CHAPTER I
INTRODUCTION

India is a land of different religions. Out of the Eight Major religions in the world, four have their origin in India. The constitution of India has accepted the principles of secularism. Secularism in India means that religion will not play any part in the public affairs of the country. During the British regime, India was not completely a secular state, some of the religions enjoyed weightage. In Europe till the 16th century the State was under the direct or indirect control of the Pope and during that period the idea of secularism in the state system arose. The history of the struggle between Church and king in England is very eloquent, for various reasons the church tried to exercise its powers in such a way as to hamper the administration of the King. In India there was no organized church and there was no conflict between religious powers and the political power.

Secularism is a protean concept, defying all efforts to pin it down to precise, concrete proposition.¹ The Encyclopedia of Britannica defines secular as 'Non-spiritual, having no concern with religious or spiritual matters. "It is used in wider sense of "anything which is distinct opposed to or not connected with religion or

ecclesiastical things, temporal as opposed to spiritual or ecclesiastical."

1.1 Concept of Religion and Secularism:

Religion is one of the important social institutions. Religion refers to the most sublime of human aspirations. Religion is existing throughout the history of human society. It is a part of human social life. It shapes human behaviour in a major fashion. Religion is a system of belief in the existence of supernatural beings.\(^3\)

According to *Emile Durkheim*, religion is “a unified system of beliefs and practices related to sacred things, that is to say, things set apart and forbidden beliefs and practices which unite into one single moral community called a church, all those who adhere to them.”

Well known person *James G. Frazer* says that religion is “a belief in powers superior to man which are believed to direct and control the course of nature and of human life.”

There should be no hesitation regarding India as a secular state if the essential element of secularism that the state is not the medium of interaction between man and God nor God is the foundation of the state. A secular state does not deny the existence of God. Existence of God unless, its recognition of the concept of religious freedom is construed as an indirect acceptance. But there may be a religion even without God. In fact, a secular state only says that all political power is derived from the people, a more

visible, although not a very determinate source, than God, and the Preamble to the Constitution of India also affirms.\textsuperscript{4}

Secularism means separation of the State from the church, mosque, temple or gurudwara, non-existence of religious fanaticism and religious intolerance, separation of political and economic processes form religious dogmas and injunctions, and acceptance of sociological and social changes in personal family religions. The term secular was made facile from the Latin 'saeculum' and 'saecularis', which originally meant "an age or generation" the times or the world. In Christian Latin, the word signified an association overtly opposed to the church.\textsuperscript{5}

The cause of the right to freedom of religion is the concept of religion itself, constitution does not define. In the Indian context, it is not always enough to say that “the term ‘religion’ has reference to one’s views of his relation to his creator”\textsuperscript{6} because a religion like Buddhism or Jainism does not believe in God or creator. Besides, in view of the phraseology of article 25(1), the word “religion” is not to be confined to a system of beliefs, tenets or doctrines, but should be seemed to include the scheme of forms, rites and ceremonies forming part of a religion or a religious denomination or sect.

Thus, “religion” refers to the body of ideas as well as the practices and performances peculiar to a religion.\textsuperscript{7} The Supreme Court observed in Lakshmindra Swamiar’s case, “A religion may not only lay down a code of ethical rules for

\textsuperscript{4} Tyagi Ruchi, Secularism in Multi-Religious Indian Society.
\textsuperscript{5} Encyclopedia Britannica, London 1950, XX, 264.
\textsuperscript{6} Davies v. Beason, (1890) 133 U.S. 333.
\textsuperscript{7} Ratilal Gandhi’s case, 1954 AIR 388, 1954 SCR 1035.
its followers to accept, it might prescribe rituals and observances, ceremonies and modes of which are regarded as integral parts of religion, and these forms and observances might extend even to matters of food and dress". 8

India is an ancient land of religious pluralism and cultural diversity. This largest democracy on the globe is a federation of 35 constituents establishing 28 full-fledged States and seven Union Territories. The Hindu religion is predominant in as many as 29 of these constituents, its followers having nearly 80 percent share in a country population of over a billion. 9

There are 160 million Muslims in India with a predominant Sunni majority the country's second largest community. 10

With a headcount of nearly 24 million, the Christians with a predominant Catholic majority are the country's third largest community. 11

The Sikhs, with a total population of 16 million, are the majority in the state of Punjab and a minority everywhere else. Next to them are 8 million Buddhists followed by 3.5 million Jains scattered all over the country. 12 Besides these, there are small Zoroastrian, Jewish and Baha'i groups and a number of tribal faiths.

9. There is an official census in India now every ten years. The approximate population figures for all communities given here are based on the Census Report of 2001.
10. Among the minority Muslim groups are the Ithna Ashari Shi'as and the Isma'ilis.
11. The Census Reports mention Catholics and Protestants separately. Among the many other Christian groups are the Presbyterians, dominant in northeastern states.
12. Among the Buddhists the Mahamayana group is dominant, while the Jains are divided into Digambar and Swetambar sects.
prevailing in certain parts of the country whose entity as separate religions is specifically recognized by State law and judicial decisions.\textsuperscript{13}

According to the nature of Constitution, India is a secular country and has no state religion. However, it has developed over the years its own unique concept of secularism that is fundamentally different from the parallel American concept of secularism requiring complete separation of church and state.

