and health and to the other provisions of this Part, all persons are equally entitled to freedom of conscience and the right freely to profess, practice and propagate religion.” Article 25 (1), Constitution of India.

the Constitution, which lay down the fundamental rights. Exercise of religion means the performance of acts in pursuance of one's religious tenet.

In India the limitations laid on the exercise of religious freedom is really very emphatic. The Constitution of India does not presume that beliefs that are religious deserve absolute protection. Clause (1) of Article 25, therefore, begins with a number of safeguards. The right to religious freedom may be exercised only under these conditions. These are substantial conditions. Commenting on the provision protecting religious freedom under article 25 of the Constitution, Shri K. Santhanam remarked in the Constituent Assembly:

“Hitherto it was thought in this country that anything in the name of religion must have the right to unrestricted practice and propagation. But we are now in the new Constitution restricting the right only to that right which is consistent with public order, morality and health”.¹¹⁷

The Courts in India on various occasions interpreted the scope of freedom guaranteed to religion that reflects the mind of the framers of the Constitution. The Bombay High Court held in one of the cases¹¹⁸ that article 25 provided to all persons the right to freedom of religion. But the Court reiterated that this “right is not an absolute or unlimited right. In the first place, it is subject to public order, morality and health. In the second place, it is subject to other provisions of Part III”.¹¹⁹

In another case¹²⁰ the Supreme Court of India ruled that article 25 of the Constitution guaranteed to every person freedom of religion. But the Court emphasized:

This is subject, in every case, to public order, health and morality...Subject to the restrictions which this article imposes, every person has a fundamental right under our Constitution...to entertain such religious beliefs as may be approved by his judgment or conscience.¹²¹

Similarly, the Calcutta High Court in interpreting the scope and limitations laid on the free exercise of religion as provided in clause (1) of article 25 held that this provision did not give, for example, a Hindu student the right to perform the

¹¹⁷ CAD, vol. 7, p. 834.

¹¹⁸ The State of Bombay v. Narasu Appa Mali, AIR 1952 Bom. 84.

¹¹⁹ Ibid., at 87.

¹²⁰ Ratilal Panachand Gandhi v. State of Bombay, AIR 1954 SC 388.

¹²¹ Ibid., at 391.

ceremonies of his religion in the compound of a Christian college.¹²² Therefore, under article

25(1) of the Indian Constitution, every person is entitled to have the right to free exercise of religion. But this right is at the same time subject to State law in order to safeguard the security and welfare of all in the society as well as the individual because protection of human persons in their dignity is the concern of the Constitution of India.

4.3.2 Religious Freedom: Subject to Regulation of Economic, financial, political and Secular Activities Associated with Religion

Article 25 (2) (a) empowered the State to regulate financial, political and secular activities associated with religion. The religious activities as such are not covered under the regulatory power of the State. It is not always easy to find out whether an activity will be covered under religious practice or under financial, political or secular activity associated with religion. Certain activities even if involve expenditure or employment of servants and priests or uses of marketable commodities cannot be said to be secular activities under Article 25(2) (a).¹²³ On the other hand the management of property attached to a religious institution or endowment has been held to be a secular activity subject to the regulatory power of the State.¹²⁴

4.3.3. Religious Freedom: subject to Social Reform and Throwing Open Temples

Article 25 (2) (b) enacts two exceptions (a) Laws providing for social welfare and social reform and (b) the throwing open of all 'Hindu religious institutions of public character' to all classes and sections of Hindus.

The freedom of religion under Article 25 (1) is, therefore, subject to the power of the State to enact laws for social welfare and social reforms. Thus, the banning of bigamous marriage was upheld as a measure of social reform.¹²⁵ Similarly, the

122 Sanjib Kumar v. St. Paul's College, AIR 1957 Cal, 524. (Cantwell v. Connecticut, 310 US 296, at 304). As quoted in V.P. Luthera, op.cit., p. 114.

123 Commissioner of H.R.E. v. Nakshmindra, A.I.R. 1954 S.C. 282; Ratilal v. State of Bombay, A.I.R. 1954 S.C.

124 Bombay v. Narasu Bapa Mali, A.I.R. 1952 Bombay 84; Ram Prasad v. The State of U.P., A.I.R. 1957 All. 411.

125 State of Bombay v. Narsu Appa Mali, A.I.R. 1952 Bom. 84.

provisions of the Hindu Marriage Act, 1955 are protected under Article 25(2) (b).¹²⁶ On the same basis the prohibition of evil of sati or system of 'devdasi' was upheld.¹²⁷

Article 25(2) (b) seeks to the State to throw open 'Hindu religious institutions of a public character to all classes and sections of the Hindus'. Public institutions would include temples dedicated to the public as a whole also those for the benefit of sections or dominations thereof. The Article confers a right on all classes and sections of Hindus to enter a public temple for the purposes of worship. However, this right is not unlimited in character. For example, in Venkataramana v. State of Mysore,¹²⁸ the Supreme Court of India held that no Hindu can claim as part of rights protected by Article 25 (2) (b) that a temple must be kept open for worship at all hours of the day and night, or that he should personally perform those services which acharyas or pujaris alone could perform. Thus, the right recognized by Article 25 (2) (b) necessarily becomes subject to some limitations or regulations which arise in the process of harmonizing this right with that protected by Article 26 (b).¹²⁹

In the instant case the facts were that in order to remove the disability imposed on harijans from entering into temples dedicated to the Hindu public generally, The Madras Legislature enacted the Madras Temple Entry Authorization Act, 1947. The Government passes an order that the Act would be applicable to a temple belonging to Godwa Saraswati Brahimin Community. The trustees of the temple filed a suit which ultimately reached the Supreme Court. Their contention was that the temple being denominational one, they were entitled to the protection of Article 26 and it was a matter of religion as to who were entitled to take part in worship. They further contented that opening of the temple to communities other than Godwa Saraswath Brahmins was violative of Article 26 (b) of the Constitution and this void.

It was held by the Supreme Court that the 'matters of religion' in Article 26 (b) include even practices which are considered by the community as part of its religion.

126 Taheer Saifuddin v. Tyebbhaji Mooraji, A.I.R. 1953, Bom. 183.

127 Sardar Syedna Taher Saifuddin Saheb v. State of Bombay A.I.R. 1962 S.C. 853 at 864.

128 A.I.R. 1958 S.C. 255

1 29 Id. at 266.

From above, it is clear that the courts while interpreting clauses (a) and (b) of Article 25 (2) and specially sub-clause (b) “has sought to strike a reasonable balance between religious liberty of an individual or a group and the social control.”¹³⁰

4.3.4 Religious Freedom: Subject to Public Order and Morality

A-- Public order

No freedom can flourish in a state of disorder, there for; it is the duty of the state to maintain peace and order so that people can enjoy the rights conferred on them by the constitution. If the enjoyment of a right by someone poses threats to peace and order to state .Then the state is empowered by the constitution to put restriction on enjoyment of such rights to the extent it is violative of peace and order. Restrict in on this ground implies that the can pass a law to regulate religious meetings or processions in public peace like road, parks, streets, etc. Even a total prohibition of religious procession can be imposed if there is any danger to peace or communal harmony.. The law also provide for the licensing of religious processions. It also declares certain acts to be offence if they trend to wound the religious feelings of any class of person or if it promotes disunity between different religious, racial or language groups, In view of these provisions many Sate have passed servel legislation prohibiting the slaughter of cow, and propagation of religion for the purpose of conversion by fraud, force, allurement or inducement, because such activities could cause law and order problem.

B -Morality

No state can allow immorality in the name of religious freedom, nor is it desirable. Religion aim at the moral well being man but sometimes , certain religious practice have resulted immoral acts, It is the duty of the state to see that such immoral practice under the grab of religious freedom are not allowed to flourish in the society . For this the constitution has empowered the state to declare illegal such immoral practice or to regulate them on the ground of morality. Such immoral religious practices included Divadasi System, sati system, gambling on deepavli, etc

In India the State has imposed extensive regulations on the exercise of religion in the interest of public peace and order. There are three reasons arising from the peculiar nature of religious practices in the country that call for these measures. First of all both Hinduism and Islam which have the largest number of followers in the

¹³⁰ Surya P. Sharma, “Freedom in Matters of Religion” in Mohammed Imam (ed.) *Minorities and the Law* 267 (1972).

country lack centralized organization and authority necessary to provide for the orderly conduct of religious practices in the public space. Secondly most religions in India place great importance to public display of religious celebrations in the form of festivals and processions spread over many days. Thirdly India being a multi-religious country, various religious communities having diametrically opposed belief systems and practices live side by side all over the country. Hence, it is not possible to permit them all to exercise their different religious beliefs to the fullest possible measure.¹³¹

Hence, the State has enacted statutory restrictions to prevent breaches of peace and to protect people from possible violence arising from religious excitements associated with practice of religion in the public places. Thus Chapter XV of the Indian Penal Code¹³² declares certain religious acts are offensive if they tend to create breach of peace. It is surprising to note that the authors of the Code who composed it in 1860 commented, “There is perhaps no country in which the government has so much to apprehend from religious excitement among the people.”¹³³

Sections 295 to 298 of the Indian penal Code¹³⁴ are more intended for keeping peace and protection of people against violence than for the protection of religion as such. These sections deal with cases where a person performs an act whereby the religious feelings of any class of citizen are wounded. Section 295 A specially limits the religious freedom of propagation by making it an offence to outrage the religious feelings of any class of citizens by acts incompatible with a civilized way of behaviour. The said section reads:

Whoever, with deliberate and malicious intentions of outraging the religious feelings of any class of citizens of India, by word either spoken or written, by signs or by visible representations or otherwise insults or attempts to insult the religion or the religious belief of that class, shall be punished with imprisonment of either description for a term which may extend to two years, or with a fine, or with both.¹³⁵

¹³¹ Donald E. Smith, op.cit. pp. 220-221.

¹³² Indian Penal Code 1860 (Act 45 of 1860).

¹³³ As quoted in R. Rachoddas and D.K. Thakore, The Law of Crimes (Bombay, Bombay Law Office, 1948), p. 671

¹³⁴ Indian Penal Code 1860 (Act 45 of 1860).

¹³⁵ Section 295 A of the Indian Penal Code as amended by the Indian Penal Code (Amendment) Act, 1961 (Act 41 of 1961).

