CHAPTER III

CONSTITUTIONAL AND JUDICIAL RESPONSE OF FREEDOM OF RELIGION

Secularism is a personal 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."² According to oxford companion to law³ defines: the word 'secular' comes from the Latin 'secularizes', which used to describe clergy who lived within medieval society rather than in secularism in a monastery. Relating to the adaptability of the term secularism C.H. Alexandrowiczeć, in the Indian context say that "the pattern of secularism developed under the Indian constitution is no limitation of secular concept adopted else where in other major democratic countries and in Medieval Period; that is a unique system, a concept of sui-generic."⁴

According to V.K. Krishna Iyer, secular states means-"the western genesis of the secular ideology the state versus

². 20 Encyclopedia Britannica 264 (1955).
⁴. This is a phase used by professor C.H. Alexandrowiczeć in his book.
the church must not petrify our thought when we develop the desideration of secularism as it applies to Indian conditions. Secularism in the political-as opposed to ecclesiastical – sense requires the separation of the state from any particular religious order. And it goes against any religion a privileged position in the activities of the state.

According G.L. Holyake "Who is regarded as the father of secularism to the concept of secularism, who stated while propagating the movement in 1846 and laid down its principles in this book "Principles of secularism and the origin and nature of secularism. Similarly by Jermy Bentham's 'Principles of legislation' stating the moral basis of politics and law determined from the point of view of human welfare sought through democratic liberal channels and intended to attain the "greatest happiness of the greatest number."

The Indian meanings of 'secularism' did not emerge in ignorance of the European or American meaning of the word. The Indian meaning of secularism has marked out a conceptual world all of its own, untroubled by its


8. Ibid.
differences with western Secularism. The constitution of India is secular and does not interfere with religious freedom; it does not allow religion to impinge adversely on secular right of citizens or the power of the state to regulate socio-economic relations. One characteristic features of Indian secularism is its determination to adopt a rational and scientific approach in the discussion and solution, relation of socio-economic problems.

The right to freedom of religion was always considered a necessary component of the constitution. In the constituent assembly, both Dr. Ambedkar and K.M. Munshi Submitted draft Articles, and a mixture of the two was adopted. A noteworthy clause that was not adopted was one preventing the state from recognizing any religion a state religion certain suggestions like that of Alladi Krishnaswamy Iyer, of a clause saving social reform, were also adopted.

3.1 Origin of the Word ‘Secular’:

The term secular was made facile from the Latin ‘saeculum’ and ‘saeularis’, 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.

10. India is secular state under 42nd Amendment Act, 1976 has inserted the world "secular" in the preamble.
It was used as a negative term, meaning ‘non-ecclesiastical,” non-religious’ or non-sacred. The term ‘secular’ has also been described variously as temporal, lay, profane, worldly, earthly, terrestrial and ‘antonym religious’.

The Dictionary of the Social Science has identified three usages of the term ‘secular’ first it refers to the worldly as against the spiritual, secondly, as opposed to the sacred and thirdly, as applied to trends and conditions which have continued over a period of time. The Encyclopedia Britannica,\(^\text{14}\) too, has subscribed two meaning to the term secular, first, as referring to that which lasts for a long period of time and secondly, as the one which is not concerned with religious or spiritual matters.

The Webster’s International Dictionary defines ‘secularism’ as a philosophy that specifically excludes or at least ignores religion. It records the substance of secularism thus.

**3.2 Secularism under Indian Constitution :**

Secularism under the preamble of the constitution declares India to be a sovereign, socialist secular, democratic republic. Indian Constitution stressed "We, the people of India, having solemnly resolved to constitute India into a Sovereign Socialist, Secular, Democratic Republic and to secure to all its citizens. Justice-Social, economic and political. Liberty of thought, expression, belief, faith and workshop; Equality of status and of opportunity; and to promote among them all. Fraternity assuring the dignity of the individual and unity and integrity of the Nation; in our

Constituent Assembly this twenty sixth day of November 1949, do hereby, adopt, enact and give to ourselves this constitution." Dr. B.R. Ambedkar, Chairman of the Drafting Committee speaking on the Hindu Code Bill in 1951.

There is no mysticism in the secular character of the State. Secularism is not anti-God; it treats alike the devout, the agnostic and the atheist. It eliminates God from the matter of the State and ensures that no one shall be discriminated against the ground of religion.\textsuperscript{15} Dr. Ambedkar states that the secular State means is that this Parliament shall not be competent to impose any particular religion upon the rest of the people.\textsuperscript{16} Secularism is a system of social ethics based upon a doctrine that ethical standards and conduct should be determined exclusively with reference to the present life and social well being without reference to religion.\textsuperscript{17} Pluralism is clear from the constitutional scheme that it guarantees equality in the matter of religion to all individuals and groups irrespective of their faith emphasizing that there is no religion of the State itself. The Preamble of the constitution read with Arts. 25 to 28 emphasizes this aspect and also the concept of secularism embodied in the constitutional scheme. The concept of secularism is one facet of the light to equality woven as the central golden thread in the fabric depicting the pattern of the scheme of the Indian Constitution.\textsuperscript{18} The term "secular" has not been defined in the Constitution of

\begin{itemize}
\item \textsuperscript{15} Ahmedabad St. Xavier's College v. State of Gujarat, AIR 1994 SC 1389 (para 75).
\item \textsuperscript{16} Parliamentary Debates, Vol. III, Pt. II.
\item \textsuperscript{17} Webster's New International Dictionary.
\item \textsuperscript{18} Mr. Ismail Faruqui v. Union of India, AIR 1995 SC 605 (para 40).
\end{itemize}
India, "because it is a very elastic term not capable of a precise definition. "Socialism is one of the basic structures of the Indian Constitution which can neither be abridged nor be defaced.

There are some constitutions in the world which provide for the religion of the State and supremacy of God.

India is a federal country consisting people professing and practicing different religions. It was, therefore, imperative for founding fathers of the Indian Constitution to frame a Constitution which must guarantee freedom of religion. Apart from guarantee of freedom of religion in Articles 25 to 28, there are other provisions such as Articles 14, 15, 16, which prohibit discrimination on the ground of religion. The Preamble also constitutes India a sovereign, socialist, secular, democratic republic. In S.R. Bommai v. Union of India, secularism has been held to be a basic feature of the Indian Constitution. A Government, which is anti-secular, cannot be said to be government according to provisions of the Constitution.

Article 25(1) protects the citizen's fundamental right to freedom of conscience and his right freely to profess, practise and propagate religion. The protection given to this right is not absolute. It is subject to public order, morality

22. (Canada) Constitution Act 1982 (Preamble); Constitution of Federal Republic of Germany (Preamble); Constitution of Swiss Confederation (Preamble).
and health as Art. 25(1) itself denotes. It is also subject to
the laws, existing of futures which are specified in Art.
25(2).24 As regards the grave-yard, though the land is scared
and waqf, its acquisition cannot be said to take away of
right to any living person to profess, practise or propagate
religion. The freedom enunciated in Art. 25 is a personal
freedom. It is a freedom which a person can claim for his
personal exercise at will; it is not a freedom guaranteeing
the preservation of the graves where bodies of some others
lie.25

The word secular was introduced in the Preamble of
the constitution in the 27th year of the Republic through the
42nd Amendment Act, 1976. Whether the Preamble is a part
of the constitution is disputable. Even the Supreme Court
has expressed two contradictory opinions on the subject. As
early as 1960. In Berubari Case,26 the Supreme Court had
held that the Preamble is not a part of the constitution and,
therefore, it has never been regarded as source of any
substantial powers. But in 1973, in the Keshavanda Bharti
case27 the Supreme Court rejected the above view and held
that the Preamble is a part of the constitution and the latter
should be read and interpreted in the light of the former.
The judiciary in future may again change its opinion. Thus,
the efforts of the architects of the 42nd Amendment Act seem
futile.

26. AIR 1960, SC 845, 1960 3 SCR 250, (Available at
Indiankanoon.org/doc/1120103).
27. AIR 1973, SC 1461.
While defining secularism in the *Ahmedabad St. Xavier’s college v. State of Gujarat*\(^{28}\) the Supreme Court observed that:” —“There is no mysticism in the secular character of the state. Secularism is neither anti-God, nor Pro-God, it treats alike the devout, the agnostic and the atheist. It eliminates God form the matters of state and ensures that no one shall be discriminated against on the ground of religion.\(^{29}\) Religious tolerance, equal treatment of all religious groups and protection of their life and property and of the places of their worship have been held to be an essential part of Indian secularism.