In 1947, the Constitution of India did not declare any religion to be the State religion or an otherwise privileged faith tradition. It declared “equality of status and opportunity” to be one of the basic ideals of future polity, and non-discrimination on the basis of religion one of the people’s Fundamental Rights.\textsuperscript{14} Twenty-six years later the Preamble to the Constitution was amended to add the word “secular” to the prefatory description of the character of the country.\textsuperscript{15}

\textbf{1.2 Meaning of Religion:}

It would be worthwhile to explain first of all the meaning of word ‘religion’. Religion is essentially a matter of personal faith and belief, with individuals or communities. A religion has its basis in a system of beliefs or doctrines which are, regarded by those who profess that religion is conducive to their spiritual well being; but it will

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\textsuperscript{13} Many of these are separately mentioned in the Census Reports. A leading case on their legal status is \textit{SP Mittal v. Union of India} AIR 1983 SC 1.
\textsuperscript{14} Constitution of India 1950, Preamble & Art. 15-16.
\textsuperscript{15} The Preamble now describes India as a “sovereign, democratic, socialist and secular republic” – the words “socialist and secular” added by the 1976 amendment.
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not be correct to say that religion is nothing else but a doctrine of beliefs. Every person has right not only to entertain such religious beliefs and ideas as may be approved by his judgment or conscience but also to exhibit his belief and ideas by such overt acts which are sanctioned by his religion.

The attitude of impartiality towards all religions which is secured by several provisions of the constitution, clearly go to establish that India is a ‘secular state’. The word ‘secular’ has also been inserted in the Preamble by the constitution (42nd Amendment Act, 1976). The Amendment is intended merely to spell out clearly the concept of secularism as indicated by the then Law Minister while introducing the Bill in the parliament.

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 other Intelligence.

First a religion undoubtedly has its basis in a system of beliefs or doctrines which are regarded by those who profess that religion is conducive to their spiritual well being, but it would not be correct to say that religion is nothing else but a doctrine or beliefs. 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.\textsuperscript{17}

Simple dictionary meaning of religion is “Dharma”. “Religion” and “faith” are interchangeable words.\textsuperscript{18} Religion means what a man honestly believes in and approves of and thinks it his duty to inculcate on others, whether with regard to this world or the next. Religion means a belief in any system of retribution by an overruling power. Religion must include the principle of gratitude to an active power that can confer blessings.\textsuperscript{19} However, it is suggested that it is a term which is hardly susceptible to any rigid definition. Out of the eight major religions, four have their origin in India. Followers of the four other religions are also among Indian citizens. During the British regime, India was not completely a secular state. Those who professed Islam or Christianity enjoyed weightage in service and in voting at the expense of the majority, viz., the Hindus. In Europe, it was in the 16\textsuperscript{th} century that the idea of secularism in the state system arose. Till that time, the states were under the direct or indirect control of the Pope.

The history of the struggle between the church and the king in England is very eloquent. Edward I had to fight with the Archbishop of Canterbury for various reasons as the latter tried to exercise his powers in such a way as to hamper the administration of the king. It is rightly observed that the struggle between the temporal and

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\item \textsuperscript{17} Commissioner of Hindu Religions Endowments Madras v. Sri Lakshmindra Theertha Swamiar, (1954) M.L.J. 596 at p. 607.
\item \textsuperscript{18} Re Tarn alsk, Barclays Bank v. Hyer (1958) I WLR 1157.
\item \textsuperscript{19} Per Willes J. Boxter v. Langley 38 L.JMC. 5 See Re Maser (1905) I Ch. 68.
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spiritual power was a prominent feature of the thirteenth century.

1.3 Common Characteristics of Religion:

1. Religion is concerned with the sacred and supernatural and distinguishes from ordinary profane.
2. Religion involves a body of beliefs contained basic writings concerned with sacred and the supernatural.
3. Emotional state of mind such as fear, awe, happiness, reverence goes into the resort of belief.
4. Religion is a group phenomenon though it is an undivided matter in a number of ways.
5. Religion involves a set of practices and the performance of rituals.
6. Religion has moral implications on its adherents in an attempt to make them behave modestly in prescribed ways in all situations.
7. There are certain materials involved in religious practices such as altar, charms, cloth, flower, banana leaves, sacrifice, cross, incense sticks etc.
8. The material objects involved in religious practices vary from culture to culture.
9. Every religion has its specific sense of worship.
10. Every religion has its specific place of worship.
11. The concept of Heaven and Hell influence their domestic life.
12. Religions attach to objects, ideas and occasionally even to human beings or animals.
According to Article 25(1) of the Indian Constitution, “Subject to public order, morality and health and to the other provisions of this Part (i.e. Part III, Fundamental Rights from Article 12 to Article 35) all persons are equally entitled to freedom of conscience and the right freely to profess, practice and propagate religion.”

The Indian State respects the religious laws of different communities under the fabric of personal law. ‘Personal laws’ refers to the system of religious rules, customs and practices related with family, marriage and succession, particularly in the case of minorities.

The Indian Constitution as well as the Indian traditions recognizes the place of individual beliefs and individual attempts to search for the divine. 20

1.4 Essentials of Religion:

Consequently, in determining this question the court is to see whether the concerned religious community itself considers a matter as an essential parts of its religion, and eventually, it is a question of proof whether the matter is, or the community consider it to be, an integral part of religion. 21 But, as Gajendragadkar C.J. observed, in Govind Lal Ji v. State of Rajasthan, 22 it seems that in the case of an obviously secular matter, the court would be justified in rejecting its being claimed as a religious practice on the ground of that claim being based on irrational considerations. However, in cases of doubt, as Latham C.J.

22. AIR 1963 SC 1638.
pointed out the court should take a common sense view and be guided by the considerations of practical necessity.\textsuperscript{23}

But the crux of the question is what practice, performance, rites, rituals, ceremonies, observances, forms or modes are to be treated as essential part of Religion or matter of religion.

The Supreme Court rightly felt that it is not an easy task to lay down any definite test in this regard, but also described:

"What constitutes the essential part of a religion is primarily to be ascertained with reference to the doctrines of that religion itself.\textsuperscript{24}

It has been observed, in the leading case of \textit{SR Bommai v. Union of India}\textsuperscript{25}; the various judges of the Supreme Court of India individually explained the significance and place of secularism under the Constitution in very meaningful words sampled prescribed as under:

(i) The Constitution has chosen secularism as its vehicle to establish an egalitarian social order. Secularism is part of the fundamental law and basic structure of the Indian political system.

