CHAPTER V
RELIGIOUS FREEDOM VIS-A-VIS
NATIONAL INTEREST, AND SOCIAL REFORMS

1. Introduction:

Indian constitution proclaimed 'India as a secular State'. The Indian secularism implies that the State does not have its own religion but it respects equally all faith. 'Freedom of Religion' enshrined in Arts, 25-28 of the Indian constitution includes freedom of conscience, freedom to practice and propagate the faith and freedom to manage religions institutions and affairs. Article 27 puts a bar on the State authority to the extent that it can not compel any one to pay 'tax' for the advancement of any religion. Moreover, the State can not use its exchequer also for the promotion of any faith or religion. Freedom of religion is guaranteed to all citizens and non-citizens and to individuals as well as religions groups on equal footings.1

But it does not mean that the freedom of religions is absolute. It is subject to certain restrictions given in Articles 25-28 because one can not be permitted to do any mischief in the name of religion, however, one is free to choose the path to reach the 'Almighty' or to attain the

'moksha', so long, he does not interfere with the religious freedom of others.

For the purposes of systematic study, this chapter is divided into following parts:

1. Religions Freedom vis a vis Protection of National Interest.
2. Religions Freedom vis a vis Social Welfare and Social Reforms.

2. Religions Freedom vis a vis Protection of National Interest:

India is a great country of great civilization. People from different communities with a variety of faith and belief have been residing here with a sense of fraternity and respect. But, unfortunately after independence, there is gradual degradation of national character and the 'love to nation' or its 'values' is diminishing. Politicians are exploiting even the 'freedom of religion' for ulterior objectives. Time and again, this question has been raised in the public circles and media that whether we are first Indians and thereafter Hindu, Muslim, Sikh or Christian or vice-versa?

The Apex Court was called upon in The National Anthem
In this case, the three children belonging to the "Jehoras: witnesses" of 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(i) of the Indian constitution. 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 religions faith which did not permit them to join in any rituals except if it be in their prayer to Jehora, their God. The Kerala High Court laid down that it was their fundamental duty under the constitution to sing the National Anthem. It further laid down that if the pupils belonging to the religions groups refused to participate in the singing of the National Anthem, it would have a very bad influence on the other pupils and the headmistress 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. The conduct of the children in not showing unqualified respect to the National Anthem, the High court said, would endanger the security of the State, in that the same will develop among the citizens a tendency to ignore the mandates of the constitution thereby defeating the object—(discernible from the preamble and other provisions) to accomplish which the people gave the constitution themselves. If religions practices run counter to public morality, health or a policy of the Govt. to uphold the sovereignty and integrity and unity of the Nation then the said religions practices must give way for the benefit of the people and the nation as a whole. 3

On appeal, a two judge bench of the Supreme Court reversed the High Court decision and held that there is no legal obligation in India for a citizen to sing the National Anthem. The right under Article 25(i) can not be regulated by executive instructions which had no force of law. The court said that by standing up while the National Anthem was being sung, the children had shown proper respect to the National Anthem and had thus not violated the fundamental

duties laid down in the 51 A of the constitution. Their conduct did not amount to an offence under the Prevention of Insults National Honour Act, 1971 as they did not prevent the singing of the national Anthem nor caused disturbance to the assembly in the singing of the National Anthem. Accordingly, the court directed the Authorities to re-admit the children in the School and to allow them to pursue their study.\(^4\)

The judgement of the Supreme Court will have far reaching consequences. In ruling so, the Apex Court have solely relied on the decisions of the American Supreme Court. This is most unfortunate. The American society is different than that of the Indian society. The forces threatening the unity and integrity of the country are operating in the country.\(^5\)

In this context this ruling of the Apex Court will only add fuel to the fire and give strength to these forces. The court's decision is likely to be interpreted as a licence for 'all' to disregard the sanctity of the National Anthem, National Flag and other national marks of the country which may endanger the national integrity and unity of the

\(^4\) Ibid.

country. It i, therefore, submitted that the judgement of the High court in instant case appears to be more sound and reasonable. However, the Apex Court did not approve the same and gave more preference and priority to the individuals rights than the 'National interest'.

The American Supreme Court was also requested to decide a similar issue in the Minnersville School Case. In this case two small children belonging to Jehora witnesses" were expelled from the School of Minnersville, Oenssylvania for refusing to salute the national flag as part of the daily exercise. It was argued on behalf of the children that they are taught to believe by the aforesaid denomination that saluting the flag was contrary to the injunction laid down in the holy scripture. The Apex Court of America was called upon to decide if the requirements of participation in such a ceremony compulsorily demanded from a child, who refused on sincere religions ground, infringed the constitutional guarantee of religions liberty. The court by a majority decision held that there was no infringement of right to freedom of religion and it was within the competence of the

6. Ibid.

legislature to adopt appropriate means to evoke and foster a sentiment of national unity amongst the children in public school.\textsuperscript{8} However, in the \textit{West Virginia State Board Case},\textsuperscript{9} the American Apex Court retracted from the view taken by it in the aforesaid case and laid down that the action of the State in making it compulsory for children in public schools to salute the national flag and pledge allegiance constituted violation of the liberty of religion.\textsuperscript{10}

Therefore, the courts are facing an uphill task in reconciling the freedom of religions connections honestly believed by men with the saving of the larger national interests which the citizens are expected to protect in matters of unity and solidarity of the Union and the States.