In the case of Public Prosecutor v. P. Ramaswamy,¹³⁶ the Madras High Court had to deal with a case of this sort. In this case the respondent, Mr. P. Ramaswamy published certain articles with malicious purpose of outraging the religious sentiments of the Muslims. The author criticised various injunctions of the Quran. He was critical of the punishment sanctioned by the Quran, such as the stoning to death of persons who were found guilty of adultery which, according to him, was inconsistent with the provisions for divorce, remarriage and allowing a person to have as many as four wives. He also questioned the punishment of cutting off hands for theft as sanctioned by the Quran. The author concluded in his article that these provisions of Quran indicated that Allah was a fool and “a foolish and barbarous person like Allah has no place in this world”.¹³⁷ The Madras High Court found the respondent of the instant case guilty of section 295 A. In giving its verdict, the Court declared: [T]he Courts have to be circumspect and pay due regard to the feelings and religious emotions of different classes of persons with different beliefs, irrespective of the consideration whether or not they shared those belief or whether those beliefs were rational or not in the opinion of the Court.¹³⁸

Under section 153 A of the Indian Penal Code,¹³⁹ it has been declared a crime to promote, on grounds of religion, race, language, caste or community, enmity between different religious, racial or language groups. This section holds an act as a criminal offence if it is detrimental to the maintenance of harmony between different religious groups or is likely to disturb public tranquility. The same is the object of section 34 of the Police Act¹⁴⁰ that prohibits the slaughter of cattle or indecent exposure of one’s person on any road, thoroughfare or other public place. Consequently, although the Islamic law sanctions cow sacrifice on Bakr-Id day, nevertheless, not to outrage the religious sentiments of the vast majority of the Hindus, the Supreme Court can provide alternative or regulatory measures as ruled in the Quareshi case¹⁴¹

¹³⁶ AIR 1964 Mad. 258.

¹³⁷ Ibid., at 258-259.

¹³⁸ Ibid., at 259.

¹³⁹ Section 153 A of the Indian Penal Code as amended by the Indian Penal Code (Amendment) Act, 1961 (Act 41 of 1961).

¹⁴⁰ Section 34 of the Police Act, 1861 (Act 5 of 1861)

¹⁴¹ Mohammad Hanif Quareshi v. State of Bihar, AIR 1958 SC 731, at 740. For the details of the case see above Section 4.4.2.

In an Ananda Marg case,¹⁴² the Supreme Court held valid the order issued by the Calcutta Police Commissioner under section 144 of the Code of Criminal Procedure,¹⁴³ which prohibited the ‘Thandava dance’¹⁴⁴ in public places. The Court asserted that carrying lethal weapons like daggers, and carrying human skulls posed danger to public order and morality and, therefore, the Police Commissioner’s order to ban Thandava dance from the public places was valid.

A year after the Supreme Court ruled that Aurobindo was not a religious teacher; the Court decided that the Ananda Margis were a religious denomination. However, in Jagadishwaranand v. Police Commissioner, Calcutta Case,¹⁴⁵ the Court refused to accept the *tandava* dance as an essential practice of the Ananda Margis. Writing for the Court, Ranganath Misra, J reasoned, ‘Ananda Murga as a religious order is of recent origin and tandava dance as a part of religious rites of that order is still more recent. It is doubtful as to whether in such circumstances tandava dance can be taken as an essential religious rite of the Ananda Margis’.¹⁴⁶

Interestingly, a single Bench of the Calcutta High Court, in a rare occurrence, took a contrary line when asked to reconsider the case.¹⁴⁷ Bhagabati Prasad Banerjee, J wrote:

The concept of tandava dance was not a new thing which is beyond the scope of the religion. The performance of tandava dance cannot be said to be a thing which is beyond the scope of religion. Hindu texts and literatures provide [for] such dance. If the Courts started enquiring and deciding the rationality of a particular religious practice then there might be confusion and the religious practice would become what the courts wish the practice to be.¹⁴⁸

This was a strong indictment of the essential practices doctrine followed by the Supreme Court since the 1960s, and a plea for reconsideration of the Court’s role in determining the rationality of religious practices.

¹⁴² Acharya Jagadiswaranda Avadhuta v. Commissioner of Police Calcutta, AIR 1984 SC 51. Ananda Marg is a Hindu religious sect.

¹⁴³ Section 144 of the Code of Criminal Procedure, 1890 (Act 5 of 1890). Section 144 empowers certain Magistrates to direct any person to abstain from any act to prevent a disturbance of the public tranquility, a Riot or an affray.

¹⁴⁴ Thandava dance is a religious cult performance practiced by the Ananda Marg sect. The use of lethal Weapons and human skulls are part of the cult dance
[1984]4scc,522,51

¹⁴⁵ Ibid,P.57

¹⁴⁶ AIR1990,cAL.336

¹⁴⁷ IbidP.57

That was not the end of the story of the Ananda Margis. In March 2004, the Supreme Court again took up the issue and further narrowed the scope of essential practices to mean the foundational ‘core’ of a religion. The majority judgment said, ‘essential part of a religion means the core belief upon which a religion is founded and those practices that are fundamental to follow a religious belief. It is upon the cornerstone of essential parts of practices that the superstructure of religion is built, without which a religion will be no religion’.¹⁴⁹ However, A. R. Lakshmanan, J contested this definition of essential practices and wrote in his dissent. ‘If these practices were accepted by the followers of such spiritual head as a method of achieving their spiritual upliftment, the fact that such practice was recently introduced cannot make it any the less a matter of religion.’¹⁵⁰

The Courts in India have been often faced with cases challenging the constitutional propriety of banning processions in some religiously sensitive areas. In a case that arose from the State of Orissa,¹⁵¹ the Supreme Court was appealed to settle a long-standing dispute between a section of Hindus and Muslims in that State. The History of the instant case was that the leaders of Hindus and Muslims of some villages in Orissa entered into an agreement in 1931 about the manner of taking religious processions. According this agreement, the Hindus should not play music near a mosque in order to enable the Muslims to hold their prayers in a calm atmosphere. In 1964 the Hindus filed a case before the Orissa High Court¹⁵² claiming that they were not bound by the 1931 agreement and that they were entitled to play music in religious and non-religious processions on the high way. The Orissa High Court rejected the petitioners’ claim. On appeal, the Supreme Court upheld the verdict of the Orissa High Court and asserted that the restrictions on playing music and beating drums by the Hindus near the mosque were not justified.

As provided in article 25 (1) of the Indian Constitution, while the State protects the individual’s right to free exercise of religion, the State is also duty bound to safeguard public order and morality because the State’s coercive power is for the purposes of maintenance of law and order necessary to promote conditions fitting for the development of the people that is worthy of human dignity.

¹⁴⁹ Acharya Jagadiswaranda Avadhuta v. Commissioner of Police Calcutta, AIR 1984 SC 51. Ananda Margi is a Hindu religious sect.

¹⁵⁰ Ibid.p.35

¹⁵¹ Shaikh Piru Bux v. Kalandi Pati, AIR 1970 SC 1885.

¹⁵² Shaikh Piru Bux v. Kalandi Pati, AIR 1964 Orissa 18.

In this connection, one of the practices associated with religion, which came under the purview of the State in India, was the system of devadasi dedication. Many Hindu temples, particularly in South India, had the tradition of dedicating young girls to the deities as devadasis (literally, servants of God). The devadasis danced and sang before the deities in the temples and in religious processions.

It was also a belief prevalent among some sections of the Hindus that spiritual merit was gained by such dedication. The dedication ceremony was done by the performance of a spiritual marriage of the girl with the deity of the temple. Although religious in origin, in time it degenerated to such an extent that most of the devadasis became either temple prostitutes or took to prostitution.

As early as a century ago prominent members of the Hindu community in South India condemned the practice of devadasi dedication on account of immorality and promiscuity spread through the system. They also made it known that the practice of devadasi dedication was not an essential part of the worship in the temples.¹⁵³ In 1924, the amended Section 372 of the Indian Penal Code¹⁵⁴ declared that any person dedicating a girl for devadasi was liable to punishment. With the enactment of Madras Devadasi (Prevention of dedication) Act, 1947, the prohibition of the devadasi practice in any form was legally enforced in South India.¹⁵⁵

In addition, The Suppression of Immoral Traffic in women and Girls Act¹⁵⁶ declared prostitution illegal if it is practiced within 200 yards of any place of public worship. The Act also makes it an offence to procure, induce or take women for prostitution.¹⁵⁷ In the case that came before the Supreme Court of India from the State of Uttar Pradesh,¹⁵⁸ the constitutional validity of the Act¹⁵⁹ was challenged on the ground that the terms of the Act amounted to a restriction on the trade of prostitution. But the Court held valid the restrictions involved in the said Act, because it was a reasonable control in the interest of public morality to stem the evil of prostitution practiced in some localities. The above considered statutes and Court observations

¹⁵³ P. Ramanatha Iyer and P.R. Naraya Iyer, *The Madras Hindu Religious and Charitable Endowment Act*, (Madras Law Journal press, Madras, 1953), p. 43.

¹⁵⁴ Section 372 of the Indian Criminal Law (Amendment) Act, 1924 (Act 18 of 1924).

¹⁵⁵ Section 3 (3) of the Madras Devadasi (Prevention of dedication) Act, 1947 (Madras Act 31 of 1947).

¹⁵⁶ *Suppression of Immoral Traffic in Women and Girls Act, 1956* (Act 104 of 1956).

¹⁵⁷ Sections 5 and 7 of the *Suppression of Immoral Traffic in Women and Girls Act, 1956* (Act 104 of 1956).

¹⁵⁸ *Uttar Pradesh v. Kaushaliya*, AIR 1964 SC 416.

¹⁵⁹ *Suppression of Immoral Traffic in Women and Girls Act, 1956* (Act 104 of 1956).

indicate that whenever the State prohibits immoral practices, religion must give way to such actions, because under the secular provisions of the Constitution of India, the State is vested with power to uphold good values, on reasonable grounds, in the interest of common good.

4.3.5 Religious Freedom: Subject to Public Health

It is the duty of a welfare State to provide legal safeguards to protect individual's life and to maintain good health of the community. However, this life-saving objective of the State may run counter to certain religious beliefs and practices. According to the Penal Code of India,¹⁶⁰ suicide is a crime that applies to the person who attempts it and those who support or assist to commit it. Similarly death by starvation or by self-inflicted torture to attain spiritual ends is also an offence under the same Code.¹⁶¹ The law, therefore, forbids suicide even if the act is motivated by religious intention.

Consequently, the practice of sati,¹⁶² for instance, though a part of Hindu religious belief and practiced by some sections of Hindus in some parts of India, was made a criminal offence by the law. In a case on sati brought before the Rajasthan High Court,¹⁶³ the Sessions Judge issued a lenient sentence of six months rigorous imprisonment to all those who were found guilty of abetting sati on the ground that the people of that particular locality where sati was committed believed it to be their religious duty to induce the act. But Chief Justice Mr. Wanchoo of the Rajasthan High Court, who spoke for the Court in the instant case remarked: “

The reasons he (the Sessions Judge) has given for this ridiculously lenient sentence are rather strange in the middle of the 20th century. He is still not sure whether the people are wrong or right in their adoration of Sati...He seems to sympathise with the view of the people that it is their religious duty to help a woman who wants to become a Sati.”¹⁶⁴

The Rajasthan High Court, therefore, disapproved the term of six months rigorous imprisonment as lenient and extended it to five years of rigorous imprisonment so that people may realize the criminality of sati abetment and that they might in no manner induce or help a woman to commit sati.