(ii) Notwithstanding the fact that the words 'Socialist' and 'Secular' were added in the Preamble of the Constitution, the concept of secularism was very much embedded in our constitutional philosophy

\textsuperscript{23} ADELAIDE Company’s case \textit{op. cit.}
\textsuperscript{24} \textit{Ibid.}
\textsuperscript{25} (1994) 3 SCC I.
from the very beginning. By this amendment what was implicit was made explicit.

(iii) Constitutional provisions prohibit the establishment of a theocratic State and prevent the State from identifying itself with or otherwise favouring any particular religion.

(iv) Secularism is more than a passive attitude of religious tolerance. It is a positive concept of equal treatment of all religions.

(v) When the State allows citizens to practice and profess their religion, it does not either explicitly or implicitly allow them to introduce religion into non-religious and secular activities of the State. The freedom and tolerance of religion is only to the extent of permitting pursuit of spiritual life which is different from the secular life. The latter falls in the exclusive domain of the affairs of the State.

Offering of food to the deity, recite of sacred text, and rites and ceremonies, including oblations to the sacred fire, prescribed by the tenets of the Hindu religion are essential parts of religion.26 Again, which persons are entitled to enter a temple, where they are to stand and worship and how worship is to be conducted and by whom are matters of religion.27 The power of the Dai, the head of the Dawoodi

Bohra community, to ex-communicate a member is also a religious matter."

The right to elect members of a committee for the administration of the property of a Gurudwara and the power to modify a budget or give directions to the trustees of a religious endowment for giving effect to the wishes of the founder of the trust are matters outside the ambit of religious freedom. Acquisition of wakf property does not also affect the religious freedom of a Mutwalli.

The right of religious freedom does not include the right of a Muslim to sacrifice cow. This right does not also include the right of a Hindu to celebrate Saraswati Puja in a Christian Missionary College. Nor does it include the exclusive right to practice priesthood in a village, or the compulsion to be initiated by a religious teacher even under a customary law. Photographing of women for election purposes is also not forbidden by the Hindu or Muslim religion. The refusal to salute the national flag in the name of religious freedom is also not permissible.

In the name of religious freedom polygamous or bigamous practices also cannot be sustained. A father cannot also claim the right to the custody of his children.

33. See AIR 1957 Cal. 524.
for rearing him up in his religious preference to the power of the High Court as parens patriae.\textsuperscript{35}

The liberty, \textit{inter alia}, of "belief, faith and worship", as also, in a sense, of "thought and expression", enshrined in the Preamble realizes itself in the form of the fundamental right to freedom of religion in articles 25 to 28 in Part III of the constitution. And although of these the first two are positively and the next two are negatively phrased, they have the same common objective to secure freedom of religion. The right to freedom of religion as embodied in these four articles (25 to 28) represents but a specific area of liberty to human right.

Yet the acceptance of the principle of secularism by the constituent Assembly was of vital significance, because in the diversified Indian Social life secularism must be an article of political faith. And the technical question whether the Indian Republic is "secular" or "jurisdictionalist", or "Erosion",\textsuperscript{36} i.e., whether these are two distinct spheres in India, the sphere of the state and the sphere of the church, or whether India believes in the supremacy of state powers does not seem to be of much practical interest.

"Articles 25 and 26 embody the principles of religious toleration that has been the characteristic feature of Indian civilization from the start of history, the instances and periods when this feature was absent being merely temporary aberrations. Besides, the serve to emphasize the secular nature of the Indian Democracy which the founding

\textsuperscript{35} Margarrate v. Chacko, AIR 1970 Ker I.

\textsuperscript{36} Luthera, V.P. The concept of the secular state and India, Oxf. U.P. 1964.
fathers considered should be the very basis of the constitution."

In the Indian context secularism has also a practical necessity as an assurance to the minority religious groups. Precisely, then, secularism means that religious questions are not to be allowed to cast their shadows on socioeconomic issue involving state decisions and actions. And it is in this spirit that the constitutional provisions relating to the freedom of religion should be viewed.

1.5 Constitution Provisions in Protection of Religion:

Constitution plays important role to protect religion. In this regard sense of Articles 25 and 26 is not limited to matters of doctrine of belief. It extends also to acts done in pursuance of ‘religion’ and, therefore, contains a guarantee for rituals and observances, ceremonies and modes of worship which are integral part of religion. What constitutes an essential part of religions or religious practice has to be decided by the courts with reference to a doctrine of a particular religion and includes practices which are regarded by the community as a part of its religion.\(^\text{37}\)

In *National Anthem case*,\(^\text{38}\) the Supreme Court observed that no person can be compelled to sing the National Anthem “if he has genuine, conscientious religious objection.” In the instant case, three children belonging to


the “Jehova’s witnesses” of the Christian community were expelled from the school for refusing to sing the National Anthem. They challenged the validity of their expulsion on the ground that it was violative of their fundamental right under Article 25 (1). A circular issued by the Director of Public Instructions had made it compulsory for all children in schools to sing the National Anthem. They had stood up respectfully when the National Anthem was being sung every morning at their school but they did not join in the singing of it. They refused to sing the National Anthem as according to them it was against the tenets of their religious faith which did not permit them to join in any rituals except if it be in their prayer to Jehova, their God. The Kerala High Court held that was their fundamental duty under Constitution to sing the National Anthem. It held that if the pupil belonging to the religious group refused to participate in the singing of the National Anthem it would have a very bad influence on, the other pupils and the Head Mistress was therefore within her right not to permit them to attend the class until they gave in writing that they will participate in the singing of the National Anthem in the school.