The Apex Court was required to decide a similar complex issue in the \textit{Dr. Ismail Faruqui Case}\textsuperscript{11} recently. The Apex Court, while dealing with the acquisition of certain areas

\textsuperscript{8} Ibid.
\textsuperscript{9} \textit{West Virginia State Board of Education v. Barnetle, 1942} 319 US 624.
\textsuperscript{10} Ibid.
\textsuperscript{11} \textit{Dr. Ismail Faruqui v. Union of India's Others, AIR 1995 SC 605.}
at Ayodhya under Ayodhya Act, 1993, laid down by majority\textsuperscript{12} that even though, \textit{prima facie}, the acquisition of the adjacent area in respect of which there is no dispute of title and which belongs to Hindus may appear to be a slant against the Hindus, yet on closure scrutiny it is not so since it is for the larger national purpose of maintaining and promoting communal harmony and in consonance with the creed of secularism. Once it is found that it is permissible to acquire an area in excess of the disputed area alone, adjacent to it, to effectuate the purpose of acquisition of the disputed area and to implement the outcome of final adjudication between the parties to ensure that in the event of success of the Muslim community in the Dispute, their success remains meaningful, the extent of adjacent area considered necessary is in the domain of the policy and not a matter for judicial scrutiny or a ground for testing the constitutional validity of the enactment.\textsuperscript{13}

The court further laid down that the right to practise, profess and propagate religion guaranteed under Article 25 of the constitution does not necessarily include the right to

\textsuperscript{12} Majority view was expressed by Chief Justice M.N. Venketakhallia, Justice Verma and Justice Roy.

\textsuperscript{13} Ibid at 607.
acquire or own or possess property. Similarly, this right does not extend to the right of worship at any and every place of worship so that any hindrance to worship at a particular place *per se* may infringe the religions freedom guaranteed under Article 25 and 26 of the constitution. Arts. 25 and 26 of the constitution does not cover right to worship at any and every place, so long as it can be practised effectively unless the right to worship at a particular place is itself an integral part of that religion.  

However, the 'minority' in this case was of the opinion that the preamble to the constitution of India proclaims that India is a secular democratic republic. 'Secularism' is given pride of place in the Constitution. The object is to preserve and protect all religions and to place all religions communities at par when, therefore, adherents of the religions of the majority of Indian citizens make a claim upon and assail the place of worship of another religion and, by dint of numbers, create conditions that are conducive to public disorders it is the


15. Minority - view was supported by Justice Ahmadi and Justice Barucha.
constitutional obligation of the State to protect that place of worship and to preserve public order, using for the purpose such means and forces of law and order as are required. It is impermissible under the provisions of the constitution for the State to acquire that place of worship to preserve public order. To condone the acquisition of a place of worship in such circumstances is to efface the principles of secularism from the constitution. Exercise of the right of the individual to profess, practise and propagate religion is subject to public order. Secularism is absolute, the State may not treat religions differently on the ground that public order requires it.\textsuperscript{16}

The judgement of the Majority in this case appears to be on more sound footing as compare to minority as "absolute secularism" can not be and should not be achieved at the cost of riots and blood-shed. Some times hard decisions are required to be taken in order protect to national unity and Integrity of the country which are priorities of the constitution. To protect these priorities of the "supreme document", if some sacrifices are required, these have to be made without any hitch or hindrance as everyone is required to protect the constitution.

\textsuperscript{16} Ibid., at 611.
In the Adelail Co. Case, the court laid down that a person could not be allowed to carry on an anti-war propaganda in the guise of religion or in exercise of his freedom of religious practice, profession or propagation etc, especially when the nation is at war. In this Australian Case, a company of "Jehovas witnesses" (a religions organization) which, among other things, was opposed to all wars, in 1941 started and proclaiming and teaching matters which were prejudicial to war activities and the defence of the commonwealth and steps were taken against them under the National Security-Regulations. The legality of the order of the Govt. was challenged by means of a writ petition before the High Court of Australia, which sustained the action of the Govt. and held that the National Security-Regulation does not offend, in any way, the religions liberty of the organization.

In the Tamas Case, the petitioner a practising advocate of High Court filed a public interest litigation under Article32 for issue of a writ in the nature of prohibition restraining the respondents namely, the Union of

18. Ibid.
19. Ramesh v. Union of India.
India, the Director General of Doordarshan, New Delhi and the producer from telecasting or screening the serial titled 'Tamas' and to enforce petitioners fundamental right under Articles 25 of the Constitution. The serial 'Tamas' is based on a novel written by Sri Bhisam Sahni. It depicts how during partition of India communal violence was generated by fundamentalists in both the communities. It was held that although in this case there was no violation of Article 25 but accepted that the petitioner has a right to draw attention of the Court to ensure that the communal atmosphere is kept clean and unpolluted. In this case, the court held that there was no such danger as the respondents' had not acted with malice or bad motive in screening the serial. Instead it gives lesson to the people that such things should not be repeated.