### 3.3 Article 18 of Universal Declaration of Human Rights and the Freedom of Religions :\(^{30}\)

The effective implementation of Article 18 of Universal Declaration of Human Rights need to be seen in this context. The Article 25 of the Indian Constitution offers freedom of religion and it says: Subject to public order, morality and health, all persons are equally entitled to freedom conscience and the right to profess, practice and propagate religion.

a. Right to change one’s religion- individual, or in community

b. There is no factor that restrict/control this process.

Whereas Indian constitution Article 25 offers:

a. Right to freely profess, practice and propagate religion.

"Propagation" does not unequivocally offer the right of

---

choice. It is interpreted in contradictory manner by people of different views. The supreme court of India does not agree that propagation includes that decision of individual to convert.

b. This freedom is subject to: Public order, morality and health. Union Government and State governments have the right to make legislation to restrict/control religious expressions in the name of public order.

The Indian context has two major issues in relation to the realization of Article 18 of UDHR and article 25 of Indian Constitution.

1. The legislation is not categorical in offering freedom of religion in its complete sense including the choice of a person to convert.

2. The Indian society is intensely communalized. It would be difficult to implement even the best of the most progressive legislation in this commuralized context, having said that let us see, what the ground reality in India is.

3.4 Freedom under Art 25 to 28 and the Role of the Judiciary:

The Indian constitution spells out the concept of freedom of religion, enshrined in the first amendment to U.S. Constitution. This amendment prohibits establishment of religion by state and guarantees free exercise of religion.

Our constitution under articles 25 to 28 guarantees the freedom of religion to all person whether citizens or non-citizens. The guarantee is available not only to individual
but also to the religious groups. The freedom of religion guaranteed by Articles 25 to 28 may be classified as follows:

**Freedom of Religion under Constitution:**

India’s Constitution provides that “all persons are equally entitled to freedom of conscience and the right freely to profess, practice and propagate religion,” subject to public order, morality and health. The Constitution explicitly prohibits discrimination on the basis of religion. Article 19 of the Constitution further protects freedom of speech, expression and association. Additionally, Article 51 imposes a positive duty on citizens to “promote harmony and the spirit of common brotherhood amongst all the

32. Id. art. 15. Specifically, Article 15 states:
(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 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 shops, 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 the 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.] Id. With regard to section (4), footnote 2 explains that the bracketed section was added by the Constitution (First Amendment) Act, 1951, s.2.
33. Id. art. 19, (1)(a)–(c). These freedoms however are limited by Article 19, (2)–(4), which roughly state that nothing in the sub-clauses shall affect the operation of any existing law, or prevent the State from making any law, in so far as such law imposes reasonable restrictions on the exercise of the right conferred by the said sub-clause[s] in the interests of the sovereignty and integrity of India, the security of the State, friendly relations with foreign States, public order, decency or morality, or in relation to contempt of court, defamation or incitement to an offence. Id. § (2)–(4) (internal brackets omitted).
people of India transcending religious . . . diversities.”

However, recent federal and state laws directly counter the freedom that the Constitution provides, resulting in widespread persecution towards religious minorities.


2. Freedom to manage religious affairs.

3. Freedom to payment of taxes for promotion of any particular religion.

4. Freedom as to attendance at religious worship in certain educational institutions.

Article 25 specially guarantees to every person and not merely the citizens of India, the freedom of conscience and the right freely to profess, practice and propagate religion.

Article 25 provides that:-

(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, practise and propagate religion.

(2) Nothing in this article shall affect the operation of any existing law or prevent the state from making any law.

34. Id. art. 51, § (e).


36. Article 25 of constitution of India.

37. Article 26 of constitution of India.

38. Article 27 of constitution of India.

39. Article 28 of constitution of India.

(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 Hindus.

Explanation - I

The wearing and carrying of Kirpans shall be deemed to be included in the profession of the Sikh religion.

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.

Articles 25 and 26 shall be read together. The right guaranteed by Article 25 is an individual right as distinguished from the right of an organized body like the religious denomination or any section thereof dealt with by article 26. Both these articles protect matters of religious doctrine or belief as well as acts done in pursuance of religion-rituals, observances, ceremonies and modes of worship. These articles embody the principles of religious tolerance that has been the characteristic feature of Indian civilization from the stack of history, the instances and periods when this feature was absent being merely temporary aberrations. Besides they serve to emphasize the secular nature of Indian democracy which the founding
fathers considered should be the very basis of the constitution.\textsuperscript{41}

**Freedom of Conscience:**

Conscience is a concept of wider connotation to include not only religious faith or belief, but any innermost of intimate thought or conversion of a person. And freedom of conscience is, indeed at bottom the freedom of thought elevated as an anointed and sublimated mental process in the region of reason, religion, ethics or morality.

But freedom of conscience also includes the freedom to entrain ideas which are anti rational, anti-religious or irreligious and even unethical or immoral by prevailing standards of reason, religion, ethics or morality. It may also be in appropriate cases, include political, social and economic doctrines.\textsuperscript{42} And on this view of freedom of conscience alone can the vital significance of the opening words of article 25(1) “subject to public order morality and health .... becomes apparent, although as an operational idea the mental freedom of conscience must be deemed to be absolute until sought to be externalised.\textsuperscript{43}

The constitutional freedom of conscience is a mental process, the right freely to profess, practise and propagate religion refers to the entire process of externalisation of an area of the mental freedom of conscience, the area relating to religion or to religious matters. The words “profess, practise and propagate “in article are intended to be liberally and conjunctively interpreted to include any

\textsuperscript{42} Venkataramanu Devaru v. State of Mysore (1958) SCR 845.
\textsuperscript{43} Cf. Adelaide v. Commonwealth (1943) 67 C.L.R. 116 Per Latham C.J.
possibly form of expression of a religious faith or belief, including, of course, anti-religious or irreligious notions or atheistic doctrines.

**Right to Practice Religion:**

To profess religion is publicly to affirm one’s belief both by word of mouth and other conduct. Article 25(1) states—it should be taken to denote all public expressions of a person’s religious ideas and beliefs and the declaration of his adherence to any religious denomination or sect. However, “to profess religion” must also in this context include expression of atheistic or anti-religious creeds. The main components of the right to profess religion are (i) Right to religious processions (ii) right to public worship. While to “profess” means to openly express or declare to freedom to practice religion” thus the right of a person to freely practise religion includes his right to perform himself, or through somebody else, religious rites, rituals, forms and ceremonies, including, participation in religious processions, and to worship or to participate in the performance of worship by somebody else.\(^{44}\)

In respect to practice and to follow the religion, two enactments of Madras and Bombay (Madras Hindu Bigamy Prevention and Divorce Act, 1949 and the Bombay Prevention of Hindu Bigamous Marriage Act, 1946) which enforced monogamy among the Hindus were challenged and was argued that the law enforcing monogamy infringed the religious freedom guaranteed by the constitution.

---

In case the Madras High Court *Srinivasa Aiyar v. Saraswati Ammal* following the *American precedent of Reynolds v. U.S.* which distinguished religious belief from practice held that the State could regulate and restrict a practice if it was thought necessary to do so in the interest of social welfare and reform. Similarly, the Bombay High Court on identical facts in *State of Bombay v. Narasappa* made a distinction between religious belief and practice and upheld the legislation which enforced monogamy among Hindu. The “belief-action” dichotomy laid down in American case of *Davis v. Beason* was followed.

When the Parliament enacted the Hindu Marriage Act, 1955 it was challenged on the ground that it violated Article 25 (Section 5 of the Hindus Marriage Act enforcing monogamy). The Allahabad High Court in *Ram Prasad v. State of U.P.* upheld the validity of the Act on the same ground. The basis of the decision rested merely on the "belief-action" dichotomy.

**Freedom to Propagate Religion:**

The word “propagate” refers not only to discrimination or communication of ideas but also to canvassing actively for or persuading or even inducing conversion or adherence to, a particular idea or creed. There is little wonder, then that in the constitution assembly the voices of vehement opposition to the inclusion of this word in article 25(1) as a constitutional novelty had to be muted by men like Munshi

---

45. AIR 1952 Mad. 193.
46. 98 U.S. 145 1879.
47. AIR 1952 Bom, 85.
48. 133 U.S. 637 1889.
by reminding the assembly of the compromise with the minorities, where in “on this word the Christian community laid the greatest stress because the word “propagate” was a fundamental part of their tenet.”