¹⁶⁰ The Indian Penal Code, 1860 (Act 45 of 1860).

¹⁶¹ Sections 306, 309 of the Indian Penal Code, 1860.

¹⁶² R.C. Majumdar, *The History and Culture of the Indian People*, op.cit. vol. 10, pp. 268-275.

¹⁶³ *Tejsingh v. The State*, AIR 1958 Raj 169 (DB).

¹⁶⁴ *Ibid.*, at 172. As quoted in P.C. Jain, op.cit. p. 267.

Maintenance of good health of the public requires on the part of the State to take measures to prevent infectious diseases. Religious beliefs cannot contravene State regulation on this matter. Sections 269 and 270 of the Indian Penal Code,¹⁶⁵ for example, empower the State to take punitive action against a person who is likely to spread such infections unlawfully and negligently. Similarly, the Epidemic Diseases Act¹⁶⁶ provides rules for enacting special measures to control epidemic diseases.

In a case filed in the Orissa High Court,¹⁶⁷ the petitioner was convicted on the ground that he refused to get himself inoculated against cholera in violation of a State measure under the Epidemic Diseases Act. The petitioner pleaded that he had “conscientious objection”¹⁶⁸ against inoculation. He, moreover, contended that he had taken homeopathic medicine against cholera attack. The Court rejected his contention and ruled that since the petitioner could not prove that taking homeopathic medicine was similar to inoculation he could be convicted for his refusal to comply with the State order. These afore seen judicial decisions and State statutes re-enforce one thing in a significant way, namely that the free exercise of religion cannot contravene the constitutional objectives to protect institutions and values intended to promote human well being in defense of human dignity.

4.3.6 Religious Freedom: Subject to Others Provisions of Part III

Clause (1) of article 25 of the Indian constitution declares that the exercise of religious freedom is subject to other fundamental rights guaranteed in part III of the Constitution.¹⁶⁹ This requires a balancing of rights in the area of religion with other rights. A constitutional question to this effect arose for the first time in 1958 in the case of Shri Venkatarama Devaru v. State of Mysore Case.¹⁷⁰ The facts of this case were as follows. The case arose out of the Madras Temple Entry Authorization Act¹⁷¹ passed by the Madras Legislature in 1947 and amended in 1949. The Preamble to the Act declared that the Act aimed at the removal of disabilities imposed by custom or usage on certain classes of Hindus¹⁷² with regard to entry into the Hindu temples in

¹⁶⁵ Sections 269, 270 of the Indian Penal Code 1860 (Act 45 of 1860).

¹⁶⁶ Section 2 of the Epidemic Diseases Act, 1897 (Act 3 of 1897).

¹⁶⁷ J. Choudhury v. The State, AIR 1963 Orissa 216.

¹⁶⁸ Ibid. at 217.

¹⁶⁹ (Article 25, the Constitution of India

¹⁷⁰ AIR 1958 SC 255

¹⁷¹ Temple Entry Authorization Act, 1947 (Madras Act 5 of 1947 as amended by Act 13 of 1949).

¹⁷² This class of people was known as ‘the untouchables’ or Harijans or the Dalits

the Madras Province, which were otherwise open to the general Hindu public. Section 3 of the Act authorized persons belonging to certain 'excluded classes' to enter any Hindu temple and offer worship in the same manner and to the same extent as Hindus in general. A 'temple' was defined as 'a place, which is dedicated to or for the benefit of the Hindu community or any section thereof as a place of public religious worship'.

The trustees of Shri Venkataramana Temple, apprehending the application of the Act to their temple, sent a memorandum to the Madras Government claiming that their temple was a 'private temple', which exclusively belonged to a Hindu sect called the Gowda Saraswath Brahmins. Consequently, their temples were not within the scope of the Act. The Government of Madras rejected the petitioners' claim. Thereupon the petitioners filed a suit before the Supreme Court under Article 26 (b) that guaranteed to a religious denomination the right to manage its own affairs in "matters of religion". The petitioners pleaded that according to scriptural authority, the caste of the prospective worshippers was a relevant part of 'matters of religion' and, therefore, the enforcement of the Madras Temple Entry Authorisation Act¹⁷³ to throw open their denominational temple to general public was violative of article 26 (b) of the Constitution. The petitioners also pleaded that since article 25(1) was subject to other fundamental rights guaranteed in Part III of the Constitution, the provision given in Article 25 (2) (b) was also subject to article 26 (b).

In delivering the judgment in the instant case the Supreme Court held section 3 of the Madras Temple Entry Authorisation Act intra vires of the Constitution. The Supreme Court observed, "the validity of section 3 of the Madras Act V of 1947 does not depend on its own force but on article 25 (2) (b) of the Constitution...and therefore, the trustees can succeed only by establishing that article 25 (2) (b) itself is inoperative as against article 26 (b)."¹⁷⁴ The court then commented that there were two provisions in the Constitution, article 25 (2) (b) and article 26 (b). These were of "equal authority, neither of them being subject to the other."¹⁷⁵ Consequently, the rule of harmonious construction had to be applied when interpreting them. Mr. Justice Aiyar who delivered the judgment of the Supreme Court said:

¹⁷³ The Madras Temple Entry Authorisation Act, 1947 (Madras Act 5 of 1947 as amended by Act 13 of. 1949).

¹⁷⁴ Shri Venkataramana Devaru v. State of Mysore, AIR 1958 SC 255, at 257

¹⁷⁵ Ibid. at 258.

The limitation “subject to the other provisions of this part” occurs only in cl. (1) of Article 25 and not in cl. (2). Clause (1) declares the rights of all persons to freedom of conscience and the right freely to profess, practice, and propagate religion. It is this right that is subject to the other provisions in the Fundamental Rights Chapter. One of the provisions to which the right declared in Art. 25 (1) is subject to Art.25 (2). A law, therefore, which falls within Art. 25 (2) (b) will control the right conferred by Art. 25 (1), and the limitation in Art. 25 (1) does not apply to that law.¹⁷⁶

According to the judgment of the Court, clause (2) of article 25 supersedes clause (1) of the same article. Therefore, the petitioners’ right to free exercise of religion is subject to the right conferred to every Hindu to enter any Hindu temple of public character. The provisions given in article 26 (b), the Supreme Court observed, were to be read in the light of the limitations contained in sub-clause (b) of clause (2) of article 25.

In Rev. Stainiclaus v. State of M.P.,¹⁷⁷ where the constitutionality of Madhya Pradesh Dharma Swantanrya Adhiniyam, 1968 and the Orissa Freedom of Religion Act, 1967 was challenged on the ground that (i) they violate the right to propagate one’s religion under Article 25(i) and (ii) the State legislature had no competence to enact such law as it did not fall within the purview of Entry I of List II and Entry I of List III of the Seventh Schedule but it fell within the residuary Entry 97 of List I. The Supreme Court rejected the contention of the appellant and held that these impugned Acts fall within Entry I of List II as they are meant to avoid disturbances to public order by prohibiting conversion of from one’s religion to another in a manner reprehensible to the conscience of the community.

In Masud Alam v. Commissioner of Police,¹⁷⁸ the banning of electrical loudspeakers was held valid. The court observed that every religion has right to have propagandists. But when such propaganda is made through loudspeakers in a crowded and noisy locality to detriment of public morals, health, order, it is prohibited by Article 25. A loudspeaker may take one to Hell instead of Heaven by very volume of its sound.

¹⁷⁶ Ibid., at 267.

¹⁷⁷ A.I.R. 1977 S.C. 908

¹⁷⁸ A.I.R. 1956 Cal. 9.

Venkataramana v. State of Mysore,¹⁷⁹ the Supreme Court of India held that no Hindu can claim as part of rights protected by Article 25 (2) (b) that a temple must be kept open for worship at all hours of the day and night, or that he should personally perform those services which acharyas or pujaris alone could perform. Thus, the right recognized by Article 25 (2) (b) necessarily becomes subject to some limitations or regulations which arise in the process of harmonizing this right with that protected by Article 26 (b).⁸¹ In the instant case the facts were that in order to remove the disability imposed on harijans from entering into temples dedicated to the Hindu public generally, The Madras Legislature enacted the Madras Temple Entry Authorization Act, 1947. The Government passes an order that the Act would be applicable to a temple belonging to Godwa Saraswati Brahmin Community. The trustees of the temple filed a suit which ultimately reached the Supreme Court. Their contention was that the temple being denominational one, they were entitled to the protection of Article 26 and it was a matter of religion as to who were entitled to take part in worship. They further contented that opening of the temple to communities other than Godwa Saraswath Brahmins was violative of Article 26 (b) of the Constitution and this void.

It was held by the Supreme Court that the ‘matters of religion’ in Article 26 (b) include even practices which are considered by the community as part of its religion.

4.4 The State’s Assistance to Freedom of Religion

The activities of a welfare State are to be ordered in a manner conducive to provide proper facilities for the integrated development of its citizens including their religious needs. The secular provisions of the Indian Constitution recognize the importance of religion in people’s lives, though may not be applicable to all.¹⁸⁰ If religion is an important factor in the welfare of the people, it must be assisted through constitutional means.

The peculiar nature of religions in India, moreover, calls for various types of State support to religion. Unlike the ecclesiastical institutions, most of the religions in India require administrative and organizational systems capable of taking care of the enormous amount of wealth and landed property they possess. These are given to them from ancient time onwards by way of endowment for religious, charitable and

¹⁷⁹ A.I.R. 1958 S.C. 255.

¹⁸⁰ Articles 25 and 26 of the Constitution of India

educational purposes in perpetuity. Under these circumstances, the State in India has assumed great responsibility for the proper administration of such religious institutions within the constitutional rights to religious freedom guaranteed to them.¹⁸¹

It has to be noted, at the same time, that India has neither State religion nor it gives any constitutional recognition to Hinduism as the religion of the majority of the citizens. There is also no Ecclesiastical Department in the Union Government as existed during the British Raj. Hence, we will examine the various kinds of assistance the State in India provides to religion while being secular. This would enable us to see another important dimension of the political philosophy of Indian secularism, which stands committed to integral humanism affirming the dignity of human persons in their individual self-identities and their plural community identities.