To sum up, the freedom of religion is not absolute and therefore, in 'national interest', the Union and the States can regulate the freedom. We are the "Indians" first, and, thereafter we are Sikhs, Muslim, Jains, Buddhists or Christians etc. we, all are under a duty to respect and protect the constitution leaving aside, all communal or regional issues. The judgement of the hon'ble Apex Court in the National Anthem case is unwanted. We should not try to
import and apply the judgments\textsuperscript{20} of the American Supreme Court "as it is". The American societies and the country have already developed and reached the levels of achieving the goals of maximum happiness of maximum number where as our country is developing and is full of chronic problems of communalism, castism regionalism, illiteracy and poverty. Therefore, excepting the fact that our constitution is somewhat similar to USA, there is hardly any similarity in the social set up and other factors governing the country.

3. Religions Freedom vis-a-vis Social Welfare and Social Reforms:

All religions are equal in matters of respect and treatment under the Indian constitution and the State, therefore, has to apply this mandate carefully when it is dealing with the sophisticated fabric of religion and its propagation specially for the equalitarian social protection and welfare. Undisputedly, Article 25 (2) is a proviso to the fundamental freedom of religion of individuals and gives regulatory power to the state for the protection of social good, and public order in addition to the only exception as it creates a special right in favour of Harijans and others regarding temple entry).

\textsuperscript{20} Supra n.9.
If we look at the religions concepts prevailing in our country then it can be easily inferred that these are so vast and wide to cover each and every aspect of life, right from birth to death. Everything appears to be guided by 'religion' or 'Dharma' including dresses and dances and there is nothing which is not 'religious' or 'religion based'. Therefore, it becomes necessary to crystallise and examine what exactly is 'religion' or 'religious practice' for the purposes of demarcating the scope of ambit of religions freedom as 'anything' which runs contrary to the general public interest can not be permitted as a 'religions practice' attached to a particular religion. The State, certainly has, its power to regulate such practices being practised under the 'pretext of religion', though these are 'secular', in fact.

The reformative zeal in the arena of religions faith and practices was must because of fantasies guiding most of the religions faith even to the extent of child or human sacrifice for 'religious benefits'. Such activities, can, even be heard in the media reports of modern society. Raja Rammohan Roy gathered strong public opinion and resentment against 'Sati' practice, though with initial doubts and hesitation from the public. This provided a strong platform and vibrating support to W. Bantick to declare the act of
"Sati' and its associated practices, a penal and punishable offence in 1829. Similarly, the Bengal Regulation of 1802 declared the infanticide practices to propitiate Gods as an offence of murder 'Thagi' claimed be associated with religion, was also regulated by W. Bentiae. The popular practices of Hindu and Muslim religions processions were also regulated by the Britishers in order to preserve the communal harmony and in the interest of public order. The Indian Penal code drafted during the British regime has a chapter on 'offences relating to religion' to deal with the problems of law and order arising out of religious sensivities. The British era further witnessed the abolition of Devdasi system.

The concept of social reforms was inherited by the Indian constitution under Article 25 (2) (b) without impairing the religions freedom. But the reformative zeal, it appears, has been more or less, practised in the arena of Hindu society whereas the State has taken, a precautionary approach in the field of orthodox Muslim society. The reformative approach in the Indian constitution can be witnessed in regulating or restricting by law, secular facets of activities having by origin some association with enlous, but being pre-dominantly of economic, financial, political or other activities by social implications. The
emphasis is on their extrication from the religions area, conveying the differential between social reforms and religions reforms. In addition to social welfare and social reform, the law clearly ensures the temple entry and right to 'darshan' to Harijans by throwing open Hindu places of worship to all Hindus. The reformative approach, in addition to Article 25 and Article 26, is further supported enshrined in Article 17, Article 15 (2), abolition of Devdasi custom implied in Article 23(1), secular administration of denominational institutions covered by Article 26 and a provision for implementing the uniform civil code under Article 44.

For the purposes of systematic study, we may divide the aforesaid concepts into followings broad heads;
A. Personnel laws and the Religions Freedom;
B. Regulation of Temple Entry, the Right to 'Darshan' and religions practices;
C. Untouchability and Caste Discrimination;
D. Ex-communication and the 'Hukka Pani' Bandh';
E. Secular Administration of Demnominational and other like Institutions.

Personal Laws and The Religions Freedom

It has always been a point of debate that whether the State under its authority and power to regulate the secular
activities associated with religion, can control or regulate certain practices which are associated with the personal laws of individuals. Apprehensions were raised at the drafting stage of the constitution and it was suggested by some members that there should be an omnibus clause in the present Article 25 stipulating that "nothing in clause (2) would affect the right of any citizen to follow the personal laws of his community."