Under Clause (2) (b) of Art. 25 the State is empowered to make laws for social welfare and social reform. Thus under this clause the State can eradicate social practices and dogmas which stand in the path of the country’s onwards progress. Such laws do not affect the essence of any religion. This clause declares that where there is conflict between the need of social welfare and reform and
religious practice, religion must yield. Social evils cannot be practiced in the name of the religion. In *State of Bombay v. Varasu Bapamali*, an Act which prohibited bigamy was held valid under Clause (2) (b), Polygamy is not an essential part of the Hindu religion; therefore it can be regulated by law. In an American case of *Reynolds v. United States*, a State law made it a criminal offence to marry with another while having a living spouse. The appellant was punished for attempting to take a second wife under the sanction and command of his religion. The Supreme Court held that his punishment was valid under the statute which prohibited bigamy. The Court said, “Congress was deprived of all legislative power over mere opinion but was left free to take actions which were in violation of social duties or subversive of good order.” Prohibition of civil practices such as Sati or system of Devadasi has been held to be justified under this clause.

As per consideration of secularism Article 44 of Indian constitution requires the state to secure for the citizen a uniform civil code throughout the territory India irrespective of caste, creed and religion. In this way harmony would be established and sense of brotherhood would be established. It has been decided in a well known case of *Sarla Mudgal v. Union of India*, in which the Supreme Court has directed the Prime Minister Narsimha Rao to take fresh look at Art. 44 of the constitution which enjoins the State to secure a uniform civil code which,

39. AIR 1953 Bom 84.
40. 98 US 145 : L.Ed. 544 (1878).
42. (1995) 3 SCC 635.
accordingly to the Court is imperative for both protection of the oppressed and promotion of national unity and integrity.

As regards the question of “Uniform Civil Code” the Division Bench of Kuldip Singh and R. M. Sahai, JJ. in their separate but concurrent judgments said that since 1950 a number of Governments have come and gone but they have failed to make any efforts towards implementing the constitutional mandate under Art. 44 of the Constitution. Consequently the problem is that many Hindus have changed their religion and have converted to Islam only for the purpose of escaping the consequence of bigamy. This is so because Muslim Law permits more than one wife and to the extent of four. Kuldip Singh, J., said that Art. 44 is based on the concept that there is no necessary connection between religion and personal law in a civilised society. Marriage, succession and like matters are of a secular nature and therefore, they can be regulated by law. No religion permits deliberate distortions, the judges declared. Much apprehension prevails about bigamy in Islam itself. In many Islamic countries as in Syria, Tunisia Morocco, Pakistan, Iran and other Islamic countries have codified their personal law to check its abuse.43

The religious freedom is no bar to social welfare and reformatory legislation. Progressive legislation in relation of marriage, divorce and inheritance cannot be challenged on the ground of being inconsistent with religious freedom.

The measures towards excitement of a uniform family law code required to be initiated as a directive principle of state policy cannot opposed to the religious freedom of members of different religious communities and denominations. The impress of social change and economic factor must be felt upon the personal laws and their legislative reform as well as judicial interpretation. The divorce of law from religion must now be unreservedly accepted at all hands. For instance, the change in the personal family law relating to imposition of monogamy for persons belonging to a community hitherto practicing bigamy under its uncodified personal law, for instance, uncodified Hindu law or the Muslim law can no more be resisted.\textsuperscript{44} The social purpose legislation, for instance, statutory provision requiring man of sufficient means to maintain his neglected wife or destitute divorced wife cannot be impugned on ground of religious freedom, and on the basis of the plea that personal law applied. In a decided case of Shah Bano,\textsuperscript{45} Muslim personal law provides only for payment of maintenance during iddat period and no longer. Section 125 Cr. P.C. did not apply to him, and so he was not obliged to pay any maintenance to his wife when he had given a talaq. The contention was rejected. As per consideration of this case Chandrachud C.J. observed that,

"Section 125 was enacted in order to provide a quick and summary remedy to a class of persons who are unable to maintain themselves. What difference would make as to


\textsuperscript{45} 1985 AIR 945, 1985 SCR (3) 844."
what is the religion preferred by the neglected wife, child or parent ... such provisions which are essentially of prophylactic nature cut across the barriers of religion.”

Social reform and morality cannot be clubbed with religion. There is no conflict between law reform and personal law. Social reform cuts across the barriers of religion and denomination. This is the lesson of Explanation II to Article 25 (2) (b). It explains the obvious that any reference to Hindus includes a reference to persons or professions the Sikh, Jain or Buddhist religion.

The temple entry too is an expressed head of social reform. Therefore, legislation to provide for this and measures to enforce this against entrenched orthodox religious order cannot be challenged on the ground or religious freedom.

In the post independence period temple entry legislation has been an important head of social legislation in the various states of the union. It has been tested constitutionality in certain cases which were initiated by the orthodox sections of various religious sects, or denominations. The resistance to its enforcement met complete disapproval of the courts.

A remarkable case known as "The Vishwanath Temple Case," held that any prevention of temple entry by the untouchables and the Harijans is forbidden, as it is a practice of untouchability and as such is breach of civil

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47. Article 25(2)/Explanation II. Kagzi, M.C.J. The Present constitutional Issues and views.
rights of the so prevented. The offence is punished under substantive law.\(^{49}\)

**1.6 Profession and Practice of Religion:**

The religious freedom and freedom of conscience are indefeasible. The scope of an individual’s religious freedom in India can be essayed by reading Article 25 of the constitution as one piece.