4.4.1 Freedom as to Payment of taxes for promotion of any particular Religion

The financial requirements of a welfare State are met by way of taxes. As a matter of justice, all who have the capacity to pay tax share the tax burden. Tax exemption is not a right but a grace granted by the State on certain reasonable grounds. It has been customary from ancient time onwards both in the East and West to assist religion by giving tax exemption to religious personnel, institutions and properties.¹⁸² During the time of the Delhi Sultanate and the Mughal Empire, Islam enjoyed tax exemption in India, while others were subject to jizya, a poll tax, for recognition of their religions by the State.¹⁸³ During the British rule in India, tax exemption was granted to all religions. But right up to 1948 the Ecclesiastical Department of the British government paid out of State revenue a large sum of money for the maintenance of Anglican churches and clergymen.¹⁸⁴

The Constitution of India empowers the legislature to pass laws to levy taxes.¹⁸⁵ The amount to be levied through taxation is left to the discretion of the

181 In particular article 26 of the Constitution of India.

182 A.S. Altekar, *The State and Government in Ancient India*, op.cit, pp. 264-269.

183 Abid S. Husain, *The National Culture of India*, op.cit. p 77

184 Donald E. Smith, op.cit, p. 128.

185 “No tax shall be levied or collected except by authority of law”. Article 265, Constitution of India the Article 14 of the Constitution of India.

legislature. The Constitution of India, however, doesn't protect taxes when they contravene the equal protection rights¹⁸⁶ or any tax measure meant to meet the expense of any particular religion or religious denomination.¹⁸⁷

The Indian Constitution is, nevertheless, silent about the matter of taxation on religion. This implies that the State in India is not debarred from imposing taxes on religious institutions. On the contrary, the State in India, by means of various statutes of the Union Government,¹⁸⁸ grants tax exemption to religious institutions of a public character because tax exemption to religion is a form of State assistance to religion in the public interest. It is part of the State's commitment for the all round development of its citizens which is a significant affirmation of the inherent worth and dignity of the human person.

4.4.2. Direct State Aid to Religious Freedom

The Constitution of India does not debar the State to levy taxes on condition that the proceeds of which are defrayed without discrimination to promote and maintain religion. Non-discriminatory taxes for the benefit of all religions would be perfectly valid as protected under article 27 of the Constitution. This article states, "No person shall be compelled to pay taxes the proceeds of which are specifically appropriated in payment of expenses for the promotion or maintenance of any particular religion or religious denomination."

The constitutional propriety of levying tax on religious activities was, nevertheless, raised for the first time in the year 1954 when the Lakshmindra case¹⁸⁹ of historic importance was appealed to the Supreme Court of India. The Supreme Court's observations of this case throw light on the interpretation of the content of article 27 of the Constitution within the secular objectives of the Constitution.

186 "The State shall not deny to any person equality before the law or the equal protection of the law within territory of India".

187 "Article 27, Constitution of India.

188 The Income Tax Act, 1961 (Act 43 of 1961), Ss. 11 & 88. The Wealth Tax Act, 1957 (Act 27 of 1957), S. 5 (1) (i), The Gift Tax Act, 1958 (Act 18 of 1958), S. 5 (1) (v) & (VI).¹⁸⁵ See A.S. Altekar, *The State and Government in Ancient India*, op.cit, pp. 264-269.

188 Abid S. Husain, *The National Culture of India*, op.cit. p 77.

189 *Commissioner, Hindu religious Endowments, Madras v. Shri Lakshmindra Tirtha Swamiar of Shri Shirur Mutt*, AIR 1954 SC 282.

The history of Lakshmindra case is to be seen in the context of several statutes¹⁹⁰ passed by many Indian Legislatures for the creation of Boards of Managers to look after the proper management and administration of religious institutions. The expenses of these Boards have been met by a contribution collected either in the form of tax or fee from the concerned institutions themselves. Similarly, the Government of Madras, under the Hindu Religious and Charitable Endowments Act of 1951, constituted the Hindu Religious Endowments Board¹⁹¹ in order to work out a system for the administration of the Shirur Mutt. Shri Lakshmindra Tirtha Swamiar of Shri Shirur Mutt., the Head (Mathadhipati) of the Shirur Mutt, appealed to the Supreme Court¹⁹² challenging many provisions of the Act as well as the activities of the Board on the ground that they infringed on several fundamental rights guaranteed under the Constitution.

One of the contentions of the appellant in this case was that the contribution levied from their religious institutions was a tax because the proceeds of the levy was not earmarked and kept apart to meet the expenses of the Board but formed part of the revenue of the State of Madras. Therefore, the plaintiff pleaded that it violated article 27 of the Constitution. While examining the case, the Supreme Court found that the contribution was in fact in the nature of tax¹⁹³ but held that it did not violate article 27. Regarding the proscription involved under article 27 of the Constitution as raised by plaintiff, the Court commented:

What is forbidden by the Article is the specific appropriation of the proceeds of any tax in payment of expenses for the promotion or maintenance of any particular religion or religious denomination. The reason underlying this provision is obvious. Ours being a secular state and there being freedom of religion guaranteed by the Constitution, both to individuals and to groups it is against the policy of the Constitution to pay out of public funds any money for the promotion or maintenance of any particular religion or religious denomination.¹⁹⁴

190 Madras Hindu Religious and Charitable Endowments Act, 1951 (Madras Act 19 of 1951), Nathdwara Temple Act, 1959 (Rajasthan Act 13 of 1959), Orissa Hindu Religious Endowment Act, (Orissa Act 2 of 1952), etc.

191 The Madras Hindu Religious and Charitable Endowments Act, 1951 (Madras Act 19 of 1951)
192 Commissioner, Hindu religious Endowments, Madras v. Shri Lakshmindra Tirtha Swamiar of Shri Shirur Mutt, AIR 1954 SC 282.

193 Ibid., at 296

194 Ibid., at 296.

Therefore, The Supreme Court indicated that the purpose of the contribution was to see that religious trusts and institutions wherever they existed were properly administered.¹⁹⁵ This was a secular administration of the religious institutions with the objective of ensuring that the endowments bequeathed to religious institutions were justly administered and their income was duly utilised for the purposes to which they were established. This implies that it is constitutionally valid to levy tax for religious purposes on condition that the proceeds of which are used non-preferentially for the benefit of the religious cause.

On the contrary, one may be surprised to note during the Seventh Amendment to the Constitution, article 290-A was added¹⁹⁶ to grant State contribution to Hindu temples and shrines in the States of Tamil Nadu and Kerala. Article 290-A reads:

A sum of forty-six lakhs and fifty thousand rupees shall be charged on, and paid out of the Consolidated Fund of the State of Kerala every year to the Travancore Devaswom Fund; and a sum of thirteen lakhs and fifty thousand rupees shall be charged on, and paid out of the Consolidated Fund of the State of Madras every year to the Devaswom Fund established in that State for the maintenance of Hindu temples and shrines in the territories transferred to that State on the first day of November, 1956, from the State of Travancore- Cochin.

It is required here, as a matter of clarification, to refer to the historical background of Article 290-A. Prior to the year 1949, Travancore and Cochin were contiguous Indian States under Hindu Maharajas. The rulers of these States sanctioned a large annual grant of money for the maintenance of Hindu temples and shrines in their respective States and directly controlled the management of these institutions. The two States were merged in 1949. As the royal grants were in perpetuity, the obligations involved thereby were also passed over to the newly created State of Travancore- Cochin. To this effect the consent of the two rulers and the Government of India were assented to by an Act of a Covenant. Hence, in 1956 when the new State of Kerala was reconstituted from that of Madras (Tamil Nadu), the covenantal obligations were also passed on and shared by the States of Kerala and

¹⁹⁵ Kidangazhi Manakkal Narayanan Nambudiripad v. State of Madras; AIR 1954 Mad 385; Jagannath Ramanuj Das v. State of Orissa, AIR 1954 SC 400; Commissioner of Hindu Religious and Charitable Endowments, Mysore v. U. Krishna Rao, and AIR 1970 SC 414.

¹⁹⁶ Section 19 of the Constitution (Seventh Amendment) Act, 1956, with effect from 1.11.1956.

Tamil Nadu by making payments to the Devaswom Funds from the Consolidated Funds of these States.¹⁹⁷

Apart from the historical context of the formation of the Devaswom Fund, the annual payment to Devaswom funds as granted in article 290-A of the Indian Constitution remains open to objection. This is a continuation of the old system of State patronage to religious institutions prevalent in India from ancient time. Similarly, in another case¹⁹⁸ the Delhi High Court uphold the constitutional validity of the State assistance to the celebrations associated with the 2500th anniversary of the attainment of salvation by Mahavira, the founder of Jainism. The Court said that the assistance of the State on an occasion like this neither amounted to State giving support to Jainism nor infringed on article 27 of the Constitution.

4.4.3 State Aid, Education and Freedom of Religion

Education is one of the important sectors where India's commitment to the philosophy of the secular State comes to force. Organized education in India traditionally remained closely associated with religion, specially confined to Hindu and Muslim religious institutions.¹⁹⁹ The Mughal emperor Akbar, nevertheless, made an attempt to impart secular education by means of government schools.²⁰⁰ It was also one of the duties of the Indian rulers to patronise classical learning that basically remained religious in character. The British government in India followed this policy. Consequently, in 1781 the British government founded the Calcutta Madrasa for Islamic study, in 1784 the Asiatic Society of Bengal for Oriental study, and in 1792 the Benaras Sanskrit College for Hindu classical learning. The Christian missionaries were also permitted to establish educational institutions of their choice to which some grants were defrayed by the government.²⁰¹

197 For details see Donald E. Smith, *op.cit.*, pp. 130-131. Devaswom Fund means fund meant for the Hindu religious purposes.

198 Suresh Chandra v. Union of India, AIR 1975 Del 168.

199 R. C. Majumdar, H.C. Raychaudhury and K. Dutta, *An Advanced History of India*, *op.cit.*, p. 264.

200 Abid S. Husain, *The National Culture of India*, *op.cit.* p. 71.

201 Donald E. Smith, *op.cit.* p. 336.

On the other hand, certain attempts were made by the British officials to follow the policy of religious neutrality in all government educational institutions. In 1854 Lord Bentinck, for instance, asserted:

The fundamental principle of British rule, the compact to which the government stands solemnly pledged, is strict neutrality... The same maxim is peculiarly applicable to general education. In all schools and colleges supported by government, this principle cannot be too strongly enforced. All interference and injudicious tampering with the religious belief of the students, all mingling of direct or indirect teaching of Christianity with the system of instruction ought to be positively forbidden.²⁰²

The dispatch of Sir Charles Wood, dated July 19, 1854, laid the foundation of the present-day system of education in India. The dispatch asserted that the government educational institutions should be strictly secular as these were founded for the benefit of the whole population of India.²⁰³ The dispatch, at the same time, brought out the grants-in-aid system to private educational institutions with financial support where the government required to take no notice whatsoever of the religious doctrines that may be taught.²⁰⁴

The framers of the Constitution of India laid great emphasis on education to eradicate illiteracy and backwardness prevalent in the country and to place the nation in the path of advancement in every field of knowledge with the hope of achieving integrated welfare of the citizens that furthers the cause of human dignity. For this purpose, they brought out a number of provisions under the Directive Principles of State Policy in Part IV of the Constitution.²⁰⁵

Besides the encouragement given to education through constitutional provisions, the State in India encourages private agencies including the religious communities to run educational institutions with the objective of speeding up literacy for the progress of the nation. The Constitution, moreover, guarantees that in

²⁰² Ibid. p. 336-337.