Notwithstanding the support given to the inclusion of the word “propagate” by Santhanam Vrishnaswami Bharati and Kashi Kanta Muitra, the true position in this regard is to be found in the following observations of Alladi Krishnaswami Aiyor.50

It was probably unnecessary to have included the expression ‘propagate’ in view of the fact that freedom of expression is already guaranteed under article 19, but the expression was inserted by way of abundant caution to satisfy certain missionary interests who were zealous about it.”

The right freely to profess, practise and propagate religion must, then, in its amplitude be taken to include any claim to freedom in regard to religion which, of course is subject to appropriate restrictions. And accordingly, the Supreme Court said:

"...every person has a fundamental right under our constitution not merely to entertain such religious beliefs as may be approved of by his judgment or conscience but to exhibit his belief or ideas in such avert acts as are enjoined or sanctioned by

his religion and further to propagate his religious view for the edification of others".\textsuperscript{51}

The Calcutta high court held that the use of a loudspeaker for calling the Azan was not an integral part of Muslim religion and, therefore, the suppression of the use of loudspeaker did not afford the right of the petitioner guaranteed by Article 25(1).\textsuperscript{52}

The Bombay prevention of Bigamous marriage Act, 1946, which forbade bigamy among Hindus, was challenged as violative of the freedom of religion of the respondent as guaranteed by article 25(1). The question before the court was whether polygamy to have a natural born son was an integral part of Hindu religion. The Bombay High Court held the Act valid and said that the birth of a natural born son was not an essential and integral part of Hindu religion. It was why the institution of adoption was created.\textsuperscript{53}

In a decided case the petitioners challenged the constitutional validity of the Bihar Prevention and Improvement of Animals Act, 1956, the U.P. prevention of cow slaughter Act, 1955 and the C.P. and Berar Animal preservation Act, 1949, which \textit{inter alia} prohibited the slaughter of cows of all ages. The petitioners \textit{inter alia} contended that the impugned Acts violated their fundamental right guarantee by Article 25(1). They argued that the sacrifice of a cow on the occasion of their Bakra Id

\textsuperscript{52} Masood Alam \textit{v.} Commr of Police, AIR 1956 Cal 9.
\textsuperscript{53} State of Bombay \textit{v.} Narasy App Mali, AIR 1952 Bom 84.
day was an integral part of their religion. The Supreme Court rejected the contention of the petitioners and held that there was no material on the record before the court which would enable them to say that the sacrifice of a cow on that day was an obligatory overt act for a Mussalman to exhibit his religious belief and idea.

The Madhya Pradesh Dhanna Swatantratya Adhiniyam Act, 1968 and the Orissa freedom of Religion Act, 1967, prohibited the forcible conversions of any person to one’s own religion. The Supreme Court held that the right to propagate religion did not grant the right to convert another person to one’s own religion. It merely meant the right to transmit or spread one’s religion by an exposition of its tenets.

In Ramesh Chota Lal Dalal v. Union of India, the Supreme Court accepted that Article 25 guaranteed the right to draw attention of the court to ensure that the communal atmosphere was kept clean and unpolluted.

In this case, the petitioner moved the court for a writ of ‘prohibition’ restraining the concerned person from telecasting or screening the serial titled ‘Tamas’ and to enforce his fundamental rights under articles 21 and 25. The serial based on a novel written by Sri Bhisma Sabni, depicted how during the partition of India communal violence was generated by fundamentalists and communalists of both communities. It was contended that

57. AIR 1988 SC 774.
the said serial was against public order and was likely to
incite the people to indulge in the commission of offences.
Among other things, it was argued that the screening of the
serial was destructive of the principle embodied under
Article 25.

The court held that there was no danger to communal
atmosphere by telecasting or screening the said serial and
that there was no violation of Article 25.

The respondents had not acted with malice or bad
motive in screening the serial. That there could not be any
apprehension that it was likely to affect public order or it
was likely to incite the commission of any offence instead,
the serial viewed in its entirety, the court held, was capable
of creating a lasting impression of the message of peace and
coeexistence and that it was more likely that the serial would
prevent the incitement of such offences in future of
extremists and fundamentalists.

In case of Ismail Faruqi v. Union of India,\(^{58}\) the
Supreme Court by a majority has held that the state can in
exercise of its sovereign power acquire place of worship like
mosques, churches, temples etc, which is independent of
Art. 300-A of the constitution if it is necessary for
maintenance of law and order. Such acquisition does not
violate arts 25 and 26 of the constitution. What is protected
under article 25 and 26 is a religious practice which forms
an essential and integral part of religion. A practice may be
a religious practice but not an essential part of religious
practice, its offering at every location where such prayers

\(^{58}\) (1994) 6 SCC 360.
can be offered would not be an essential religious practice. Status of mosque in secular India is same as and to higher that of places of worship of other religion such as temple, church. A mosque is not an essential part of the practice of the religion of Islam and Namaz (prayer) by Muslims may be offered anywhere even in open. The right to worship does not include the right of worship at any and every place, so long as it can be practiced effectively, unless the right to worship at a particular place is itself an integral part of that right. Under the Mohammedan law applicable to India, title to a mosque can be lost by adverse possession. The matter in this case was referred to the Supreme Court for its advisory opinion by the president on Dec. 6, 1992 due to the demolition of disputed structure of Babri Mosque at Ayodhya, law and order in the country was disturbed in order to defuse the crises, the Union Government acquired the whole property surrounding the mosque. This was challenged by the petitioners on the ground that it was violative of Article 25 and 26 of the constitution as they were deprived of their right to worship in the mosque but Hindus were allowed to worship therein. The Court held the act valid as it does not interfere with the essential element of religion. 'While the right to worship is an essential part of a religion but it does not include the right to worship at any place and every place.\footnote{59}

Following \textit{Rev Stainislaus}\footnote{60} stating the Supreme Court bench comprising of Chief Justice V.N. Khare and Justice

\begin{footnotes}
\footnote{59. Dr. J.N. Panday, pp. 331-332, 49th Edition (The Constitutional Law of India).}
\end{footnotes}
S.B. Sinha held that the Orissa Freedom of Religion Act, 1967 which provided that a person wanting to convert to a particular religion must make a personal declaration which would be verified by the police also, is valid and overruled the decision of the Orissa High Court. The Court said, “What article 25 grants is not the right to convert another person to one’s own religion, but to transmit or spread one’s religion by an exposition of its tenets. Article 25 (1) guarantee “freedom of conscience to every citizen and not merely to the followers of one particular religion. The Article postulates that there is no fundamental right to convert another person to one’s own religion because if a person purposely undertake the conversion of another person to his religion, that would impinge on the freedom of conscience guaranteed to all citizens of the country alike.

In case of Ramji Lal Modi v. State of Uttar Pradesh\(^\text{61}\) the validity of section 295-A of IPC was challenged on the ground that it interfere with citizens right to freedom of speech and expression guaranteed under article 19(1) (a). Article 19(1) (a) subject to certain limitations, guarantees to all citizens the freedom of speech and expression. The right it has held includes the liberty of Profess.\(^\text{62}\) Thus a citizen cannot be stopped from publishing or distributing any book pamphlets and other literature of religion or otherwise, unless his action overreaches the limitations imposed on this right.

---

\(^{61}\) AIR 1957 SC.

\(^{62}\) Ramesh Thapper v. State of Madras, AIR 1950 SC.
In a decided case of *Sanjiv Datta’s case*\(^{63}\) Justice Sawant has observed that Freedom of religion is the core of Indian Culture. In his opinion the Indian constitution by guaranteeing freedom of conscience insured inner aspects of religious belief. The external expression of it has been protected by guaranteeing right to freely practice and propagate religion. It has been observed that “religious practices of performance of acts in pursuance of religious belief are much a part of religion as faith or belief in particular doctrines the expression right freely to profess and practice his religion indicates that in India a person can declare freely and openly his religious faith and can freely practise his religion. Article 25 of the constitution thus, guarantees to only the freedom to have faith or belief in religious tenets of any sect but also the freedom to declare his religious faith and to practise his religion. In addition, article 25 of the constitution guarantees to every citizens right to propagate any religion i.e. to publicize his religious views. Freedom of religion guaranteed by article 25 includes the freedom to practise rituals and ceremonies which are essentials and integral parts of religion.\(^{64}\) It is to be noted that right to perform a religious practice may be acquired by custom also.