(a) Hindu Law

The reformation of Shastric Hindu Law in the light of prevailing concepts of ideal social norms started even during British rule with the policy of codification of laws. A number of legislations such as the caste Disabilities removal Act, 1850, the widows Remarriage Act, 1856, the Hindu Women's Rights to Property Act, 1937 and the Hindu Married Women's Right to Separate Residence and Maintenance Act, 1946, were passed to bring in the concept of 'equality' and protection of oppressed classes and sections of the society and upgrading their social status.

After the enforcement of the Indian constitution, Parliament passed the Special Marriage Act, 1954 followed by

the Hindu Code Consisting of four major legislations regulating the entire concept of Hindu Law.

In The Narasu Appamali Case, the Bombay High Court was approached in reference to the constitutional validity of State reforms affecting the personal laws. The Bombay Prevention of Hindu Bigamous Marriages Act, 1946 made it a penal offence for Hindus to contact bigamous marriage. The State had excluded Muslim from the purview of the Act in defence to their practice of polygamy. It was argued that the law discriminates, only on the ground of religion and therefore, hit by Article 15 (2), Hindus and Muslim in matters of punishment.

In other words, the social reform is restricted to Hindu society only and the Muslim were left out. The honourable court taking a cautious view, upheld the validity of the Act and laid down that polygamy is not an essential part of a Hindu religion. Moreover, it is to be seen by the State that it want to bring about the social reform stages by stages or by community wise or territorywise. Chief


23. Ibid., at 87.
Justice M.C. Chagle of the Bombay High court observed. One community might be prepared to accept and work social reform, another may not yet be prepared for it, and Article 14 does not lay down that any legislation that the State may embark upon must necessarily be of an all-embracing character. The State may rightly decide to bring about social reform by stages and the stages may be territorial or they may be communitywise. The court further strengthened its stand by laying down that the two communities can not be treated absolutely alike as both the communities are governed by their separate personal laws based upon their separate religions texts; both have different background and evolution; in Hindu society a marriage is a sacrament whereas in Muslim it is purely a contract and Article 44 of the Indian Constitution recognizes the existence of two separate and distinctive personal laws. Therefore, the receptivity of the two communities with regard to reforms differed and further among Hindus the polygamy is never recognized.

24. Ibid.
25. Ibid
26. Ibid at 93.
Justice Gajendragadkar, the then Judge of the Bombay High Court commented: Article 44 of the Constitution is, in my opinion, very important.... This article says that the State shall endeavour to secure for the citizens a uniform civil code throughout the territory of India. In other words, this article by necessary implication recognizes the existence of different codes applicable to the Hindus and Mohammedans in matters of personal law and permits their continuance unless the State succeeds in its endeavour to secure for all the citizens a uniform civil code. The personal laws prevailing in the country owe their origin to scriptural texts. In several respects their provisions are mixed up with and based on considerations of religion and culture; so that the task of evolving a uniform civil code applicable to the different communities of this country is not very easy. The framers of the Constitution were fully conscious of these difficulties and so they deliberately refrained from interfering with the provisions of the personal laws at this stage but laid down a directive principle that the endeavour must hereafter be to secure a uniform civil code throughout the territory of India.  

27. Ibid., 91-92.  
28. Ibid., at 92.
In the Reynolds Case, a State law made the second marriage a criminal offence while the first spouse is living and prescribed punishment for the same. The appellant, in the case, was punished for attempting to take a second wife "under the sanction and command of his religion". The Supreme Court of USA laid down that his punishment was ruled under the statute which prohibited bigamy. The court said that congress was deprived of all legislative powers over mere opinion but was left free to reach actions which were in violation of "Social Duties" or "Subversive of Good Social order".

In the Srinivasa Aiyyer Case, the Madras High Court has upheld the constitutionality of the Madras Hindu (Bigamy Prevention and Divorce) Act, 1949 and made it clear that after the passing of the Hindu marriage Act, 1955, the 'Hindu marriages' shall be monogamous as a rule and abolished polygamy and polyandry as a policy. Moreso, Section 11 declares a bigamous marriage as void ad initio and Section 17 of the Act read with Section 494 and 495 of the Penal Code prescribes punishment for the same. The court

even did not allow a prevalent custom of plural marriage in
the region as an exception. In the Ram Prasad Case, a similar issue came for discussion before the Allahabad High court. The petitioner, which challenging the constitutional validity of the U.P Government Servant Conduct rules questioned the monogam enforcement measures and contended that under the old Hindu scriptures and manuals, a person was allowed and permitted to go for a second marriage on failure of the first wife to bear a son, during her lifetime for procurement of a son (which was considered essential for 'pindadan' and the continuation of race and name of the Hindu family).

The practice, therefore, was claimed to be part of his religion protected by Article 25 (1). However, the court laid down that the Yainyawalkya smriti only permitted second marriage for the purpose of a son, but at the same time, it also provided an option of adoption to fulfill the object, and therefore, the claimed practice could not be regarded as

31. Ibid., See also H.B. Singh v. State of Manipur, AIR 1959, Mani. 20.

an integral part of religion. In the Narasu Case, also, Chief Justice Chagla, was of the view that an adopted son, being an equally efficacious alternative to a natural son, the Hindu religion provided for the continuation of the line of a Hindu male within the framework of monogamy. To be more precise polygamy can not be permitted for the aforesaid purpose among Hindus and the State could intervene to regulate the institution of marriage in the interest of society. Monogamy was the social fact of the institution of marriage and as such within the purview of the State's power of social reforms. Therefore, for the welfare, and protection of social interests, bigamy stands abrogated even if it is regarded as an integral part of the religion, as the legislature of a country is the best judge of what is necessary and expedient for the welfare or reform of a particular community at any particular stage.