One person along with every other person is “equally entitled to freedom of conscience, and the right freely to profess, practice and propagate religion.” He has a two fold freedom viz. (1) freedom of conscience (ii) freedom to profess, practice and propagate religion.\(^{50}\) The first is a separate element of his freedom, and ensure to him liberty of thought, belief, faith, worship and discourse. He can enter such religious beliefs and ideas may be approved by his inner judgment, conscience and conviction. Neither can he be put to any religious test, nor he can be compelled to give any justification for his faith. He cannot be prosecuted for his inner conviction, his belief or disbelief in the Almighty. He cannot be compelled to receive any religious instruction, or coerced to change his ideas of the things spiritual. He cannot be required to embrace a faith, if he is an atheist by conviction. Forced conversion is absolutely forbidden.\(^{51}\) There can be no compulsion on him to get converted to any religion. Any involuntary conversion must impair his freedom of conscience. There is no fundamental

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49. Section 3 of the Protection of Civil Rights Act, 1955
50. Article 25(1).
right in anyone to convert him to one’s religion. No one can after inducement or cause intimidation of any sort to make him agree to conversion. Dissemination of the faith means and includes transmission of religious belief and the faith. It permits efforts to spread religion from person to person, or from place to place. It excludes conversion turning to or causing others to turn to the faith. These acts are aspects of religious propagation. These acts can only be reasonably regulated in the interests of morality, health and public order. The legislation may be passed to restrict and crudity or compulsion associated with use of force, fraud or inducement which might disturb inter-community amity, and cause breach of public peace and order.

1.7 Personal Faith and Religion:

A person’s right to observance and exercise of his faith and religion is rendered comprehensive by use of the three words, namely, to profess, to practice, and to propagate. These terms should be taken to bear their ordinary common sense, dictionary and grammatical meanings. To “profess” religion is to affirm the belief and faith and own them publicly both by word of mouth and conduct. In case of the sikhs wearing and carrying of kirpans is an act of profession of the sikh religion.

To “practise” religion is to perform the prescribed religious duties, sites and rituals and to exhibit religious belief and ideas by such acts as prescribed by the religious order. And, to “propagate” religion is to spread and publicize the religious philosophy and message for edification of other fellow human beings. So understood the
words, when taken together, comprehend every aspect of
an individual’s religious existence. He can worship God in
his own way, recite religious books, and offer prayer in a
temple, mosque, church or synagogue. The religious
discourse can be conducted in a temple, or a parlour
meeting. An individual’s entry therein cannot be forbidden
by the state, or be obstructed by the community. Indeed,
the state is expected to remove all hindrances and
disabilities of caste untouchability, prejudice or orthodoxy
be enacting appropriate legislation, if the temple entry idea
is not accepted by the orthodox and conservative society.
Legislation throwing open the Hindu temples for all Hindus
by religion in any of its forms or developments was thought
of by the framers considering the state of public opinion
and wide-spread socially evil practice of untouchability and
casteism, has been judicially held valid.52

The constitution provides for protection for both
profession and practice of religion. The state cannot preach
any religion, cannot interfere with the practice of any
religion, or concern itself with enforcement of the discipline
within a particular religious community or denomination in
matters of religion.

State is not a chooser of religious creeds and
doctrines, and cannot interfere with the observances of
religious practices by a religious order which are deemed
necessary for maintaining the strength of the religion.53

52. Article 22 (2) (b)/ Explanation II-Venktararnana Devaru v. State of
53. See Derrett J.M., Freedom of Religion under the Indian constitution;
Ex-communication. See also tripathi P.K. Secularism; constitution
provisions and judicial Review.
Where the state, by a law took away the power to excommunicate a member of the Dawoodi Bohra community by the Dai-ul-Mutalk, the head of the Dawoodi religious order for lapse from the orthodox religious creed or doctrine, or a breach of some practice considered essential for practicing the religion, it was held that the law tended to interfere with matter of religion was unconstitutional.\(^{54}\)

The profession, practice or propagation of religion are free from state regulation and control, and are subjected to restrictions under certain heads of social interests, namely, public order, health and morality.

All must profess, practise and propagate religion freely, and also equally. One person cannot enjoy his freedom as to restrict the like freedom of his fellow citizens. One man's freedom is restrained by another person's right to enjoy the same equally. It is subject to the social control, and to the extent it is necessary for the state to impose reasonable restrictions in the interests of the general public in maintenance of public order public health and morals.

In order that the restrictive authority of the law is not without restrictions, the constitution defines the heads of restrictions under which restrictive legislation can be enacted by the appropriate legislature. The constitutional limitation provisions intended to achieve this objective are two viz.

\(^{54}\) Article 26(b) Syedna Aher Saifuddin Saheb v. State of Bombay, AIR 1962, SC 853.
(i) The opening clause of Article 25(1) - "subject to public order, morality and health and other provisions of this part," and

(ii) Article 25(2) opening with the non-obstante clause, "Nothing in this article shall affect...—"

These clauses are intended to balance the individual citizen's religious freedom with the inalienable minimal public control, social, sociological, economic and secular interests observed by the society and the state. If the exercise of religious freedom overreaches its legitimate limits, and clearly and immediately endangers to the recognised interests of the society and the state, restrictions can be placed for reasons of state security, public order, social reforms and minimal necessary economic regulation. Practice of religion and mode of worship must not affect the social and temporal values. The guarantee of religious freedom, does not take away the paternalist authority of the state to legislate and enact laws for maintenance of public order, public health and public morality. The break-up of the permitted heads of restrictive legislation may thus include:-

(i) Public order
(ii) Morality and health
(iii) Social welfare and reforms
(iv) Economic, financial and political regulation and
(v) Respect for the fundamental sights of citizens in general.
1.8 Public Order in Context of Religion