²⁰³ Ibid., p. 340.

²⁰⁴ Ibid. p. 341.

²⁰⁵ "The State shall, within limits of its economic capacity and development, make effective provisions for securing the right...to education..." Article 41, Constitution of India.

"The State shall Endeavour to provide, within a period of ten years from the commencement of this Constitution, for free and compulsory education for all children until they complete the age of fourteen years". Article 45, Constitution of India.

"The State shall promote with special care the educational and economic interest of the weaker sections of the people and, in particular, of the Scheduled Castes and Scheduled Tribes." Article 46, Constitution of India.

imparting education, the minorities are free to conserve their respective language, script, culture and religious tenets. The State in India assists with substantial aid to facilitate education through these institutions. In giving aid, the Constitution prohibits the State from religious or linguistic discrimination.

4.4.4 Restriction on Religious Instruction in Educational Institution

Article 28 of the Constitution is specifically concerned with the question of religious instruction in three categories of educational institutions. It provides:

- (1) No religious instruction shall be provided in any educational institution wholly maintain out of State funds.
- (2) Nothing in clause (1) shall apply to an educational institution which is administered by the State but has been established under any endowment or trust which requires that religious instruction shall be imparted in such institutions.
- (3) No person attending any educational institution recognized by the State or receiving aid out of State funds shall be required to take part in any religious instruction that may be imparted in such institution or to attend any religious worship that may be conducted in such institution or in any premises attached thereto unless such person or, if such person is a minor, his guardian has given his consent thereto.

Clause (1) of the Article 28 refers to the first category of educational institutions, which is wholly owned by the State, where the prohibition to impart religious instruction is absolute. Neither the State nor a private agency may provide religious instruction in such institutions. Clause (2) of Article 28 deals with the second category of educational institutions in which the State does the administration in the place of a trustee. However, under this category the institution itself is established under a trust or an endowment wherein the terms of the trust or endowment require imparting religious instruction, which is protected under this clause.

Clause (3) of Article 28 deals with the third category of educational institutions. These are owned and managed by religious denominations, but come under the system of grants-in-aid. These institutions are free to impart religious instruction. The provision under article 28 (3) assures the conscience clause by which the State protects the individual's right to freedom of conscience by placing them

above religion while at the same time the State acknowledges as well as protects religious pluralism.

D.V.A College, Julandhar V. State of Punjab²⁰⁶ saying that the provisioned not imply that religious instruction would be given. A provision for an academic study of, and research in, the life and teaching or the philosophy and culture of any great saint of India in relation to, or their impact on, the Indian and world civilization could not be considered as providing for religious instruction. The court stated that religious instruction is that ; which is imparted for inculcating the tenent, the ritual, the observance, ceremonies and mode of worship of a particular sector denomination'

In Aruna Roy V, Union of India,²⁰⁷ the Supreme Court has ruled recently that article 28 does not ban a study of religious. The whole emphasis of Art, 28 is "against imparting religious instruction" .There is no prohibition on ' Study of religious philosophy and culture, particularly for having value based social life in a society which is degenerating for power, post or property'.

4.4.5 Freedom as to Attendance at Religious Institution or Religious Worship in certain Educational Institutions

The last provision dealing with protection of religious freedom of minorities is Article 28.²⁰⁸

Article 28 (1) of the Article provides that no religious instruction shall be provided in any educational institution wholly maintained out of State funds. Thus, the institutions which are wholly maintained out of State funds are not amendable to this provision. The restriction laid down in clause (1) would not apply under clause.

Article 28 (2) Where an educational institution though administered by the State has been established under an endowment or trust.

Article 28 (3) provides that in educational institution recognized or aided by the State, no student can be required to take part in religious instructions given in that institution unless he consents or if he is a minor, his guardian consents to it.

Article 28 makes a distinction among three types of educational institutions i.e., institution of completely public nature, where there is absolute prohibition on religious education; the institution where State acts as trustee, religious instructions

²⁰⁶ AIR 1971 SC 1731

²⁰⁷ {2002}6, SCALE 408, also see, infra, sec.f.

²⁰⁸ Freedom as to attendance at religious institution or religious worship in certain educational institution

are allowed: the institution aided by the State, the religious instructions is permitted on a voluntary basis. Article 28 (3) thus supplements Article 30(1).²⁰⁹

In a very recent case²¹⁰ (popularly known as Natioanl Anthemcase) the Division Bench²¹¹ of the Supreme Court has held that no person can be compelled to join in the singing of National Anthem against his will, “if he has genuine conscientious religious objection”. Such compulsion, according to the court would be violative of the fundamental right guaranteed under Articles 19(1) (a) and 25 (1) of the Constitution. The facts of the case in brief were as follows: Some children from a school in Kottayam, Kerala were debarred from attending their classes because they refused to sing the National Anthem of the country. These children belonged to Jehovah’s witnesses who worshipped only Jehovah – the creator – and none other. It was against the tenants of their religious faith which does not permit them to join in any rituals except if it be in their prayers to Jehovah.

The school authorities had made it compulsory for the children to participate in morning school assembly when National Anthem was sung. The children who are petitioner in this case stood mutely and refused to sing National Anthem even though there was circular to that effect issued by the Directorate of Education. Consequently they were expelled from the school on July 26, 1985. The petitioners moved the Kerala High Court.²¹² The High Court rejected their plea on the ground that National Anthem affected no body’s religious susceptibilities and thus appealed to the Supreme Court. The Supreme Court held that there was no provision in law which obliged any one of sing the anthem nor it is disrespectful to the anthem if a person stood up and did not join in the singing. “Such conduct does not either prevent the singing of the National Anthem nor causes disturbance to an assembly engaged in such singing so as to constitute an offence under section 3 of Prevention of Insults to National Honour Act, 1971. The court pointed out that Jehovah’s witnesses have the same attitude towards “God save the Queen” in Britain and “The Star-Spangled ...” in the U.S.A.²¹³

²⁰⁹. M.P. Jain, op.cit. Supra note 101 at 535.

²¹⁰ Judgment delivered on 12th August, 1986. See Kusum, “To sing or not to sing”, The Hindustan Times (Sunday Magazine) August 24, 1986, p. 9.

²¹¹ It comprised of Chinnappa Reddy and M.M. Dutt, J.J. 70 The title of the case is Bijoe Emanuel v. State of kerala, 1986 Feb.

²¹² The title of the case is Bijoe Emanuel v. State of kerala, 1986 Feb.

²¹³ In *Minersville School District v. Gobitis* (1940) the religious freedom and salute to American flag was involved. Justice Frankfurter who gave the majority judgment (Justice Stone dissenting) held the religious freedom must give way to political authority. In the second case, *West Virginia State Board of Education v. Barnette*,.

neither their patriotism nor their nationalism has been called into question on this score. This decision has been seen by some as encouragement to separatism in India.

4.5 Right to Cultural and Educational and Religious freedom

[1] Article 29-Protection of Minority Interest [2] Article 30- Right Minorities' to Establish and Administer Educational Institution,

In the present state of affairs, education is a costly sector in India as it is elsewhere. So, educational institutions need substantial grants by way of aid from the State. In this context, in dealing with education in the country, the Constitution guarantees to minorities the right to conserve their language, script and culture. The State also grants to all minority communities, whether based on language or religion, the right to establish and administer educational institutions of their choice as given in the article 29 and 30.

4.5.1 Protection of Interest of Minority

Article 29 reads:

(1) Any section of the citizens residing in the territory of India or any part thereof having a distinct language, script or culture of its own shall have the right to conserve the same.” (2) No citizen shall be denied admission into any educational institution maintained by the State or receiving aid out of State funds on grounds only of religion, race, caste, language or any of them.

4.5.2 Right to minority to establish and administer education institution

Article 30 Reads;

(1) All minorities, whether based on religion or language, shall have the right to establish and administer educational institutions of their choice.

(2) The State shall not, in granting aid to educational institutions, discriminate against any educational institution on ground that it is under the management of a minority, whether based on religion or language.

Clause (1) of article 30 guarantees to all minorities the right to establish educational institutions of their choice and clause (2) of the same article saves educational institutions managed by minority communities from discrimination in giving State aid. This article is supplementary to clause (a) of article 26, which empowers religious denominations to establish institutions for charitable purposes.

State aid involves also State control over beneficiary institutions in order to see that the goal set by the government is better realized. Some of the methods of control exercised by the State such as inspection, process of granting recognition,

auditing and qualification of teachers etc., are acceptable to all. The conflict of interest arises when control becomes a matter of interference with the internal administrative policies, which are proper to these institutions. The requirement here is a harmonious understanding between the general interest of the society at large and affirmative interest of the minority communities to maintain their identity as well as their development. On several occasions the Supreme Court has been appealed to on account of conflicts arising from State encroachment on the autonomy of the minorities to manage their educational institutions as alleged by the latter. Christians have brought most of these allegations as they run the highest number of educational and charitable institutions across the country. We shall examine for our purpose three important cases²¹⁴ of this sort to see in the judicial decisions values that protect human dignity.

The propriety of interference in the management of schools aided by the State arose for the first time in a historic case in 1957 in reference to the Kerala Education Bill case.²¹⁵ The object of the Bill was to lay down certain rules for the better management of all aided educational institutions in the State of Kerala. Clause 3 (5) of the Bill warned that failing to comply with the stipulations of the Bill would amount to forfeiture of State recognition of the concerned schools. Sub-clause (3) of clause (8) made it known that the fees collected from the students in an aided school must be deposited with the government. Clause 9 dealt with certain regulations regarding the salary of the teachers employed in the State aided schools. Clauses 10, 11 and 12 authorized the State to prescribe qualification for the appointment of teachers and regulations to improve the working conditions of the school staff. In particular clause 11 provided that appointment of teachers should be made by the Public Service Commission with due regard to the principle of communal reservation. Clauses 14 and 15 contained provisions for government takeover of the schools in case of mismanagement.²¹⁶

The Managers of the Christian minority schools pleaded before the Supreme Court that the impugned Bill was an infringement of their rights guaranteed under clause (1) of article 30 of the Constitution. The State of Kerala, on the contrary,

²¹⁴ Sidhrajibhai Sabbai, Rev. v. State of Gujarat, AIR 1963 SC 540 (Hereafter it will be referred to as SidhrajibhaSabbai), W. Proost. Rev. Father V. The State of Bihar, AIR 1969 SC 465 (Hereafter it will be referred to as Fr. Proost).