So, in the Hindu Law, both the judiciary as well as the legislature have shown the desired interest for the purposes of reformation and it appears, the courts have laboured and taken the pains of providing some sort legal justifications

33. Ibid.
34. Supra n. 22.
35. Supra, n. 21, p. 317.
whenever any practice, custom or usage is protested as religious one. There have been strong and active litigations to preserve and protect the aforesaid practices under the pretext of religious freedom but the courts, on most of the occasions, after careful scrutiny found them secular one and, therefore, permitted the state regulations to check or control these social evils or for providing for social reforms.

(b) Muslim Law:

In the field of Muslim law, unfortunately, the post independence period has been marked by legislative unwillingness to experiment with or to introduce the reforms in the personal laws of Muslim due to fundamentalists pressures on parliament. The courts, however, have evaluated the reasoning for upholding the constitutionality of such measures in the province of Muslim personal laws also on the similar lines as in case of the Hindu law.

During the pre-independence period, however, it appears that the Muslim law too was invaded by the passage of the Wakf validating Act, 1913 & 1930, the Cutchi Memons Act 1920, 1942, the Wakf Act, 1923 & 1954, the Child Marriage Restraint Act, 1929, Shariat Act, 1959, the Durgah Khwaja Sahib Act, 1936 & 1955 and certain state laws like the Bombay prevention of ex-communication Act, 1949 and 1959
etc. In The Badruddin Case, the Allahabad High Court even made a remarkable observation in the field of reformation of Muslim Personal Law. The court said:

It may be that under the personal law of Muslims, a Muslim may have as many as four wives. But I do not think that having more than one wife is a part of religion. No authority was cited to show that it is obligatory upon a Musalman to have more than one wife.

Though the court has tried to evaluate the constitutionality of Muslim personal law but there is hardly any legislative activity since, 1950 to impose the reformation over the community opinion. The rigid approach of the fundamentalists of the Muslim community overpowered the state and central enactments. For example, the Muslim Personal Law (Shariat) Act, 1963, as amended by Kerala State, establishes supremacy of Muslim personal law over the new State rule governing succession to agricultural land. The Orissa Mohammedan Marriages and Divorces Registration Act, 1949 keeps registration voluntary and therefore, non-effective. Similarly, the Dowry (Prohibition) Act, 1961 which prescribes punishment for the dowry transactions

36. Ibid., at 312.
38. Ibid at 301.
expressly excludes 'Mehar' or dower from the purview of the Act. 39

The Cr.P.C. of 1973 which introduced a clause providing for the maintenance of a divorced wife also. This projected reform was vehemently criticized by the Muslims and 'their' mediamen on the ground that under Muslim Law a husband is bound to maintain a divorced wife only during the period of idda and not thereafter. To be more precise, the Muslims were on their feet to raise their objections against the measure and called it as "an interference with the Islamic Law." 40 Ultimately, a clarification was provided in Section 127 of the code that the magistrate shall cancel his order if satisfied, that the customary sums due were personal.

The orthodox Muslims recognized the special Marriage Act, 1954 as a rival legislation and wanted exemptions to Muslims under this Act also. They feel that a Muslim marrying under this Act commits a 'sin' and his marriage is unlawful in the eyes of 'Islam'. 41 The Government unconsciously, have accorded recognition to the Muslims unacceptance of the Act by distinguishing between Hindu and

40. Ibid., at 319.
41. Ibid.
Muslims in the 1976 Amendment to the Act by which it is provided that only Hindus that they, while marrying under the Act may retain their personal law of succession; the omission of Muslims suggesting that the government also does not expect any Muslims to marry under the Act. There is one field in which there is little opposition from Muslims quarters, i.e. The central and State laws for Wakf Administration. It is, perhaps so, because the Wakf Boards are to comprise of exclusively Muslims members.  

But there are certain departures also (from the orthodox and traditional approaches) among Muslims. Mohd. Ghouse feels that the Muslim Polygamy and divorce institutions are discriminatory against the Muslim woman on the only ground of her religion, for the Muslim personal law applies to only Muslims and a Muslim wife can not unilaterally from Muslim religion. These institutions are, therefore, he maintains, violative of Article 14. He is, further critical of the of practies of polygamy and arbitrary divorce and considers these practices without any religions motivation and therefore misfounded. Though the

42. Ibid.
43. Jasbir Mahmood (ed.), "Islamic Law in Modern India (1972) p. 56.
basic and primary sources of Muslim law is undisputedly, the Quran and the Sunna but the relations and certain other things it regulates are, from no standpoint strictly religious and are purely social or secular similitud and therefore, the State can regulate the same. Neither polygamy and unilateral right to divorce nor non-maintenance of orphaned grand children can be identified with Muslim Culture.