The expression "bears a wide connotation; and signifies public tranquility which is a result of a internal regulations enforced by the Government which they have established". It is the state of undisturbed current of the life of the community. Any activity or speech which causes breach of public peace cannot be part of religious freedom. If a mosque is used as a safe sanctuary for foreign intruders, the police can enter it to remove them to be dealt with by the security forces. If a Gurudwara is habitually used as a place for safe direction post of a political movement or realisation of a political demand, the police can act likewise. If a temple is selected as a site to practice untouchability made punishable by law. An individual can be arrested, if he utters things which hurt other persons' religious feelings, and if his explosive utterances have a tendency to disturb public peace he can be restrained and also punished for what he says. Any activity or attempt to raise communal passions, for instance, a talk or whisper that a man or a group of men have been "forcibly" converted to another religion, can cause communal disorder. This must be a breach of public order, affecting the public peace and the society at large.\(^{55}\) The acts, writings, utterances, recitals indulged in with a deliberate intention to insult the religious beliefs of any class of citizens can be prohibited, prevented, or restricted.\(^{56}\)

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In Lucknow (Uttar Pradesh) the Sunni Mussalmans took out processions and recited Madde Saheba. This outraged the religious beliefs of the Shias who regard Abu only as the next prophet; and the latter too come out in a procession and began to recite tabberraa which was not approved by the Sunni faith. Thus, the two sects would be attempting to hurt religious susceptibilities of one another; presenting a clear possibility of a breach of public peace. Therefore, it was observed the recital of Madde Saheba and Tabberra in public could be banned. The prohibition in the particular case was found good, and in the interest of the public order.57 In Varanasi (Uttar Pradesh) the Shia Musalmans claimed their denominational religious freedom to observe Moharram by holding Majlises recitations of namaz and massia, by doing matam, and also by taking out customary processions with tabut, tazia, alomst Zulijiha etc. or across certain land situate in the crowded area of Doshipura in the city. They contended that these customary religious and denominational rights were recognised on the basis of inter-community and denominational shia-sunni litigation, and registration of shia wakf land. They complained that from 1960 the sunnis of the area started causing obstruction in observance of their denominational practices as there were two graves of some sunni-saints and to recite namaz and read fathia. The shia petitioners alleged that the authorities too started interfering by resort to prohibitory orders under section 144 Cr. P.C. and also by placing undue restrictions on the

peaceful observances and performances of their religious rituals on the occasion of Moharrarn, Chehalurn, Barawafat etc.

Under the circumstances brought before the Supreme Court, and in the interests of public order, the court directed that two Sunni graves should be shifted to a convenient place to ensure non-interference into inter community religious observations, rituals etc. The court overruled the sunni objection based on Fatwas, based the sheriat, issued by the religious heads Muftis and Imams. The court held that shifting of graves was not un-Islamic or contrary to the Koranic injunctions.

Freedom in a society is not unrestricted. The individual religious freedom should measure with similar freedom of every other individual. Therefore, one can exercise his freedom only equally along with others. Article 25 confers freedom on all persons equally. An individual should not profess, practise and propagate his religion, so as to restrict the freedom of other fellow-citizens. He has a duty towards others generally not to disturb or obstruct them in exercise of their freedom. Any breach of this duty is forbidden, and if the breach is likely to endanger the public peace, or law and order such breach of the duty can be made punishable by law.

The last of these heads of restrictions is a general head of restriction. It projects religious freedom, other fundamental right and the state regulation associated with them, as well as prohibitions regards practice of

untouchability, disability on grounds of caste, creed etc. For instance, a citizen is given freedom of speech and expression in matters of religion, subject to the reasonable restrictions clause of Article 19(2); and the members of any religious group are given right to form any religious organization, association or assembly, subject to the requirements of peaceful unarmed assembly, public order, and morality. However, the condition of assembly being unarmed cannot prevent the wearing and carrying of Kirpans in the case of the sikhs, because this is deemed to be included in the profession of the sikh religion. Also, while availing their religious freedom, they can neither practise untouchability, nor subject any person to any disability, liability, restriction or condition with regard to access to, and use of wells, tanks, bathing ghats, places of public resort etc.

Religious freedom as such does not enlarge the scope of, say, right to assembly and association over the scope fixed under article 19. It does not extend either of these freedoms in the religious sphere to all persons in supersession of the general intent of Article 19 to limit to the citizens alone.

From the stand point of the state, the provision for religious freedom does not take away the regulatory power of the state given to it elsewhere in Part III. For instance, its power to place reasonable restrictions on freedom of speech and expression under Article 19(2) is not denied in the area covered by Article 25. The words “and to other

provisions of the part” in clause (I) of article 25 make the religious freedom overridden by other rights: rights like as to freedom of speech and expression, freedom of assembly and association, freedom to carry on a profession trade or business etc. It is withdrawn to the extent it restricts the right to personal liberty and other freedoms of an individual. Religious freedom stands harmoniously along with other fundamental rights. It is one among many freedoms conferred upon the individual. While construing the provisions of article 25 the proper context of the general fundamental rights must not be weakened. Its assertion cannot decrease the scope of freedom of the individual. Its practice neither can affect the exercise of other freedoms, nor it can affect the regulatory power given to the state elsewhere in Part III.

What can be restricted in the interests of public order can axiomatically be prohibited and suppressed on considerations of public safely and security of the state. Any subversive activity, for instance non-cooperation in successful prosecution of war efforts individually, or in concert with other persons belonging to any religious faith cannot be permitted on pretence of his irrationally held religious faith for instance, that the state is an emanation of (Church of Satan), a citizen cannot be permitted to feel free of his allegiance to the state, and refuse to resist an invading army.60

60. See Adelaide Company of Jehovan’s witnesses Incorporated v. Commonwealth (the jehovah’s witness case) 1943 67 C.L.R. 116.
1.9 Denominational Rights:

The two types of denominational rights are admixed, and inter-dependent. For instance, right to enter the premises of a Hindu math is a religious right; but the right to manage and administer math property a secular right. The right to manage the affairs of religion, to establish and maintain religious and charitable institutions, to acquire and own property, and to manage it in accordance with religious prescriptions and law. The “matters of religion” include essential religious practices, rites and ceremonies considered essential for practice of the religion. In respect of these matters the denominational right is absolute. The manner of its exercise is unregulated by the state authority. However, the question whether a particular matter is a matter of religion is capable of being raised in a court of law and in case of doubt the extent of a claim based on it can be determined. The absolute character of the denominational rights in respect of matters of religion is judicially stressed, although strangely enough it is mentioned in clause (b) of article 26, which along with other clauses of the article is subject to a substance clause pertaining to the requirements of public order and morality.