In a well known decided case of *Jagdishwaranand v. Police Commissioner*,\(^{65}\) the Supreme Court held that the Tandav Dance by Anand Margies in procession is not essential and integral part of the religion of Anand Margies.

In *Commissioner of Police v. Jagdishacanand*, a petition was filed under Article 32 claiming protection of Article 25 and 26 for performance of Tandav Dance in Public Procession as part of the Anand Margis religion. In this case the Supreme Court directed the High court to examine the issue keeping in view of the earlier judgment of the Supreme Court. The High court held that the Supreme Court gave indication that the matter is not finally concluded and it is still open. The High Court expressed the view that the practice of Tandav Dance in Public procession forms part of the religion of the Anand Margies. In this case the High court expressed the view that the decision of the Supreme Court in *Jagdisharanand v. Police Commissioner*, is not binding in the present circumstances. Right to religion includes right to seek declaration that church was Episcopal.

In a decided case of *Bijoo Emmanual v. State of Kerala*, the Supreme Court has made it clear that a person can refuse to sing the National Anthem, if there is genuine conscientious religious objection. If a person shows proper respect to the National Anthem, does not prevent the singing of the National Anthem and does not cause any disturbance to the assembly in the singing of the national anthem, he can neither be punished for violation of fundamental duties laid down under Article 51A nor for any offence under the prevention of insult to National Honour Act. 1971.

66. AIR 1991 Cal. 263.
67. Ibid.
69. (1986) 3 S.C.C. 615.
A disposition towards making gift for charitable or religious purpose may be a pious act but the same cannot be said to be an integral part of any religion. If a person professing Christian religion does not show any inclination of disposition towards charitable or religions purpose, he does not cease to be a Christian.

As Per Khare, C.J. expressed his view in context of religion and said that only because charity and compassion are preached in every religion, the same by itself would not be a part of the “religious practice” within the meaning of Article 25.⁷⁰

Deprecating the recent trends relating to religious fundamentalism the Supreme Court in State of Karnataka v. (Dr.) Praveen Bhai Thogadia⁷¹ held secularism means that state should have no religion of its own, and each person, whatever his religion, must get an assurance from the state that he has protection of law to freely profess, practice and propagate his religion and freedom of conscience.

3.5 Restrictions on the Freedom of Religion:

The “freedom of conscience” and the right to “profess, practice and propagate religion”, guaranteed by article 25(1) is subjected to:

(a) Public order, morality, health and other provisions of part III⁷²
(b) Any law regulating or restricting any economic, financial or other secular activity associated with religious practice.⁷³

---

⁷² Opening words or clause (1) of article 25 (The Constitutional Law of India).
⁷³ Clause (2) of article 25.
(c) Any law providing for social welfare or reforms or the throwing open to all persons the religious institutions belonging to their religion of a public character.\textsuperscript{74}

Article 25(1) is modeled on article 44 of the constitution of the Irish Free state which provides: “Freedom of conscience and the free profession and practice of religion are, subject to public order and morality, guaranteed to every citizen”. Article 25(1) however enumerates the right to propagate religion which is not found in the constitution. To Staunch Hindus the inclusion of a right to propagate religion was obnoxious and an attempt was made in the constitution Assembly to delete the word “propagate”. But the attempt was unsuccessful because certain interests were very zealous about it and it had been agreed to be included in the Minority Report. According to Sir Alladi it was probably as unnecessary to have included the expression “Propagate” in article 25(1) in view of the fact that freedom of expression is already guaranteed under article 19 but the expression was inserted by way of abundant caution.\textsuperscript{75} In America the propagation of religion has been held to include the right of individuals to dedicate property by way of trust to the purpose of sustaining and propagating definite religious doctrines wherefore it is the duty of courts to see that the property so dedicated is not diverted from such trust.\textsuperscript{76}

\begin{flushright}
74. Clause 2(b) of article 25.  
75. Alladi Constitution and Fundamental Rights.  
\end{flushright}
Court has reached the same conclusion although not based on Article 25(1) for in *Rati Lal v. State of Bombay.*

However, this freedom like any other freedom is not absolute and is subject to certain limitations which are provided in the Constitution itself. In *Jeved v. State of Haryana,* it was submitted on behalf of the petitioners to permits performance of marriages with four women obviously for the purpose of procreating children and any restriction thereon would be violative of the right to freedom of religion enshrined in article 25 of the Constitution. Rejecting this argument the Supreme Court held that the freedom under article 25 is subject to public order, morality and health. So the article itself permits legislation in the interest of social welfare and reform, which are obviously part and parcel of public order, national morality and the collective health of the nation’s people. The protection under articles 25 and 26 is with respect to religious practice, which forms an essential and integral part of the religion. A practice may be a religious practice but not an essential and integral part of that religion. Article 25 does not protect the latter. Accordingly, the Supreme Court rightly held that a statutory provision casting disqualification on contesting for, or holding, an elected office is not violative of article 25 of the Constitution.

In *John Vallamattom v. Union of India,* the Supreme Court has rightly explained that article 25 is subject to the other provisions contained in part III of the Constitution. It

---

77. AIR 1954 SC. 388 394.
provides freedom of “profession” of religion, meaning thereby the right of the believer to state his creed in public and freedom of “practise” meaning his right to give it expression in forms of private and public worships. A disposition towards making gift for charitable or religious purposes may be a pious act of a person but the same cannot be said to be an integral part of any religion.\(^{80}\)

Following *Rev. Stainislaus v. State of M.P.*,\(^{81}\) the Supreme Court in *Satya Ranjan Majhi v. State of Orissa*,\(^{82}\) has reiterated that right to propagate one’s religion does not include the right to convert another.

**State Rights on Public Order Morality and Health:**

The rights conferred by article 25(1) are by no means absolute. In the first place, they are subject to “*public order, morality and health*” - what is called in American Law the police power of the state. The only case in which it was invoked is *Tej Raj v. State of Madhya Pradesh*.\(^{83}\) The executive officers of the state Government, claiming and asserting a right of ownership on behalf of the state on what was in reality a public Jain temple had installed a Hindu idol in that temple and had prohibited members of the Jain community from entering and worshipping except on

---

80. *Id.*, at 626-27. (Per Khare CJ On this point, Sinha J. Concurred with the opinion of Khare C.J. However, Lakshmanan, J. gave a dissenting opinion. According to him the contribution for religious and charitable purposes is a philanthropic act intended to serve humanity at large and is also recognized as a religious obligation. Therefore, bequeathing property for religious and charitable purposes cannot be controlled or restricted by the legislature, as it would offend the fundamental rights of the testation under articles 25 and 26 of the Constitution. *Id* at 631. It is submitted that the majority opinion appears to be right.

81. (1977) 1 SCC 677.


83. AIR 1954 SC 403(i).
condition of Hindu being allowed to worship the newly installed idol. The Madhya Pradesh High Court held that under Article 25(1) the members of the Jain community had the right to enter and worship in their temple according to the principles of their own religion to which the presence of a Hindu idol and its worship by Hindu within the temple precincts was repugnant, and that the action of the state Government could not be defended on the ground of public order, morality or health. The court added sardonically “a public temple cannot be made a museum for an exhibition of deities and idols of all religions.”

**Secular Activities:**

Clause (2) of Article 25 contains further limitations on the rights conferred by clause (1) sub-clause (a) reserves the right of the state to “regulate or restrict any economic, financial, political or other secular activity which may be associated with religious practices” and interpreted by the Supreme court this means that religious practices as such cannot be regulated or restricted by the state but only secular activities which may be associated with religious practice.

It may be noted that the sub-clause uses both the expression “regulate” and “restrict”. The former expression is a familiar one in American constitution law while the latter has been generally used in the Indian constitution. Whether here the power to restrict would include the power to prohibit has not yet been decided by the Supreme

---

84. Vide “reasonable restrictions” in article 19.
Court. In construing the scope of restriction a distinction may have to be drawn between ‘regulation’ and restriction having regard to the use of both the expression in juxtaposition in article 25(2) (a). It is seen from the constituent Assembly debates that the insertion of the word ‘prohibit’ in Article 25(2) (a) was moved but was negative.