²¹⁵ The Kerala Education Bill, 1957, AIR 1958 SC 956.

²¹⁶ Ibid. at 982.

defended the Bill on the ground that so long as the institutions did not receive any aid from the State, they had a right to establish and maintain their educational institutions within the meaning of article 30 (1) of the Constitution. However, if the minorities were the beneficiaries of any State aid, they had to abide by the terms of the aid, provided there was no discrimination.

In giving verdict to this case, the Supreme Court rejected the extreme positions taken by the State of Kerala and the Managers of the Christian minority schools. The Supreme Court held that without infringing the rights guaranteed to the minorities under article 30 (1), it was open to the State through proper channel to lay down reasonable rules and regulations governing the institutions receiving the aid. The Court observed: It stands to reason... that the constitutional right to administer an educational institution of their choice does not necessarily militate against the claim of the State to insist that in order to grant aid the State may prescribe reasonable regulations to ensure the excellence of the institutions to be aided.²¹⁷

But the Supreme Court held that such rules could not violate the fundamental right of the minority educational institutions to administer them as protected under Article 30 of the Constitution because the legislative power of the State was subject to fundamental rights.²¹⁸ In regard to the over-all tenor of the Bill, one writer observed that the most fundamental Christian objection to the Bill was that it took away the freedom of the management to appoint the kind of teachers needed to maintain the distinctive Christian orientation and atmosphere in the school²¹⁹

A couple of years later the Sidhrajbai Sabbai case²²⁰ was brought before the Supreme Court for protection under article 30 of the Constitution. The Sidhrajbai Sabbai case was about a minority Christian society, known as the Gujarat and Kathiawar Presbyterian Joint Board, which was running several primary schools and a Teacher's Training College in the State of Gujarat. The college was getting an annual grant under the Education Code of the State of Gujarat. The Education Department of the State held examinations and granted certificates to teachers trained in the college of the Sidhrajbai Sabbai Board. The State was interfering with the admission policy

²¹⁷ Ibid., at 983,

²¹⁸ Ibid., at 984,

²¹⁹ C.P. Mathew, "Church in Kerala and the New Education Act", in N.C.C. Review, vol. 79 (1959), pp. 271-272.

²²⁰ Rev. Sidhrajbai Sabbai v. State of Gujarat, AIR 1963 SC 540.

of the college and ordered that 80 per cent seats of the college should be reserved for the nominees of the Government of Gujarat on the ground that the State of Gujarat need to train 40,000 teachers to staff the primary schools in that State. On refusal to comply with the State order, State aid was suspended.

As the college belonged to the minority religious community, the Managing Board of the college appealed to Supreme Court for constitutional protection under article 30 (1), in addition to a few other provisions of the Constitution. In its observation of the instance case, the Supreme Court found that the order of the Gujarat Government made serious inroads into the rights guaranteed to the Managing Board to administer the college under clause (1) of article 30. In issuing the judgment, the Court compared this article with article 19 under which reasonable restrictions can be placed on the fundamental rights of citizens.

The Supreme Court observed in the instant case: Unlike Art. 19, the fundamental freedom under clause (1) of Art.30, are absolute in terms: it is not made subject to any reasonable restrictions of the nature the fundamental freedoms enunciated in Art.19 may be subjected to. All minorities, linguistic or religious have by Art.30 (1) an absolute right to establish and administer educational institutions of their choice; and any law or executive direction which seeks to infringe the substance of that right under Art. 30 (1) would to that extent be void. This, however, is not to say that it is not open to the State to impose regulations upon the exercise of this right...Regulations made in the true interests of efficiency of instruction, discipline, health, sanitation, morality, public order and the like may undoubtedly be imposed. Such regulations are not restrictions on the substance of the right which is guaranteed: they secure the proper functioning of the institutions, in matters educational.²²¹

The Supreme Court, furthermore favouring the argument of the appellants that the regulatory measures of the State could only be in the interest of the minority institution, emphasized: The rights established by Art. 30 (1)...is intended to be effective and is not to be whittled down by so-called regulative measures conceived in the interest not of the minority educational institution, but of the public or the nation as a whole...Regulations which may lawfully be imposed either by legislative or executive action as a condition of receiving grant or of recognition must be directed to making the institution while retaining its character as a minority institution. Such

²²¹ Ibid., at 545. Our emphasis is in italics.

regulation must satisfy a dual test – the test of reasonableness and the test that it is regulative of the educational character of the institution and is conducive to making the institution as effective vehicle of education for the minority community or other persons who resort to it.²²²

These judicial observations led the Supreme Court to decide that State's order to reserve 80 per cent of the seats for its nominees was an unreasonable demand on the minority college and, therefore, violated the protection granted to minority institutions under clause (1) of article 30 of the Constitution. Similarly, in the case of Fr. Proost²²³ the Supreme Court had to decide once again on the extent of protection guaranteed to minority educational institutions under Article 30 (1) of the Constitution. In this case, the petitioners were the Jesuit Fathers of the Catholic Church who established the St. Xavier's College and got it affiliated with Patna University, who wanted to secure to the college the rights appertained to a minority educational institution.

The management of the college under consideration contended that the college was founded to give Catholic youth a full course of moral and liberal education by imparting religious instruction and maintaining "a Catholic atmosphere in the institution".²²⁴ The management however, asserted that the college was also open to all non-Catholic students. The State of Bihar, nevertheless, argued that even though the college came under minority community, the protection of Article 30 (1) could not be extended to the college because the provision of the said article applied only to the institutions, which were founded to conserve the language, script or culture as referred to under article 29 (1) of the Constitution. The State of Bihar further contended that the college under consideration in the instant case was, moreover, open to all sections of the people and there was no programme of such kind as specified under Article 29 (1) of the Constitution and, therefore, the college did not qualify to seek protection of the Constitution as guaranteed under Article 30 (1).

The Supreme Court rejected altogether the position taken by the State of Bihar. The Court asserted that articles 30 (1) and 29 (1) had specific purposes. Article 30 (1) applied to all minority educational institutions. The fact that the members of the other community were given admission in a minority community did not prevent

²²² Ibid, at 547. Our emphasis is in italics.

²²³ W. Proost, Rev. Father V. The State of Bihar, AIR 1969 SC 465.

²²⁴ Ibid., at 466. Our emphasis is in italics

it to secure protection of Article 30 (1) of the Constitution. The Supreme Court observed that the benefit of article 30 (1) was not limited to the needs of a single community exclusively, but it grants minorities the right to establish educational institutions to cater to the educational need of the citizens or section thereof.

The Courts in India have upheld two principles in the aforesaid cases. Firstly, under clause (1) of article 30, the Courts have defended in absolute term the protection guaranteed to the minority institutions to establish and administer educational institutions of their choice. Secondly, the Courts have also approved the State- intervention to impose reasonable regulations on them in the interest of efficiency of the institution and to maintain certain fundamental human values, such as public order, morality and health²²⁵ which are necessary for people to organise their lives in a manner that protects human dignity

In the case of the Kerala Education Bill,²²⁶ while admitting State intervention, the Supreme Court upheld the State action on basis of human welfare for the benefit of employees and backward classes.²²⁷ Similarly, in the case of Sidhrajibhai Sabbai²²⁸ the Supreme Court held valid State intervention in the minority institutions in the interests of efficiency of instruction, discipline, health, sanitation, morality, public order and the like. The Court, nevertheless, observed that “such regulations are not restrictions on the substance of the right”²²⁹ granted to minorities under clause (1) of article 30 but to secure the proper functioning of the institutions in a way that is affirmative of human dignity.

These judicial decisions on minority institutions reiterate the principle of tolerance by respecting plural ways of life in the civil society, which is an integral aspect of Indian ethos. The value significance of this principle finds constitutional protection under articles 29 and 30. While clause (1) of article 29 guarantees to any section of the citizens residing in the territory of India or any part thereof having a distinct language, script or culture of its own the right to conserve the same, article 30 protects the right to minorities based on religion or language to establish and administer educational institutions of their choice. Therefore, minorities are given space to preserve and promote the value potentials of their respective traditions as

²²⁵ Ibid., at 466. Our emphasis is in italics

²²⁶ In re The Kerala Education Bill, 1957, AIR 1958.

²²⁷ Ibid., at 983.

²²⁸ Ibid., at 983.

²²⁹ Ibid., at 545. Our emphasis is in italics

well as to put them in the service of the nation by way of educational institutions. Supreme Court's position on these cases also indicates that the judiciary recognizes the reality of the Indian people characterized by a pluralism of identities, namely religious, cultural and linguistic. Constitutional recognition of this pluralism is a veritable affirmation of the dignity of human persons in their individual self-identities and in their collective community identities.

4.6 Abolition of Untouchability

The practice of untouchability based on the caste system has been a blot on the Indian society. Here we are concerned with the practice of untouchability whereby a certain section of the Indian community on account of their birth or profession were shunned and excluded in the past from religious practices in the Hindu temples. Various theories and opinions have been proposed on the origin of the caste system and untouchability²³⁰ some regard it as part of Hindu religion and others treat it as merely a social structure, which happened to develop in India.

In one of the early studies, Hutton wrote, "The social habits of caste are inextricably tied up with religions".²³¹ Similarly, Dr. B.R. Ambedkar, the leader of the depressed classes²³² declared, "To ask people to give up caste is to ask them to go contrary to their fundamental religious notions".²³³ Among the multitudinous caste divisions of Hindu society, it was the people who belonged to the untouchable castes who suffered maximum disabilities and received from their fellow religionists the most uncivilized treatment for ages. In most of the Hindu kingdoms, especially in South India, for centuries people of the untouchable castes were treated as slaves and their women were not allowed to wear clothing above the waist.²³⁴ During the British rule, one of the measures adopted by the government to establish legal equality was the government policy to admit the children of the untouchable castes in all

²³⁰ B.R. Ambedkar, *Annihilation of Caste* (Bombay, Bharat Bushan Publishing House, 1937); J.H. Hutton, *Caste in India: Its Nature, Function and Origin* (Bombay, Oxford University press, 1951); Max Weber, *The Religion of India: The Sociology of Hinduism and Buddhism* (Illinois, Glencoe, Free press, 1958); G.S. Ghurye, *Caste and Class in India* (Bombay, Popular Book Depot, 1971). '

²³¹ J.H. Hutton, *op.cit.* p. 23.