62. Article 26 (a)
The secular, economic, financial and political activities associated with the religious practice can be regulated and controlled under clause (2) (a) of article 25 on the basis of the interpretational rule of harmonious construction.\(^65\)

It has been observed in the *Durga Khawajasahib's case*\(^66\) that the right to manage and administer the denominational property both moveable and immoveable is a restricted right. It is subjected to the general property law and, the law of public trust and endowment.\(^67\) The administration of a religious institution and management of its property can be enquired into and its books of account searched and seized, by an inquiry commission. Its budget can be modified and appropriate directions for better financial arrangements can be given.\(^68\) A special law for trusts, endowments and foundations can be enacted. For instance, the property of a Hindu math, if not properly managed by the mathadhish, can be temporarily managed in accordance with the official directions given for bringing about the improved management of property of the religious trust and endowment. A mahantship or mathadhipati of a math includes both aspects of an office as well as property; and mahant has certain personal rights pertaining to matters of religion; and at the same time he has certain beneficial proprietary rights in respect

of the math property. He is free from state regulation and control in respect of the first type of rights, and he can freely discharge the religious tenets. His proprietary rights cannot be destroyed. Although they can be regulated by law, and can be reasonably restricted in the interests of the math:

Article 26 of the Indian Constitution enlightens the society respect to religion. The denominational side of the religious freedom is dealt with in article 26. The recognition is given to the right of religious denomination in respect of (i) management of its own “matters of religion”, and (ii) establishment, maintenance of religious and charitable institutions, ownership, acquisition and administration of property of religious and charitable institutions, trusts, endowments, desvasthanams, wakfs and foundations. Like the individual’s right to religious freedom, the denominational right in matters of religion too is subject to the restrictive clause (2) of article 25.

The temple entry legislation colourably cannot vest in the state any police power or authority to demolish the character of a denominational temple. It only can confer a right to enter and a privilege to worship perceptively in the form and maimer ordinated by the denominational faith. The entry into a temple cannot entitle a person to after the denominatioal mode of worship observed in the temple. The temple entry right given to an individual is not absolute or unlimited in character. The temple entry right of a Hindu

in respect of a Jain temple does not entitle him to install a Hindu idol there in.\textsuperscript{70} In a denominational temple no one can obstruct the worship offered by the members of the denominational,\textsuperscript{71} or to perform those services which only archakas alone should perform. The denominational temples should only be opened to all, except on occasions of special denominational worship. Education of persons not belonging to the particular denomination from the denominational temple on the ground that they are not objects of the benefit of the denominational foundation cannot be forbidden under the provisions of temple entry legislation.

\textbf{1.10 Religious and Charitable Trusts, Wakfs and Endowments:}

The denominational right in respect of establishment, administration and management of religious trusts, endowments, devasthanams, maths, gurudwaras, durgah, wakfs is expressly recognised in clause (a), (c) and (d)) of articles 26. However, this right can be regulated and restricted by the law of property, public religious trusts and taxation. Immunity against perpetuity, exemption from taxation and exception from state acquisition of property cannot be claimed as a matter of course. Legislation can be enacted to provide for a management committee for a Durgah, a Gurudwara Prabandhak committee, and to improve the administration of a math property, or taking over administration of secular affairs of a religious


institutions.\textsuperscript{72} True that colourable legislation cannot be enacted to deal with matters of religion, while apparently dealing with administration and management of religious institutions and trusts. At the same time the denominational right to manage a Gurudwara cannot be a cover to advance the political objectives of an organised group, resistance to the legitimate secular measures of the Government, or an agitation for appointment of politically oriented management committee on the basis of communal election in preference to nomination. The right to administer property of the religious trusts and endowments can be regulated, in accordance with law; and disputes concerning the office of a trustee, or a mathadhish of a math, or sujjadanashin of a durgah regarding worship in a temple,\textsuperscript{73} a dispute between management committee of the Durgah and Khadims can be subject matter of court proceedings.

In this area of denominational right the court in the swamiar recognised the power of the state to administer math property by declaring that the administration of the math property was an incident of the office of the head of the math and as such his proprietary right in respect of the endowed property could not be unreasonably taken away. The court projected article (19) (1) (f) and article 26(1) (a) and declared certain provisions of the impugned act unconstitutional.

It was observed that total deprivation of the right of management and taking over by the commissioner,

\textsuperscript{72} AIR 1962 Rajasthan 196.
\textsuperscript{73} Ibid.
restricting his power to enter into the math premises at any time constituted unreasonable restrictions, and therefore, could not be permitted. However in later decisions of the Durgah committee, the Nathdwara\textsuperscript{74} and the Jagannath Temple cases\textsuperscript{75} the court seems to have leaned in favour of curtailment of the denominational right in respect of management and administration of the related property. In the Durgah committee sanctioned the power of the statutory committee to restrict and regulate the privilege of the Sajjadanashini in the Nathdwara. It did not disapprove the power of a statutory board to provide for regulation and control of the powers of the Goswami (Tilkayat Maharaj) on the basis of the past pre-denominational practice. In the Jagannath temple it approved the taking away of the property rights, vesting in a management committee. Giving validity to past practice after the constitution was opposed to the express constitutional position under Article 26(1) (a) and, a reversal of Mukherjee's balanced approach in the Swamiyar.