**The Social Welfare and Reformatory set up:**

Clause (2)(b) of Art. 25 of the Constitution empowers the state to make laws for social welfare and social reform. 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 practised 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

---

85. In the cow slaughter case (AIR 1958 SC 731) The question was left open. *Narender Kumar v. Union of India,* AIR 1960 SC. 430 where the court held that the word restriction in Article 19 would include prohibition AIR 1958 S.C. 731.


87. AIR 1953 Bom 84.

88. 98 US 145 : L.Ed. 544 (1878).
of good order.” Prohibition of civil practices such as Sati or system of Devadasi has been held to be justified under this clause. 89

This right protected to related right to enter into a temple for the purpose of worship. But it does not follow from this that right is absolute and unlimited in character. No one can claim that a temple must be kept open for worship at all hours of the day and night or that he should be permitted to perform those services personally which the Acharya alone could perform. 90 The State cannot regulate the manner in which the worship of the deity is performed by the authorised pujaris of the temple or the hours and days on which the temple is to be kept open for darshan or puja for devotees. 91

The right of Sikhs to wear and carry Kirpans is recognized as a religious practice in Explanation 1 of Article 25. This does not mean that he can keep any number of Kirpans. He is entitled to keep one sword. He cannot possess more than one Kirpan without a license. 92

The provisions of sub-clause (b) of article 25(2) which may be studied in two parts are extremely enigmatic.

The first part of the sub-clause reserves the right of the state to provide for “social welfare and reform”. What is the legal connotation of the expression “social welfare” and social reform? It would appear that in the context of religious freedom the adjective ‘social’ must be construed in antithesis to “religious”. In this view, “social” will be a word

---

92. Art. 25 Explanation I Constitution of India.
of limitation of state power. It would mean power to promote
or reform social relations as distinguished from religious
practices and the state will have no power to interfere with
religious practices as such. But that is not the sense in
which the Supreme Court has construed the provision.

The second part of Article 25(2) (b) has caused much
difficulty and even confusion. It saves the power of the state
to make laws providing for “the throwing open of Hindu
religious institutions of a public character to all classes and
sections of Hindus”. Language of such wide amplitude has
been employed as would make one wonder if all that is
included was really intended. The provision may be
analysed thus: (1) Hindu religious institutions of a public
character (2) may be thrown open (3) to all classes and
sections of Hindus (4) not with standing article 25(1) as to
the meaning of “Hindu religious institution of a public
character, first, by Explanation II to Art. 25 the expression
“Hindu” includes a Sikh, Jain and Buddhist Hence Hi
du, Sikh, Jain and Buddhist religious institutions come
within the scope of the provision. Secondly, “religious institutions
will include not merely temples or vihars but mutts,
monasteries, pathshallas and the like.

Thirdly, does the expression “Religious institutions of a
public character” mean only such institutions as are
dedicated to the use of members belonging to a particular
religion as a whole, or does it also include what are purely
denominational institutions such for example as a temple
endowed for the benefit of the members of a particular sect
or sub-sect as distinguished from the entire religious group
as a whole? The point arose in an acute form in the Madras Temple Entry Case.93 The Supreme Court felt compelled by the language of the provision to construe it in the broader sense as including within its scope even purely denominational institutions.

It will be seen from the above that on the language used, it is possible to construe the provision so widely as to empower the state to make a law throwing open a Jain temple to all Hindus, a Hindu denominational Mutt to all Hindus, Sikhs, Buddhists and Jains, a Sikh Gurudwara to Buddhists and so on. And so the question arises; was all the intended? From the constituent Assembly debates, it is seen that as originally drafted the words used were “for throwing open Hindu religious institutions of a public character to any class or section of Hindus.” This obviously had reference to what used to be known as the Temple Entry movement which was launched in order to secure admission for Harijans (Hindu out caste) into temples which were open only to caste-Hindus. An amendment was however moved by a private member to substitute the words “all classes and sections” for the words “any class or section” and the amendment was accepted.

It is difficult to understand why the provision empowering the throwing open of religious institution has been inserted in Article 25 which deals with personal or individual rights. Article 26 which deals with the rights of religious institutions would appear to be the appropriate place. This defect in drafting had to be set right by process

of judicial interpretation in the temple entry case. The Madras Temple Entry Authorisation Act authorised persons belonging to the excluded classes to enter and worship in any Hindu temple, the term “Hindu temple” being defined as “a place which is dedicated to or for the benefit of the Hindu community or any section there of as a place of public religious worship. The trustees of the shree Venkataramana Temple, which was a denominational institution belonging to the Gowda Saraswati Brahmin community of Hindus, claimed the right conferred by Article 26(b) to exclude from the temple all other. Hindu communities and impugned the validity of the Madras legislation as contravening article 26(b) Article 26(b) guaranteed to religious denominations autonomy in matters of religion and undoubtedly the impugned law infringed that right. But that was not all. The law had been enacted in pursuance of Article 25(2) (b) which made specific provision in this behalf. To avoid a conflict between article 25(2) (b) and article 26(b) the court was invited to construe the former provisions as confined to the throwing open of religious institutions dedicated to the Hindu public in general and not denominational public temples. However attractive the suggestion was, the court declined to read into article 25 (2) (b) words of limitation which were not there, and held that even denominational public institutions were within that clause. There being no way of avoiding an apparent conflict between two provisions in the constitution, the court held that article 26 (b) must be read subject to article 25 (2) (b), that is to say, of the denominational rights conferred by article 26(b) as regarded
one particular aspect of them, viz., entry into temples for worship; the rights declared under article 25(2) (b) should prevail. In other words, the court interpreted Article 25(2) (b) as if it were included in Article 26 and not in Article 25.

Role of Constitutional Machineries in Religion:

The validity of legislation compelling monogamy among Hindus has been challenged again and again but without success. The Madras High court in Srinivasa Aiyar v. Saraswathi Ammaal, 94 was of the view that marrying a second wife with a view to beget a son" even if the belief that he would procure a son by a second marriage was well founded "was not so much a matter of religion as of sentiment because the Hindu law recognised the right to adopt a son who would have the same religious efficacy as a natural born son, and in any case the impugned law was saved by article 25 (2)(b). When parliament enacted the Hindu Marriage Act, 1955 its provisions prohibiting bigamy were challenged before the Allahabad and Manipur High Courts. By then the Supreme Court had already pronounced that the right to practise religion under article 25(1) embraced religious practices as well but only those practices which were enjoined by religion. Hence the Allahabad High Court hold that in view of the existence of an alternative mode of obtaining a son by adoption, a second marriage was not an obligatory religious practice within the protection of article 25(1) before the Manipur High Court a desperate but interesting attempt was made to convince the court that the anti-bigamy legislation far from

94. AIR 1952 Mad. 193.
promoting social welfare was anti-social in reality. It was argued at the bar, that there was a preponderance of females over the male population in Manipur and so if men were restricted to single wife, the excess female population would be prevented from satisfying their biological needs in lawful wedlock and thus driven to immorality.\textsuperscript{95}

In a Mosque situate in a crowded locality the system of calling the Azan\textsuperscript{96} through an electrical loudspeaker was introduced but on complaints from the residents of the locality the police authority withdrew permission to operate the loudspeaker. On behalf of the Mosque it was contended that there was a violation of Article 25 because the Azan could not be heard by the faithful unless magnified mechanically. Following the Bombay view of article 25 (1) Sinha J. of the Calcutta High Court negatived the contention saying that calling the Azan through a loudspeaker was certainly not required by the religion and in any case there was no right to mere religious practice.

The Article 26, dealing with the right to freedom of religion, provides

\begin{itemize}
  \item[a)] to establish and maintain institutions for religious and charitable purposes.
  \item[b)] to manage its own affairs in matters of religion
  \item[c)] to own and acquire moveable and immoveable property; and
  \item[d)] to administer such property in accordance with law.
\end{itemize}

\textsuperscript{95} Singh v. Ongbi, AIR 1959 Manipur 20.
\textsuperscript{96} Calling the faithful to prayer five times a day
Religious Denomination or Section There of:

The expression “denomination” is also used for each of the sects and sub-sects of a religion. So construed, the Arya Samaj, Ananda Marga Vaishnava (the followers of Ramanuja); the followers of Madhawacharya, and other religious teachers, though not a separate religion has been held to be a separate religious denomination and as such has the right to the protection of article 26.

Article 26 secures to every religious denomination or its any section as a collectively, four conflated and conjunctively operating rights, although it is not necessary that any denomination or its any section must be actually enjoying them all in order to claim the protection of this article.