²³² Donald E. Smith, *op.cit.*, p. 303;

²³³ B.R. Ambedkar, *Annihilation of Caste*, *op.cit.* p. 39. 2

²³⁴ K.M. Panikkar, *Hindu Society at Cross Roads*, *op.cit.* p. 3.

government schools and in all State aided schools. By 1878, this policy was enhanced by giving special fee concessions to these children²³⁵

The significant contribution of the British regime in this regard was that the State under British rule reduced the power of the caste-based village political institution known as the panchayat and expanded the secular jurisdiction of the State. The British administration inculcated the secular principle that it was within the purview of the State to regulate and change society by legislation and, therefore, marginalized the traditional caste regime, which held its power by the authority of the sacred texts and immemorial customs.²³⁶

The Indian Secular State disregards caste in the same way as it disregards religion in defining an individual's rights and duties in terms of citizenship. An egalitarian society of individuals has become the legal basis of the social order as against a hierarchy of persons of lower and higher before the law. Equality before the law and equal protection of the law has been the positive expression of this principle as given in article 14 of the Constitution, which reads, "The State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India".

In fact, prior to the creation of the Constitution, determined efforts were made by Indian reformers in many parts of the country to abolish untouchability. These efforts had enabled many States during the British Raj to enact legislations proscribing the practice of untouchability in any form.²³⁷ these efforts received constitutional expression in article 17 of the Constitution, which abolished untouchability and made its practice in any form a punishable offence. Article 17 states, "Untouchability" is abolished and its practice in any form is forbidden. The enforcement of any disability arising out of "Untouchability" shall be an offence punishable in accordance with law."

In pursuance of article 17, the Parliament enacted in 1955 the untouchability (offences) Act²³⁸ prescribing punishments for the practice of untouchability. This Act applies not only to Hindus but also to all who take part in the excommunication of, or imposition of any social disability on, any person who refuses to practice

²³⁵ M.N. Shrinivas, "A Note on Sanskritization and Westernisation", in *Far Eastern Quarterly*, vol. 15 (1956), p. 495.

²³⁶ J.H. Hutton, *op.cit.* pp. 94-148.

²³⁷ G.S. Ghurye, *op.cit.*, pp. 189-190

²³⁸ Donald E. Smith, *op.cit.*, p. 304.

untouchability.²³⁹ In regard to the practice of religion and untouchability, the Act makes it an offence to prevent any person from entering places of public worship due to the practice of untouchability. The Act says: (i) Whoever on the ground of untouchability prevents any person: from entering any place of worship which is open to other persons professing the same religion or belonging to the same religious denomination or any section thereof, as such person; or (ii) from worshipping or offering prayers or performing any religious service in any place of public worship, in the same manner and to the same extent as is permissible to other persons professing the same religion or belonging to the same religious denomination or any section thereof, as such persons; shall be punishable with imprisonment which may extend to six months, or with a fine which may extend to five hundred rupees or with both.²⁴⁰

In a case²⁴¹ brought before the Allahabad High Court, the Court upheld the conviction of two dhobis (washer men) under the United Provinces Act,²⁴² who refused to wash the clothes of Chamars, an untouchable caste, in that Province. Similarly, a barber who refused to cut the hair of individuals belonging to the caste of cobblers and leather workers was convicted under the West Bengal Hindu Social Disabilities Removal Act.²⁴³ The petitioner in the instant case²⁴⁴ registered his contention before the Calcutta High Court claiming that the impugned Act contravened his constitutional right to carry out his profession as barber. The Court rejected his claim and held that regulations imposed by the Act were reasonable ones, which were meant to remove social evil, and, therefore, in no way deprived the petitioner of his constitutional rights.

In the famous Vishwanath temple case of Banaras²⁴⁵ the petitioners challenged the constitutionality of the Uttar Pradesh Removal of Social Disabilities Act.²⁴⁶ The Act provided that a person could not prevent another from having access to any public temple or enjoying the advantages, facilities and privileges of any such temple to other Hindus. Traditionally the Vishwanath temple of Banaras was open to high caste Hindus only. The low-caste Hindus, the so-called Harijans, were not allowed to enter

²³⁹ The Bombay Harijan (Removal of Social Disabilities) Act, 1946 (Bombay Act 10 of 1946);

²⁴⁰ Removal of Civil Disabilities Act, 1946 (Orissa Act 11 of 1946);

²⁴¹ Untouchability (Offences) Act, 1955 (Act 22 of 1955).

²⁴² Section 7, the Untouchability (Offences) Act, 1955.

²⁴³ Section 3, the Untouchability (Offences) Act, 1955.

²⁴⁴ State of U.P. v. Banwari, AIR 1951 All. 615. Quoted in Donald E. Smith, op.cit., p. 307

²⁴⁵ U.P. Removal of Social Disabilities Act, 1947 (U.P. Act 14 of 1947).

²⁴⁶ The West Bengal Hindu Social Disabilities Removal Act, 1948 (West Bengal Act 37 of 1948).

the main portion of the temple for darshan (worship) of the presiding deity. When the Harijans demanded entry on the basis of the enabling Act, the temple authorities objected on the ground that the Act was unconstitutional. The Division Bench of the Allahabad High Court rejected the petitioners' objection and held the impugned Act valid on the basis of social welfare and reform initiated by the State of Uttar Pradesh.

In 1966 another important case of a similar kind²⁴⁷ was appealed before the Supreme Court. In this case the appellants challenged the Bombay Act,²⁴⁸ which permitted to open Hindu places of worship to all sections and classes of Hindus. The appellants, who belonged to a certain Swaminarayan sect, known as the Satsangi sect, registered their contention that theirs was a sect, which was entirely separate and distinct from rest of the Hindu community. Therefore, the appellants claimed that the untouchables and even other non-satsangis could not claim entry to their temples.

The Supreme Court, however, rejected the contention of the petitioners on the ground that the Satsangis formed part of Hindu religion and, therefore, they could not exclude entry to low caste Hindus even if they were non-Satsangis. Dr. Gajendragadkar, Chief Justice, who delivered the judgment of the Supreme Court in the instant case, asserted that the main objective of the temple entry act was "to establish complete social equality between all sections of Hindus in the matter of worship".²⁴⁹

While giving the decision of the Supreme Court, first of all the Chief Justice traced the long history and nature of Hinduism. He relied on the authoritative scholarly interpretation of Hinduism written by such scholars as Monier Williams, Dr. Radhakrishnan, Max Muller and Bal Gangadhar Tilak,²⁵⁰ and then indicated the evolution of the Satsangi sect and its religious ideal as having based on the philosophy of Visishtadvaitavada of Ramanuja Chari. Consequently, the honourable Chief Justice declared though the Satsangis could be considered as reformers, yet they were not out of the Hindu fold. Summing up the observations of the Court he then asserted: In conclusion, we would like to emphasise that the right to enter temples which has been vouchsafed to the Harijans by the impugned Act in substance symbolises the right of

²⁴⁷ Banamali Das v. Pakhu Bhandari, AIR 1951 Cal. 167. Quoted in V.D. Mahajan, The Constitutional Law of India, and op.cit. p.126.

²⁴⁸ Swami Hariharan and Saraswati v. The Jailor in Charge, District Jail, Banaras, AIR 1954 All. 601.

²⁴⁹ U.P. Act 14 of 1947.

²⁵⁰ Shastri Yagnapurshdasji v. Muldas Bhunardas Vaishya, AIR 1966 SC 1119.

Harijans to enjoy all social amenities and rights for, let it always be remembered that social justice is the main foundation of the democratic way of life enshrined in the provisions of the Indian Constitution.²⁵¹

In summing up these observations, we stress that the caste based hierarchical social order of the Hindu society has been a stumbling block for the creation of an egalitarian social order because the caste system divides the human community into high and low before the law. Implicit in this system is the concept of hierarchical anthropology according to which human persons in their essential nature are not equal by birth. The caste-based anthropology denies the dignity of human persons as moral subjects and remains opposed to an egalitarian social order, which is a pre-requisite to establish secular State. Therefore, religion must give way to these legal measures amounting to social welfare and reform.

4.7 Religious Freedom and Right to Equality

Articles 14, 15 and 16 of the Constitution of India deal with the right to equality. Article 17 is the special provision that abolishes ‘untouchability’ and forbids its practice in any form. Right to equality before the law and equal protection of the law to all citizens irrespective of religion, race, sex and place of birth is one of the basic values of a secular democratic State.²⁵² Article 14 of the Constitution provides both aspects of equality to all persons, including aliens who reside within the territory of India.²⁵³

There are at the same time some provisions of the Constitution that recognise exception to the general rule of equality on various reasonable grounds. These are given in clauses (3) and (4) of article 15 and in clauses (4) and (5) of article 16. Exceptions to the general rule of equality granted under clause (4) of article 15 and clause (4) of article 16 would be of interest for our consideration.

Article 15 reads: (1) The State shall not discriminate against any citizen on grounds only of religion, race, caste, sex, place of birth or any of them. (2) No citizen

²⁵¹ The Bombay Hindu Places of Public Worship (Entry Authorisation) Act, 1956 (Bombay Act 31 of 1956).

²⁵² Shastri Yagnapurshdasji v. Muldas Bhunardas Vaishya, AIR 1966 SC 1119, at 1127.

²⁵³ Ibid., at 1128-1129, 1130-1134.

shall, on grounds only of religion, race, caste, sex, place of birth or any of them, be subject to any disability, liability, restriction or condition with regard to – (a) access to shop, public restaurants, hotels and places of public entertainment; or (b) the use of wells, tanks, bathing ghats, roads and places of public resort maintained wholly or partly out of State funds or dedicated to the use of general public. (3) Nothing in this article shall prevent the State from making any special provision for women and children. (4) Nothing in this article or in clause (2) of article 29 shall prevent the State from making any special provision for the advancement of any socially and educationally backward classes of citizens or for the Scheduled castes and the Scheduled Tribes.

Article 16 reads: (1) there shall be equality of opportunity for all citizens in matters relating to employment or appointment to any office under the State. (2) No citizen shall, on grounds only of religion, race, caste, sex, descent, place of birth, residence or any of them, be ineligible for, or discriminated against in respect of, any employment or office under the State. (3) Nothing in this article shall prevent Parliament from making any law prescribing, in regard to a class or classes of employment or appointment to an office (under the Government of, or any local or other authority within, a State or Union territory, any requirement as to residence within that State or Union territory) prior to such employment or appointment. (4) Nothing in this article shall prevent the State from making any provision for the reservation of appointments, or posts in favour of any backward class of citizens which, in the opinion of the State, is not adequately represented in the services under the State. (5) Nothing in this article shall affect the operation of any law which provides that the incumbent of an office in connexion with the affairs of any religious or denominational institution or any member of the governing body thereof shall be a person professing a particular religion or belonging to a particular denomination.