According to the decided case of \textit{Ragunath v. State of Karala},\textsuperscript{76} the interpretation of Art. 27 came up for consideration before the Kerala High Court. The petitioner impugned the Government order that "the cost of repairs of reconstruction for restoration to the condition existing prior to the incidents of religious and educational institutions and the houses of defense personnel damaged will be met by Government." The petitioner prayed for

\textsuperscript{76.} AIR 1974 Ker. 48.
mandamus directing the State of Kerala and the District Collector, Cannanore to forbear from spending any amount from the public funds of the State of Kerala to reconstruct the places of worship destroyed during the disturbances in the State, because, according to the petitioner, such expenditure contravened Art. 27. However, the Court repelled the contention and held that the order did not hit the provision of Art. 27.

1.11 Role of Religious Instruction in Freedom of Religion:

One of the other important aspects of religious freedom is that children should not be forced to attend and take lessons in religion. In the educational institutions run by the state, or aided by the public funds there should be no attempt to mould the religious beliefs in any particular doctrinaire direction. To ensure this it has been declared that any religious instruction cannot be organised for the school going children, and also for the boys and girls studying in colleges. In the private educational institutions established under trusts or endowments recognised, or administered by the state no compulsion can be applied to enforce attendance at religious instruction or worship conducted in accordance with wishes of the author or a trust, or settler of an endowment or a settlement. In accordance with this provision the Banaras Hindu University and the Aligarh Muslim University provide religious instructions on Hinduism and Islam to those who

77. Article 28(1)
78. Article 28(2) - (3).
consent to take them and do not object otherwise, but cannot enforce attendance at such instructions.\textsuperscript{79}

The prohibition in connection with religious instruction does no mean any hostility to imparting of religious instruction in educational institutions. It only relates to prohibition against forced instruction and against expenditure of public money for imparting such instruction. Any use of the school building outside the normal schedule for organising religious instruction programme to be carried on by instructors employed by a religious trust, a denomination or sect for those who, or if minor whose parents have no objection, is not forbidden. \textit{Mc Collum v. Board of Education,}\textsuperscript{80} is a decision of the American supreme court to the contrary and does not seem to be relevant to our country. The decision is criticised even in the United States of America. In \textit{Zorach v. Clausion,}\textsuperscript{81} even the American Supreme Court seems hesitant to go to the logical limits of the Mc Collum. It does not forbid religious instruction facilities in aided and recognised institutions. Making the students find time to attend religious instruction by releasing them during school hours after their parents have been informed and requested to encourage their wards and permit them to attend is not bad, and therefore, not objectionable. The prohibition is against compulsion and not against encouragement of the religious instruction in other ways.

\textsuperscript{79} The Banaras Hindu University (Amendment) Act 1951 The Aligarh Muslim University (Amendment) Act. 1951.
\textsuperscript{80} (1948) 333 US 203
\textsuperscript{81} (1952) 343 US 306
This aspect of religious freedom guarantees the growth of free conviction ad conscience in a child, and prevents religious indoctrination. It ensures freedom of those who prefer to remain atheists, and therefore, do not believe in the efficacy of any religious instruction. Religious freedom includes freedom to entertain a disbelief in the existence of God.

1.12 Hypothesis:

The practice of freedom of religion under Indian constitution is not serving the purpose effectively but judiciary has made efforts and innovated to safeguard the freedom of religion of the citizens of India, but due to procedural implications, the courts cannot move so fast as they could be.

There are several legislative provisions which protect every person in respect of worship and believes. Every person is free to follow any religion irrespective of caste and creed. Constitutional Law of India emphasizes on secularism that is extended upto that citizen(s) can profess and practice any religion in India. But inspite of this, so many riots are reported on the issue of practice of religion. Even after the secularism, constitutional rights and various promises of the Indian leaders, there are various communal riots on the issue of following different religions. Therefore, there is a need to study or review the provisions of secularism and constitutional freedom of religion to understand the basic laws, problems, interpretations and implementation of the laws regarding freedom of religion.
1.13 Object of the Study:

The research work is to analyze and to determine the scope and importance of religion. In India, every person enjoy(s) religion as a fundamental right.

The main object of present research work is to examine the law relating to Freedom of religion and constitutional perspective – An evaluation in context of constitutional law of India to maintaining the relation with other constitutional laws at global level.

1.14 Research Methodology:

The basic object of research has always been to arrive at certain conclusions and to give suggestions on the basis of the study and it has been possible by getting material which is informative on the basis of proper understanding of the relevant document on the subject. The methodology used in the present research work is basically intended to be comprehensive. The primary source of information consequently has been mainly the legislations of India. In the context of research methodology opted for this research study, the merits of Anthropological mode of research has been discussed in detail. At the same time the drawbacks of Anthropological mode of study by the researcher has been duly compensated by resorting to the opinion of the experts expressed by them in their books articles and the judgments pronounced by the eminent judges on the subject.
Analytical method\textsuperscript{82}, Comparative method\textsuperscript{83}, Anthropological method and Critical method\textsuperscript{84} have also been adopted and applied to examine all the relevant aspects and related problems. The research work is based on the studies of primary as well as secondary sources of information. The primary sources are taken in the form of legislations; Secondary sources are available and have been utilized in the form of foreign judgments, journals, periodicals, magazines and articles. While studying the meaning and origin of freedom of religion, the researcher explored the provisions of different enactments articles, journals and definitions given by different jurists and academicians in order to project clear picture on the subject of research study. According to need of time, interpretation given by Apex court of India as well as that of different courts of foreign countries has been elaborately discussed. Emphasis has been mainly made to cover all relevant areas for the study of subject, which till now has not been explored to the desirable extent.

\textsuperscript{82} Analytical research deals with about the present law.
\textsuperscript{83} Examinations of doctrines, rules and institutions of developed legal systems.
\textsuperscript{84} Study of present law and needs of the society.