3.6 Right to establish and maintain - Institutions for Religious and Charitable purpose:

Under Article 26 complete freedom is given to a community organized under a definite name following certain common beliefs conducive to their spiritual well being. Such an organized body is free to establish and maintain the religious and charitable institutions and to handle all the affairs related to matters of religion, they can own, acquire and administer any moveable and immovable property for the same purpose. But this freedom is subject to public order, health and morality. Here our constitution,

implicitly defines the role of State, which is explicitly defined in Article 25 (2)(a)(b) which provides:101

"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 Hindus."

So, the combined effect is that State has regulatory powers in secular activities of these institutions to maintain the public order, health and morality and not otherwise. Freedom when given absolutely leads to destruction and if these reasonable restrictions are not imposed this freedom can also be misused by criminals, politicians and anti-social elements. So Constitution through State maintains a balance and prevents these sacred institutions from becoming a den of anti-national activities.

The Supreme Court in Acharya Jagdiswaranand Avadhut v. Commissioner of Police,102 held: “Every religious denomination or organization enjoys complete freedom in the matters of deciding what rites and ceremonies are essential according to the tenets of the religion they hold. The Court has the right to determine whether a particular rite or ceremony is regarded as essential by the tenets of a particular religion. The State cannot interfere in their freedom to manage its own affairs in matters of religion.

unless they run counter to public order, health and morality."

In Acharya Maharajshri Narendra v. State of Gujarat\textsuperscript{103} it was held that Article 26, guarantees \textit{inter alia} the right to own and acquire movable and immovable property for managing religious affairs. This right however, cannot take away the right of the State to compulsorily acquire property.

In Durgah Committee, Ajmer v. Syed Hussain Ali\textsuperscript{104}, it was held that Article 26(c) and (d) did not create rights in any denomination or section of it; it merely safeguarded and guaranteed the continuance of rights that such denomination or section had. If the right to administer properties never vested in the denomination, or had been validly surrendered by it or had otherwise been effectively and irretrievably lost to it, Article 26 could not be invoked.

In Church of God (Full Gospel) in India v. KKR Majestic Colony Welfare Association,\textsuperscript{105} the Supreme Court held that the custom of religious prayer through the use of loudspeakers is not an essential element of any religion. A person’s religious freedom is subject to “public order, morality and health” and to stop such religious practice from creating noise pollution and from disturbing the other’s peace does not tantamount to violation of Articles 25 and 26.

In A.S. Narayan v. State of Andhra Pradesh,\textsuperscript{106} the petitioner challenged the validity of Andhra Pradesh Charitable and Hindu Religious and Endowments Act

\textsuperscript{103} AIR 1974, SC 2995.
\textsuperscript{104} 1962 1 SCR 383.
\textsuperscript{105} AIR 2000 SC 2773.
\textsuperscript{106} AIR 1996 SC 1765.
abolishing hereditary rights of archaka and other office holders on the ground that it violated his right to freedom of religion under Articles 25 and 26 of the Constitution. The court held that the Act is not violative of above-mentioned Articles and is valid. The hereditary right, appointment of priests is not an essential of religion or matter of religion or religious practice. The right to religion guaranteed under Articles 25 and 26 is not an absolute or unfettered right but subject to regulation by the State of any activity — economic, financial or secular. The appointment of a priest is a secular activity, which could be regulated by law. The Act regulates only secular part of the religious institutions or endowments. The Act does not interfere with the performance of any religion’s worship or ceremony. Archakas are employees of temple.

In Ewanlangki-E-Rymbai v. Jaintia Hills District Council\textsuperscript{107} it was held in the context of the United Khasi-Jaintia Hills Autonomous District (Appointment and Succession of Chiefs and Headmen) Act, 1959 exclusion of Christians from contesting election to the posts of chiefs or headmen was not unconstitutional.

It was reiterated in I. Nelson v. Kallayam Pastorate\textsuperscript{108} that rights under articles 25 and 26, are not absolute and unfettered. Right to manage does not carry with it a right to mismanage and therefore in cases of mismanagement, courts can oversee its function.

Under clause (a) of Art. 26, every religious denomination has right to establish and maintain

\textsuperscript{107} Supra note 90.
\textsuperscript{108} 2006 (9) SCALE 245.
institutions for religious and charitable purposes. The words “establish and maintain in art. 26(a) must be read together and therefore it is only those institutions which a religious denomination establishes, which can claim to maintain it. Thus in *Azeez Bashu v. Union of India* the Supreme Court held that the Aligarh University was not established by the Muslim minority and therefore it could not claim the right to ‘maintain’ it. It was established under the statute passed by parliament.

**Right to Manage ‘Matters of ‘Religion’:**

Every religious denomination or its any section is entitled under article 26 (b) to manage its own affairs in religious matters. Precisely it is the doctrine of internal autonomy in religious matters that has been inserted into this article. *Bira Kishore Dev v. State of Orissa*, the Shri Jagannath Temple Act took the management of secular activities of temple from the Raja of Pun and vested it in the committee constituted under the Act. The court held the Act Valid as it did not affect the religious aspect.

In *Atheist Society of India v. Government of A.P.* the petitioner, Atheist society of India, prayed for issuing a writ of mandamus directing the state Government to prohibit breaking of coconuts, performing of poojas, chanting of mantras or sutras of different religions at state functions. The Andhra Pradesh High Court rejected their prayer and held that these activities have been a part of the Indian tradition and are meant to invoke the blessings of almighty

---

110. AIR 1964 SC 1501.
111. AIR 1992 AP 310.
for the success of the project undertaken. Such noble thought cannot be found fault with as offensive to anyone. May be that the petitioner’s society which claims to be atheist or do not appreciate the invocation of gods as they do not believe in God. There is no constitutional guarantee to the faith of the all who worship barren reason that there is no God. It is not the object of the constitution to turn the country into an irreligious place. A secular state does not prohibit the practices of religion. It is prevented to infringe the rights of crores of Indians which are granted to them under Art 25 and will run directly contrary to the secular objectives of the preamble to the constitution which is one of the basic structures. It would deprive them of their right of thought, expression, belief, faith and would amount to abolition of Indian tradition and religious practices.

**Articles 25(1) and 26(B)**

In case of *N. Adithayan v. Travancore Devaswom Board*\(^\text{112}\) held that just because traditionally only Brahmins carried out functions of priests does not mean that non-Brahmins are prohibited from doing so. Properly trained and qualified person may be appointed as poojari regardless of caste.

Submission to the effect that the personal law of Muslims permits performance of marriage with four women obviously for the purpose of procreating children and any restriction thereon would be violative of the right to freedom of religion enshrined in Article 25 was rejected by the *Supreme Court in Javed v. State of Haryana*. It was held that

---

\(^{112}\) (2002) 8 SCC 106.
a religious practice which is not integral part of the practice of that religion is not protected under Article 25 and hence a statutory provision casting disqualification on contesting for, on holding, an elective office was not violative of Article 25.

**Right to Own and Acquire Property:**

By virtue of article 26(c) every religious denomination or its section has the right to own or acquire moveable or immoveable property. “Property in this article also denotes both a bundle of rights relating to a thing, whether moveable or immoveable, or the thing itself. But it does not include a right which never vested in a denomination, nor is any denomination’s property incapable of being acquired or requisitioned by the state.

**Right to Administer Property:**

Article 26 clause (d) of this article entitles every such denomination or its section “to manage its property in accordance with law”. The word “property” in both the clauses has the same meaning and, therefore, in this clause also it does not include a right which never vested in a denomination.

What articles 26 (d) gives to a denomination is the right to manage its property in accordance with law, and consequently, the state is competent to regulate by law the manner of managing such a property.

---

113. 1962 ISCR 383.
Restrictions on the Rights Under Article 26:

All the four rights under article 26 are subject to restrictions. They suffer, first, from a limitation arising out of the definition of “matters of religion”. Secondly, all their operations are alike subject to public order, morality and health to which freedom of conscience and the right freely to profess, practice and propagate religion in Article 25 are also subject to. And lastly, they are mutatis mutandis, subject to the other restrictions in Article 25.