The Muslim law on these aspects does not also represent the moral mores reflected in qur'anic verses. To be precise, therefore, neither reforms nor replacement of Muslim personal law 'Violates' or encroaches the religions or cultural rights of the Muslim against Article 25 and Article 29 (1) of the Indian constitution.  

In the Shahulameedu Case, the Kerala High Court, while interpreting the rule relating to wife's maintenance contained in Section 488(3) of the Cr. P.C. did not deny its benefit to the wife of a bigamous Muslim staying away from him after his second marriage. Specifically emphasizing the

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44. Ibid., at 54.
45. Ibid., at 55.
mandate of Article 44, Justice Iyer, the then Judge of the Kerala High Court remarked: 47

The Indian constitution directs that the State should endeavour to have a uniform civil code applicable to the entire Indian humanity, and indeed, when motivated by a high public policy, s. 488 of the Criminal procedure Code has made such a law, it would be improper for an Indian Court to exclude any section of the community born and bred up on Indian earth from the benefits of that law....

In the Shah Bano Case, 48 the Apex Court delivered a "controversial" judgement while dealing with the right of a divorced Muslim wife to seek maintenance under Section 125 cr. PC. The court laid down that Section 125 (1)(b) which defines 'wife' as including a divorced wife, contains no words of limitation to justify the exclusion of Muslim women from its scope. Therefore, a divorced Muslim woman, so long as she has not remarried is a 'wife' for the purposes of Section 125 and the statutory right available to her under the this section is unaffected by the provisions of the personal law applicable to her. 49 The court further said

49. Ibid.
that the explanation to the Second Proviso to Section 125 (3) confers upon the wife the right to refuse to live with her husband, if he contracts another marriage, leave alone 3 or 4 other marriages. It shows, unmistakably, that Section 125 overrides the personal law if there is any conflict between the two.\textsuperscript{50}

The court made it clear that the statements in the textbooks viz Mull's Mohammedan law (18th Edit.) and Tyabji's Muslim law (4th Edit) are inadequate to establish the proposition that the Muslim husband is not under a legal obligation to provide for the maintenance of his divorced wife, who is unable to maintain herself. Section 125 deals with cases in which a person who is possessed of sufficient means neglects or refuses to maintain amongst others, his wife, who is unable to maintain herself. Since, the Muslim law, which limits the husband's liability to provide for the maintenance of the divorced wife to the period of iddat, does not contemplate or countenance the situation envisaged by Section 125, it can not be said that the Muslim husband according to his personal law, is not under an obligation to provide maintenance, beyond the period of iddat, to has divorced wife who is unable to maintain herself. The true

\textsuperscript{50} Ibid.
position is that if the divorced wife is able to maintain, her husband's liability to provide maintenance ceases with the expiration of the period of iddat. If, she is unable to maintain herself, she is entitled to take recourse to Section 125. Therefore, it can not be said that there is conflict between the provisions of Section 125 and those of the Muslim Personal law on the question of the Muslim husband's obligation to provide maintenance for a divorced wife who is unable to maintain herself. 51

The court further said, that it is also a matter of regret that Article 44 of our constitution has remained a dead letter. It provides that the State shall endeavour to secure for the citizens, a Uniform civil Code, throughout the territory of India. There is no evidence of any official activity for framing a common civil code for the country. A belief seems to have gained ground that it is for the Muslim communally to take a lead in the matter of reforms of their personal law. A common civil code will help the cause of national integration by removing disparate loyalties to laws which have conflicting ideologies. No community is likely to bell the cat by making gratuitous concessions on the issue. It is the State which is charged with the duty of securing a

51. Ibid, at 946.
Uniform civil code for the citizens of the country and, unquestionably it has legislative competence to do so. A counsel in the case whispered, somewhat audibly, that legislative competence is one thing, the political courage to use that competence is quite another. We understand, the difficulties involved in bringing persons of different faiths and persuasions on a common platform. But, a beginning has to be made if the constitution is to have any meaning. Inevitably, the role of the reformer has to be assumed by the courts because it is beyond the endurance of sensitive minds to allow injustice to be suffered, when it is so palpable. But piecemeal attempts of courts to bridge the gap between personal laws can not take the place of a common civil code. Justice to all, is a far more satisfactory way of dispensing justice than justice from case to case.52

The parliament, however, diluted the impact of this judgement by passing the Muslim women (Protection of Rights and divorce) Act, 1986 amid "strong protest and agitation" by the Muslim fundamentalists who claimed the judgement as "invasion of personal laws of Muslims" by the judiciary.