Article 15 of the Constitution provides for a particular application of the general principle of equality embodied in Article 14. Clause (1) of article 15 directs the State not to discriminate against any citizen on the ground only of religion, race, caste sex or place of birth or any of them. The prohibition contained in this clause applies to the State in dealing with citizens.²⁵⁴ Clause (2) of the article 15 prohibits the private individual as well as the State from inflicting any discrimination or disability

²⁵⁴ Ibid., at 1135.

with regard to citizen's access to shops, hotels etc., and all places of public entertainment and resort.²⁵⁵ The social and religious impact of this clause is to be seen in the context of the dreadful history of the so-called 'untouchable people' who, for centuries in the past, were subject to social segregation and humiliation in many parts of the country.²⁵⁶ Similarly, clauses (1) and (2) of article 16 embody the principle of equality laid down in article 14 with reference to appointment and employment under the State.

Let us now analyze and see the rationale behind the exception clauses to the general doctrine of equality, which are known as provisions of "protective discrimination"²⁸³ or "compensatory discrimination."²⁵⁷ Clause (3) of article 15 makes exception in favour of women and children and clause (4) of the same article provides exception in favour of some backward classes of citizens and for Scheduled Castes and Scheduled Tribes for their advancement in the field of education. Similarly, clause (4) of article 16 gives exception in favour of any backward class of citizens in the area of appointment for jobs under the State, if they are not adequately represented in such services.

The framers of the Constitution were aware that women and children needed a humane social order conducive to their growth and empowerment affirmative of their dignity and, therefore, the State is free to enact provisions to that effect. The constitution-makers thought out also the socially and educationally backward communities as a 'class of people'²⁵⁸ who deserved, on reasonable grounds, certain concessions or differential treatment - also known as affirmative action - to catch up with the progress of the society so that these communities would be eventually enabled to join the national mainstream with dignity and self-respect.²⁵⁹ These exception clauses for differential treatment provided in the Constitution add a new dimension to what the right to equality means in a secular democratic State, which is committed to the principles of egalitarian social order and social justice in order to

²⁵⁵ Both aspects of the equality right are also found in the Charter of Universal Declaration of Human Rights of the United Nations: "All are equal before the law and are entitled without any discrimination to equal protection of the law." Article 7, Universal Declaration of Human Rights, (1948

²⁵⁶ V.D. Mahajan, *Constitutional Law of India*, op.cit. 86-87.

²⁵⁷ *Ibid.*, pp.109-110.

²⁵⁸ P.B. Gajendragadkar, *The Constitution of India*, op.cit. p.25.

²⁵⁹ Harold G. Coward, "India's Constitution and Traditional Presuppositions Regarding Human Nature" in *Religion and Law in Independent India*, ed., Robert D. Baird (New Delhi, Manohar Publications, 1993), pp. 35-37.

further the cause of human dignity for all citizens. It means equal treatment of equals in equal circumstances. However, this does not prohibit the State to make exceptions on reasonable grounds, if the exception sought by the State should be consistent with the advancement of the weaker sections of people in the society so that they may engage themselves with the rest of the society in self-respect and dignity. This principle was the defining to add clause (4) to article 15 by the Constitution (First Amendment) Act, 1951.²⁶⁰

The reason to amend article 15 of the Constitution arose as a result of the decision of the Supreme Court in the historic Champakam Dorairajan case.²⁶¹ The facts of the case were as follows: The Government of Madras had issued an order known as the Communal Government Order (Communal G.O.), which, inter alia, classified students on the basis of caste and community; and accordingly allotted a proportionate number of seats to each community in the State-run medical and engineering colleges. In 1951 Shrimathi Champakan Dorairajan, who sought admission in a medical college in the State of Madras, complained that she was denied admission on the ground that she was a Brahmin because more meritorious Brahmin candidates already filled the seats meant for that community. Therefore, she registered her case²⁶² before the Madras High Court challenging the constitutionality of the communal G.O as ultra virus of the Constitution.

The advocate General of the State of Madras justified the Communal G.O, because he pointed out that its objective was to afford facilities to backward classes to get into higher education for their advancement in the society. The Madras High Court, however, declared the communal G.O void as it contravened clause (1) of article 15 of the Constitution that prohibits discrimination on the grounds only of religion and caste. The Madras High Court observed that in the present case, the classification was solely based on the petitioner's caste and religion and, therefore, the Court concluded that the "Communal G.O ... flies in the face of article 15 (1) of the Constitution".²⁶³

²⁶⁰ C.H. Alexanderowicz, "The Secular State in India and the United States", in Journal of Indian Law Institute, vol.2 (1960), p. 289.

²⁶¹ Gregory H. Stanton, "Three Concepts of Equality: Compensatory Discrimination in India and America", in Indian Journal of Public Administration, vol. XXVII (January-March, 1981), pp. 1-28.

²⁶² For various kinds of classification permitted under the provisions of the Constitution of India for protective discrimination see V.D. Mahajan, Constitutional Law of India, op.cit. pp. 87-90.

²⁶³ Ibid., pp. 112-126; P.B. Gajendragadkar, The Constitution of India, op.cit., pp. 25-26.

On appeal, the Supreme Court favoured the decision of the Madras High Court.²⁶⁴ The Supreme Court, however, examined the case under clause (2) of Article 29,²⁶⁵ since the impugned G.O. came under the admission policy of the Government of Madras in educational institutions run by the State. The Supreme Court then observed:

The right to get admission into any educational institution of the kind mentioned in clause (2)...is not to be denied to the citizen on grounds only of religion, race, caste, language or any of them. If a citizen... has the academic qualifications but is refused admission only on grounds of religion, race, caste, language or any of them, then there is a clear breach of his fundamental right.²⁶⁶

Under these judicial observations within the purview of article 29 (2), the Supreme Court declared that the Communal G.O was void because its implementation amounted to discrimination only on grounds of religion and caste.²⁶⁷

As a sequel to this decision²⁶⁸ of the Supreme Court, clause (4) was added to article 15 to empower the State to enact special provision for the advancement of the socially and educationally backward classes of the citizens as directed by article 46 of the Constitution.²⁶⁹ It is to be noticed, at this point of our investigation, that the backwardness of some sections of people is closely connected with caste and religion to which they belonged. In instances of this sort, religious freedom must give way to the operation of the enabling provisions for affirmative action, which is appropriate to the objectives of the welfare State as intended by the framers of the Constitution.²⁷⁰

Hence, clause (4) of article 15 is an enabling provision to carry forward the objectives of the welfare State in defence of human dignity of the weaker sections of citizens in the society. It does not impose any obligation but only empowers State Governments to take appropriate measures necessary when situations arise to further the cause of social welfare consistent with the progressive enhancement of human dignity in a particular socio-historical context. The affirmative action's permitted by

²⁶⁴ P.B. Gajendragadkar, *The Constitution of India*, op.cit, p. 26.

²⁶⁵ V.D. Mahajan, *Constitutional Law of India*, op.cit, p.523.

²⁶⁶ *The State of Madras v. Champakam Dorairajan*, (1951) SCJ 313.

²⁶⁷ *Champakam Dorairajan, Smt v. The State of Madras*, LLR(1951) Mad.149

²⁶⁸ *Ibid.*, at 197.

²⁶⁹ *The State of Madras v. Champakam Dorairajan*, (1951) SCJ 313.

²⁷⁰ "No citizen shall be denied admission into any educational institution maintained by the State or receiving aid out of State funds on grounds only of religion, race, caste, language or any of them." Clause (2) of article 29, Constitution of India.

the State in India under article 15 (4) are available to those citizens who come under the classification of backward classes, Scheduled Castes and Scheduled Tribes.²⁷¹

Similar objectives of the welfare State in view, some special provisions benefiting certain sections of citizens have been provided in Articles 330 to 334 in Part XVI of the Constitution. Article 330 provides for the reservation of seats for the Scheduled Castes and Scheduled Tribes in the Parliament, whereas article 332 gives reservation facilities in the Legislative Assemblies. Articles 331 and 333 provide for representation of the Anglo-Indian community in the Parliament and Legislative Assemblies by nomination. Article 334 recommends certain time frame for the termination of these special considerations. These provisions do not amount to fundamental rights. However, like the constitutional intension implied in article 15(4),²⁷² they are meant to facilitate certain weaker sections of society to regain their rightful place in the plural society, which is consistent with the progress of the nation and civilized thoughtfulness in solidarity with those sections of citizens who haven't caught up with the national mainstream.

The foregoing study enables us to see the meaning of the right to equality as provided in article 14 of the Constitution. It means equal treatment of equals in equal circumstances. It does, however, permit the State in India, under its constitutional provisions, to provide differential treatment to citizens from marginal sections of the society with the objective of improving their social, economic and educational position befitting to a standard of life worthy of human dignity.²⁷³ The implied principle is that a society is egalitarian when all are treated with respect in their dignity as human persons. This egalitarian principle of the Indian Constitution, when seen in the context of the welfare State, demands the protection of human dignity by promoting the development of all sections of the people. Religion must cooperate in the functioning of the Constitution to achieve its humane objectives.

The Preamble of the Constitution of India and the various provisions of Part III and IV of the Constitution explicitly enunciate that the positive content of the political freedom consists in establishing an egalitarian social order based on the principles of the welfare State and Democracy. The purpose of the constitutional

²⁷¹ The State of Madras v. Champakam Dorairajan (1951) SCJ 313, at 315,316

²⁷² Ibid., at 317.

²⁷³ The State of Madras v. Champakam Dorairajan (1951) SCJ 313 Ibid., at 317

vision is to create a mighty solidarity²⁷⁴ of all citizens of India and to safeguard the dignity of the individual as well as to protect the unity and integrity of the nation.²⁷⁵

In pursuance of these ideals, the State in India has been empowered to enact legal measures for social welfare and reform. Religious beliefs and practices that contravene these legislations, which are intended to promote all round welfare of the people consistent with the progressive enhancement of human dignity, must be redefined and updated in order to create space for these State measures.

For centuries in the past, the Indian society had been a divided society before the law as it was structured on a caste based hierarchical social order according to which human persons in their essential nature are not equal by birth. In this particular social and religious milieu, which seems to be unique to Indian society, article 17 together with article 15 (2) (4) and article 25 (2) (b)²⁷⁶ have the revolutionary potential to carry forward social reform and to transform the caste ridden Indian society into an egalitarian social order, wherein the inalienable worth and dignity of each individual person as a moral subject is affirmed and protected by the secular law of the Constitution.

²⁷⁴ ” Article 46, Constitution of India.

²⁷⁵ State of Kerala v. N.M. Thomas, AIR 1976 SC 490

²⁷⁶ V.D. Mahajan, Constitutional Law of India, op.cit., p. 113