Articles 25 and 26

The Supreme Court having upheld the constitutionality of the A.P. Charitable and Hindu Religious Institutions and Endowments Act, 1987, questions were raised in the review petitions in as much as the Supreme Court has in several decisions explained the scope of the said provisions and it has been held therein that religious practice or performance of acts in pursuance of the religious belief are as much a part of a religion as faith or belief in a particular doctrine that, if the tenets of a particular religion require performance of certain rites and ceremonies to be performed at certain times and in a particular manner, these cannot be treated as secular activities, that the protection under Article 25 and 26 is not confined to matters of doctrine or belief but they extend to acts done in pursuance of religion and therefore contain a guarantee for rituals and observances, ceremonies and modes of worship which are an integral of a religion but what constitutes an essential part of a religion has to be the doctrine of a particular religion; that a religious denomination 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 that the protection is only permissible where the practice is a religious one that to determine whether a particular practice is a matter of religion may be a difficult task because religious and secular practices are intricately mixed up that the task of disengaging the secular from the religious may not be easy but it must nevertheless be attempted in dealing with claims of protection under Articles 25 and 26 and the proper test to be applied to determine whether a particular practice is an integral part of the religion; is to ascertain whether it is regarded as such by the community following the religion or not that the Supreme Court has been cautious to observe that certain practices will be treated as part of religion only if they are regarded by the said religion as its essential and real part.\textsuperscript{115}

3.7 Freedom from Taxes for Promotion of any Particular Religion:

No person shall be compelled to pay any taxes the proceeds of which are specifically appropriated in payment of expenses for the promotion of maintenance of any particular religion or religious denomination.

Article 27 prohibits the levying of a tax, the proceeds of which are specifically appropriated towards promotion of

a particular religion. If such a tax is imposed, no person can be compelled to pay it.

In *Rati Lal v. State of Bombay*,\(^\text{116}\) the Supreme Court has held that a tax is in the nature of a compulsory exaction of money by a public authority for public purposes. The imposition is made for public purpose to meet the general expenses of the State without reference to any special advantage to be conferred upon the tax payer. Tax is a common burden and the only return which the tax-payer gets is a participation in the common benefits of the states.

In *Sri Jagannath v. State of Orissa*,\(^\text{117}\) held that the levy under the Orissa Hindu Religious Endowments Act, 1939, was in the nature of a fee and not tax. The payment was demanded only for the purpose of meeting the expenses of the commissioner and his office which was the machinery set up for due administration of the affairs of the religious institution. The object of the contribution was not the fostering or preservation of Hindu religion or of the denomination within it, but to see that religious institutions were properly administered.

In a case *Ragunath v. State of Kerala*,\(^\text{118}\) 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

\(^{116}\) AIR 1954 SC 388.

\(^{117}\) AIR 1954 SC 400.

\(^{118}\) AIR 1974 Ker. 48.
Government." The petitioner prayed for 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.

This is a bold judgment exploding a popular myth that Art. 27 forbade any promotion or maintenance of religion, but only the levy of taxes for promotion and maintenance of any particular religion.

A similar question arose before the Orissa High Court in *Bir Kishore Mahanty v. State of Orissa*, the case arose in the following way.

The petitioner who is resident of Cuttack and a tax payer of various taxes levied by the State Government filed the writ application under Art. 226 for issuance of a writ of mandamus directing the State of Orissa to forbear from spending any amount from the public funds of the State for renovation of the tanks of Markanda, Narendra and Swetaganga at Puri. It was stated in the petition that the said tanks are held in high reverence by the Hindu public who use them for religious purposes and periodical religious rites of Lord Jagannath of Puri are performed there. It was contended that spending of money from out of the funds of the State for renovation of these tanks amounts to

---

119. AIR 1975 Orissa 8.
maintenance of Hindu religion which is forbidden by Art. 27.

On the above facts, the Court held that what is prohibited under Art. 27 is taxation of the specific appropriation of the proceeds of any tax for promotion or maintenance of any particular religion or religious denomination. In making the grant for the purpose under consideration, no question of promoting or maintaining the Hindu religion arises at all.

**Restrictions on The Right Under Article 27:**

The gist of this freedom is that no person can be compelled to pay a tax the proceeds of which are specifically used for the promotion, or maintenance, of any particular religion. Article 27 does not prevent the state from spending public funds for religious and charitable purposes without making discrimination between different religions or between religious and secular institutions.

The Supreme Court affirmed this position in *Jagannath Das’s case*, and consequently, and levy, contribution, or fee, as distinguished from tax in regard to a religious institution or endowment specifically for the purpose of defraying the expenses of the administration of its property is valid.

**3.8 Prohibition of Religious Instruction in State Aided Institution:**

In our country religion is a very sensitive issue, it has lot of power to create controversy at any time. Controversy of Derasacha Sauda is a very recent example to be quoted here. Now it is quite clear to us that Secularism is a very
important aspect of our Constitution as well as of our country.

Last in this series is Article 28, a very important article. The purpose of this article is to avoid any kind of religious instructions in the name of religious education. The religious instructions can block the mindset of present generation to a fixed point and it actually takes away their power to think freely and prudently. They will respond only to pre-conceived notions and that deprives them from their independence of choice.

Article 28, provides

(1) No religious instruction shall be provided in any educational institution wholly maintained out of state funds.

(2) Nothing in clause (1) shall apply to any 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 institution.

(3) No person attending any educational institution recognised 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 there to unless such person, if such person is a minor, his guardian has given his consent there to.
In *Aruna Roy v. Union of India*, the Supreme Court held that the entire emphasis of Article 28 is against imparting religious instruction, or performance of religious worship. There is no prohibition on studying religious philosophy and culture, particularly to have a value based social life in a society lusting after power, post or property. The national curriculum framework for school education pertaining to education for value developments is neither violative of Article 28, nor does it put secularism to peril. It is a wrong presumption and contention that the knowledge of different religions would bring disharmony in a society. On the contrary, knowledge of various religious philosophies is conducive in bringing communal harmony as ignorance breeds hatred because of wrong notions, assumptions, preaching and propagandas by misguided interested persons making the students aware that the essence of every religion is common, and that only practices differ cannot be taken as violative of Article 28. Secularism should be taken to mean developing an understanding and respect towards different religions.

As far as religious education is concerned it has the completely reverse effect. The real essence of any religion is to impart sincerity, devotion and wisdom, so that people can decide for themselves independently without getting influenced by the conditioned minds to get self-knowledge, to regulate their behaviour in the society with their fellow beings, to balance themselves mentally, spiritually, physically to exist in this world and to make this world a

---

120. AIR 2002 SC 3176.
better place to live. So, religious study containing teachings of the great personalities, their experiences, and their philosophy is not prohibited at all as that gives us knowledge regarding the moral and spiritual aspects of life.

In the case of *D.A.V. College v. State of Punjab,*\(^{121}\) it has been held that the words “Religious instructions” have been held as not prohibiting education of religions dissociated from "tenets, the rituals, observances, ceremonies and modes of worship of a particular sect or denomination." The academic study of the teachings and the philosophy of any great Saint such as Kabir, Guru Nanak and Mahavir was held to be not prohibited by Article 28 (1) of the Constitution.

Present generation with the change in time and with better education is more confident and independent. They are continuously breaking the set principles and tending towards making their own rules by relying upon their own judgments. Today they themselves consider what is right, reasonable, and sound for them without giving an ear to what their parents others are following for years. And, Article 28 provides them this freedom.

The prohibition of article 28 is two pronged. In the first place, there is a total prohibition under clause (1) of this article on imparting any religious instruction in any educational institution maintained wholly out of state funds. However, by virtue of clause (2) if the state even wholly maintains an educational institution in administering capacity with in the terms of any endowment

---

\(^{121}\) 1971 (2) SCC 269.
or trust under which the institution has been established, this prohibition cannot operate if the endowment or trust requires the imparting of religious instruction in such an institution.

Then, article 28(3) forbids the compulsory attendance of any person attending an educational institution recognised or aided by the state at any religious instruction or worship conducted in the institution or any premises attaches to it unless the person concerned, or the guardian of any such minor person, voluntarily consents to such an attendance.