52. Ibid., at 954.
(B) Regulation of Temple Entry, Right to Darshan and Religions Practices:

As pointed out earlier, that the religions freedom under Art 25 (1) is not absolute in character and is subject to power of the State to make laws for social welfare and social reforms. Further, the freedom of religion certainly cannot prevent State from throwing open all 'Hindu Religions Institutions of Public Character' to all classes and Sections of Hindus without any favour or discrimination. Undisputedly, the aforesaid right confused by Article 25 (2) (b) is a right of "all classes and Sections of Hindu" to enter into a public temple and to have 'darshan'. The scope and the unqualified terms of this article would cover individuals under Article 25. Therefore, the 'right to enter a temple' shall be available against individuals and against denominations. The fact is that, though Article 25 (1) deals with the right of individuals Article 25 (2) is much wider in its contents and has reference to the rights of communities, and controls Article 25 (1) and 26 (1). Institutions of public character would mean and include temples dedicated to the public as a whole and also those founded for the benefit of sections or denominations thereof. Article 25 (2) (b), therefore, prescribes a right to enter into a temple for the purposes of 'darshan' and
'pooja', though this right will be certainly regulated by the rules made in this behalf by the management of such temple or the denomination for the internal management of the place of worship. But, again such rules can not take away the substance of the right of 'darshan' under the pretext of internal order or the management of such public institutions or places of worship or temples. Therefore, the right of 'darshan' and worship is also not absolute and unlimited in character.

In the Venkataramana Devarre Case, the Apex Court was called upon to decide a substantial question of law in appeal that whether the right of a religions denomination to manage its own affairs in matters of religion guaranteed under Ar. 26 (b) is subject to, and can be controlled by, a law, protected by Article 25 (2) (b) throwing open a Hindu public temple to all classes and Sections of Hindus.

The case relates to the District of South Kanara which formed until recently part of State of Madras and is now comprised in the State of Mysore, there is group of three villages which are collectively is known as 'Moolky Petah'

54. Ibid., at 259.
which inhabits a famous temple dedicated to Sri Venkataramana renowned for its sanctity. It is this institution and its trustees, who are appellants in this case. The trustees are the members of a sect known as Gowda Sarwath Brahmins. It is said that the home of this community in the distant past was Kashmir, that the members, there of, migrated hence to Mithila and Bihar, and finally moved southwards and settled in the region around Goa in sixty villages. They continued to retain their individuality in their new surroundings, spoke a language of their own called "Konkani", married only amongst themselves, and worshipped idols which they had brought with them. Subsequently, owing to persuasion by the Portuguese, they migrated further south, some of them settling at Bhatkal and others in Cochin. In 1947, the State of Madras, passed the Madras Temple Entry Authorization Act "to remove the disabilities imposed by custom or usage on certain classes of Hindus against entry into Hindu temples in the province which are open to the general Hindu public".55

The Apex Court laid down56 that when there is question as to the nature and extent of a dedication of a temple that

55. Ibid., at 260.
56. Ibid., at (263-64).
has to be determined on the terms of the deed of endowment if that is available and where it is not, on other materials legally admissible, and proof of long and uninterrupted user would be cogent evidence of the terms thereof. Therefore, in the instant case, the public has acquired a right to worship in the disputed temple, though the same is originally of 'denominational character'. The public after coming into force of the Madras Temple Entry Act, and under Article 25 (2) (b) can not be refused to 'enter and worship' in this temple though the court recognized certain specific rights 'denominational character' live 'puja' on and other religious practices on special occasions etc. in favour of the Gowda Saraswat Bhrahmin Family who are a religious denomination of a sect of Hindus.  

The court further laid down that exclusive right of the members of the 'community' to worship for all the time will be hit by Article 25 (2) (b), and can not be recognized, but, the distinct right, namely that during certain hours monies and on special occasions, it is only of the Gowda Saraswat Brahmin community that have the right to take part therein, and that on those occasions, all other

57. Ibid., at 264.

58. Ibid at 258.
persons would be excluded, would clearly be a denominational right. Then, if this right is recognized, what is left to the public of their right under Article 25(2)(b) is substantial. On, the facts, therefore, it is possible to protect the right of the community on those special occasions, without affecting the substance of the right declared by Article 25(2)(b); and this strikes a just balance, between the right's of the Hindu public under Article 25(2)(b) and those of dehomination of the trustees and is open to objections.  

The court further said that no member of the public could claim as a part of the rights protected by Article 25 (2) (b) that a temple must be kept open for worship at all hours of the day and night, or that he should personally perform those services which the 'Archakas' alone could perform. It is again a well known practice of religious institutions of all denominations to limit some of its services to persons who have been specially initiated, through at other times, the public in general are free to participate in the worship. Thus, the right recognized by Article 25 (2) (b) must necessarily be subject to some

59. Ibid.
60. Ibid., at 268.
limitations or regulations, and one such limitation or regulation must arise in the process of harmonizing the right conferred by Article 25 (2) (b) with that protected by Article 26 (b). 61

The Apex Court confirmed 62 that right conferred by Article 25(2) (b) is a right conferred on all classes and sections of Hindu's to enter into a public temple and on the unqualified terms of that Article, that right must be available, whether it is sought to be exercised against an individual under Article 25(1) or against a denomination under Article 26 (b), the fact is that though Article 25(1) deals with rights of individuals, Article 25(2) is much under in its scope and contents and has reference to the rights of communities, and controls both Article 25(1) and Article 26(b). 63

Therefore, the court dismissed the appeal of the petitioners and uphold the right of the public to worship subject to rules and regulations and tenets of the denomination. The court also upheld the certain specific rights of the denomination on special and ceremonial