3.9 General Constitutional Provisions of Equality for Citizen in Respect of Freedom of Religion:

The Constitution of India contains in its Chapter on Fundamental Rights several provisions that emphasize complete legal equality of its citizens irrespective of their religion and creed and prohibit any kind of religion-based discrimination between them. Among these provisions are the following:

1. The State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India.\(^{123}\)

2. The State shall not discriminate against any citizen on grounds only of religion, race, caste, sex, place of birth, or any of them, either in general or in the matter

\(^{122}\) Available at http://ietd.inflibnet.ac.in/bitstream/10603/1936/8/08-chapter%203.pdf

\(^{123}\) Art. 14 (The Constitution Law of India).
of access to or use of general and public places and
conveniences.\textsuperscript{124}

3. There shall be equality of opportunity for all citizens in
the matter of employment or appointments under the
State and no citizen shall, on grounds only of religion
be ineligible for, or discriminated against, in respect of
any employment or office under the State.\textsuperscript{125}

4. The traditional religious concept of 'untouchability'
stands abolished and to find its practice in any form is
strictly forbidden.\textsuperscript{126}

5. If the State imposes compulsory service on citizens for
public purposes no discrimination shall be made in
this regard on the ground of religion only.\textsuperscript{127}

To meet the demands of Article 17 noted above, soon
after the commencement of the Constitution Parliament had
enacted an Untouchability (Offenses) Act, which was later
amended and renamed as the Protection of Civil Rights Act,
1955. The Act prescribes penalties for the practice of
untouchability in various specified forms. A second law
enacted in this respect is the Scheduled Castes and

**Freedom of Religion as and Individual’s Rights:**

Religious freedom as an individual’s right is
guaranteed by the Constitution to 'all persons' within the
following parameters:

\textsuperscript{124} Art. 15 (The Constitution Law of India).
\textsuperscript{125} Art. 16 (The Constitution Law of India).
\textsuperscript{126} Art. 17 (The Constitution Law of India).
\textsuperscript{127} Art. 23(2) (The Constitution Law of India).
1. All persons are equally entitled to freedom of conscience and the right freely to profess, practise and propagate religion.\textsuperscript{128}

2. There shall be freedom as to payment of taxes for promotion of any particular religion by virtue of which no person shall be compelled to pay any taxes the proceeds of which are specifically appropriated in payment of expenses for the promotion or maintenance of any particular religious denomination.\textsuperscript{129}

3. No religious instruction is to be provided in the schools wholly maintained by State funding; and those attending any State-recognized or State-aided school cannot be required to take part in any religious instruction or services without their (or if they are minor their guardian's) consent.\textsuperscript{130}

\textbf{Freedom of Religion as a Group Right :}

Freedom of religion is guaranteed by the Constitution of India as a group right in the following ways:

1. Every religious denomination or any section thereof has the right to manage its religious affairs; establish and maintain institutions for religious and charitable purposes; and own, acquire and administer properties of all kinds.\textsuperscript{131}

2. Any section of the citizens having a distinct language, script or culture of its own shall have the right to conserve the same.\textsuperscript{132}

\textsuperscript{128} Art. 25(1) (The Constitution Law of India).
\textsuperscript{129} Art. 27 (The Constitution Law of India).
\textsuperscript{130} Art. 28 (The Constitution Law of India).
\textsuperscript{131} Art. 26 (The Constitution Law of India).
\textsuperscript{132} Art. 29 (The Constitution Law of India).
3. Religious and linguistic minorities are free to establish and administer educational institutions of their choice, which shall not be discriminated against by the State in the matter of giving aid or compensation in the event of acquisition.  

Limitations of Religious Freedom:

The Fundamental Right to religious freedom cannot be enjoyed in an absolutely unrestricted way. There are limitations within which these rights can be exercised, as also lawful restrictions which can be imposed by the State on such rights, as detailed below:

1. The right to freedom of religion is, in general, subject to public order, morality, health and the other provisions of the Constitution.

2. Despite the right to religious freedom, the State can pass laws providing for social welfare and reform and also to regulate or restrict any secular activity - economic, financial, and political, etc. - even though it may be traditionally associated with religion.

3. Despite the minorities' right to establish and maintain educational institutions, no citizen can be kept away from any State-aided or State-maintained educational institution only on religious grounds.

Distribution of Religious Matter under Schedule VII:

Under Article 246 of the Constitution read with Schedule VII various religious matters noted below fall in the jurisdiction of the State - and both Parliament and the

---

133. Art. 30 (The Constitution Law of India).
state legislatures, or either of them, can legislate on such matters:

i. Pilgrimage outside India - Union List, entry 20;
ii. Pilgrimage within India - State List, entry 7;
iii. Burials & burial grounds, cremations & cremation grounds - State List, entry 10;
iv. Family relations, succession & all other personal-law matters - Concurrent List, entry 5;
v. Charities, charitable institutions & endowments - Concurrent List; entry 28;

3.10 Bar on Religious Role in Election:

By a dictate of the Constitution religion has no role to play in elections to Parliament and State Assemblies and Councils. For all elections to central and state legislatures the electoral rolls for every constituency shall be general and common and no person can either be excluded from, or included in, any such roll only on the basis of his or her religion.137

To implement this provision of the Constitution the election law contained in the Representation of the People Act, 1951 incorporates provisions declaring the use of religion during electioneering both a 'corrupt practice' that will vitiate the election of the winning candidate and also a punishable offence.

Statutory Bar for using Religion in Election:

Disqualification for Election:

Under the election law of India a person guilty of the following offences relating to religion may be disqualified for a period of six years:138

(a) Representation of the People Act, 1951, Section 125 (using religion for electoral gain);
(b) Indian Penal Code, Sections 153-A and 505 (offences against religion);
(c) Religious Institutions (Prevention of Misuse) Act, 1988 (misusing shrines for unlawful activities); and

Invalidation of Winning Candidate's Election:

The Representation of the People Act, 1951 also prohibits use of religion and religious symbols with a view to promoting an aspirant's candidacy for a public election or for adversely affecting the election of another such candidate. The Act empowers the High Courts to declare the election of a winning candidate to be void if he commits, inter alia, a 'corrupt practice'.139 Indulgence in any of the following acts either for the furtherance of a candidate's election or for prejudicially affecting another candidate's election will be 'corrupt practice' under the Act:

(a) An appeal to vote, or refrain from voting, for any person on the ground of his religion, race, caste, community or language.140

---

138. Section 8, The Representation of the People Act, 1951.
139. Section 100.
140. Section 122(3).
(b) Use of or appeal to religious symbols (unless specifically allotted under the Act).\textsuperscript{141}

(c) Promoting or attempting to promote enmity or hatred between different classes of citizens on grounds of religion, race, caste, community, or language.\textsuperscript{142}

(d) Propagating the practice or commission of sati or its glorification as defined in the Commission of Sati (Prevention) Act 1987.\textsuperscript{143}

Notably, indulgence in any of these acts will be regarded a 'corrupt practice' if it is indulged in:

(i) By the candidate himself; or

(ii) By his agent; or

(iii) By any other person with his or his agent's consent – Section 122(3), (3A), (3B).

**Offence of Promoting Religious Disharmony:**

Promoting or attempting to promote feelings of enmity or hatred between classes in connection with an election on the grounds of religion, race, caste, community or language, is declared by the Act to be an offence punishable with imprisonment up to three years, fine, or both - Section 125. This provision would apply irrespective of the civil action provided for in Section 123 read with Section 100 as analyzed above.

**Provisions for Hindus, Buddhists, Jains & Sikhs:**

The Constitution includes the following special provisions for the Hindu, Buddhist, Jain and Sikh communities:

\textsuperscript{141} Section 122(3).
\textsuperscript{142} Section 122(3A).
\textsuperscript{143} Section 122(36).
(a) Declaration of abolition of untouchability (mainly a Hindu religious custom) and prohibition of its practice in any form.\textsuperscript{144}

(b) A Directive Principle of State Policy requiring the State to take steps to prohibit slaughter of cows and calves (reverence for whom is customary among the Hindus).\textsuperscript{145}

(c) Declaration of the validity of pre-existing and future laws made to throw open Hindu places of worship to all sects and sections of the Hindus (with a supplementary provision giving the power for the Buddhist, Jain and Sikh shrines),\textsuperscript{146} Explanation I.

(d) A special provision for the grant of specified annual maintenance allowances to be given from the State exchequer for the upkeep of Hindu temples of a certain denomination in two South Indian states, Kerala and Tamil Nadu.\textsuperscript{147}

(e) Declaration of wearing and carrying a \textit{kirpan} (sword) a Fundamental Right for the Sikhs,\textsuperscript{148}

\textsuperscript{144} Article 17 (The Constitution Law of India).
\textsuperscript{145} Article 48.
\textsuperscript{146} Article 25.
\textsuperscript{147} Article 290A.
\textsuperscript{148} Explanation II. Article 25.