61. Ibid.
62. Ibid. at 259.
63. Ibid.
occasion under Article 26(b). The decision of the Apex Court, however, was criticized by P.K. Tripathi as "fallacious in argument and illogical in reasoning" quite as he considered the original error was committed in Shirur Math Case by Mukherji J., by impregnating Article 26(b) with the contents of Article 25(1) minus the impairment in clause (2) of that Article. He further feels that the serious distortion of the constitutional scheme in Ayer J.'s line of interpretation lay in reading Article 26(b) independent of Article 25(2). In his view, the correct way for validating temple entry laws would have been by reading Article 25(2) as incorporated in Article 26(b) and not by applying the doctrine of harmonious construction as done by the hon'ble Apex Court in the instant case. The protection of the non-obstantate clause of Article 25 can be made available to such law only by reading that clause as incorporated in Article 26 as its integral part.64

In the Yagnapurushdasji Case,65 the Apex Court while dealing with the Bombay Temple (Entry Anthosisation) Act, 1956 laid down that the impugned Act does not invade the


traditional and conventional manner in which the act of actual worship of the deity is allowed to be performed only by the authorized poojaris of the temple and by no other devotee entering the temple for darshan. The main object of the Act is to establish complete social equality between all sections of the Hindus in the matters of worship and in no way affect the right of the devotees of particular sect guaranteed under Article 26 (b) of the constitution of India.66 The court further held that the 'Swaminaryan Sampradaya' (Sect) to which the appellants belong is not a religion distinct and separate from the Hindu Religion and the temple of the aforesaid sect are covered within the ambit and purview of the aforesaid Bombay Act, 1956.67 The court while dismissing the appeals maintained that the right to enter temples which has been vouchsafed to the Harijans by the aforesaid Bombay Act in substance symbolises the right of Harijans to enjoy all social amenities and rights for, let it always be remembered that social justice is the main foundation of the democratic way of life enshrined in the provisions of the constitution.68 The court, therefore,

66. Ibid., at 1120.
67. Ibid.
68. Ibid at 1135.
clearly re-emphasized in this case that the Harijans who want to enter the temple, not be refused the entry on superstitions ignorance and complete misunderstanding of the teachings of Hindu religion and of the real significance of the tenets and philosophy taught by 'Swaminarayan himself'.

In the E.R.J. Swami Case, the Amendment to T.N. Hindu Religions and Christian Endowments Act, 1959, the hereditary principle of appointment of 'pujaris' and 'archakas' was abolished. The statement of objects and reasons explained that the amendment was done with a view to abolish the monopoly of certain castes in the matter and to enable the people belonging to other castes including the scheduled tribes to be appointed. As such, the object of the amendment was justified by the State in line and tune with the general policy and object underlying Article 17 of the Indian constitution. But during the course of hearing, the advocate general refused to be bound by the statement of objects and reasons, regarding appointment in accordance with usage of the temple and said that the only departure contemplated by the said amendment was that 'the usage of hereditary appointment of 'pujaris' was a secular and not a religious

usage. The court further explained that Archaka's appointment is no doubt governed by usage but the real question, is whether such a usage should be regarded either as a secular usage or a religious usage. The court nicely pointing out the difference, opined that Archaka's powers and functions are undisputed religious but the function for his own appointment is secular one because Archaka is not a religions head but is a servant of the temple; the Dharmkarla or Shebait appoints him; are the factors which indicates and establishes that he is under the disciplinary control and governance of the trustee and therefore, the act of his appointment by the trustee should be deemed as essentially secular and not religious.

The decision of the court appears to be too much technical in the instant case. The courts were right. When they uphold the temple entry laws by enforcing omnibus equality clause but to prescribe reforms in the religion" or to eliminate the hereditary usage ensuring denominational qualification of the Archaka failed to get judicial protection. Justice Mukherjee's observation in the L.T.  

70. Ibid.  
71. Ibid at 1595.  
72. Ibid., at 1596.
Swamiar Case\textsuperscript{73} appears to be more sound in this regard: A religion undoubtedly has its basis in a system of beliefs or doctrines which are regarded by those who profess that religion as conducive to their spiritual well being, but it would not be correct to say that religion is nothing else but a doctrine or belief. A religion may not only lay down a code of ethical rules for its followers to accept, it might prescribe rituals and observances, ceremonies and modes of worship which are regarded as integral parts of religion, and these form and observances might extend even to matters of food and dress.\textsuperscript{74}

In the \textit{Pogakhle Laxmireddy Case}\textsuperscript{75} the A.P. High Court recently was prayed to decide a complicated problem under Article 25 of the Indian constitution. In this case, it was alleged that about 3 to 5 centuries back his Holiness S.M.P.V.B. Swamy during his tender age was visiting from place to place. While so, he took shelter in the house of Smt. Garimmi Reddy Achamma at 'Bangnapaly' and he used to look after his cows in the nearby forest area. During the grazing period His Holiness used to write the secret book,

\begin{itemize}
\item \textsuperscript{73} \textit{HRE v. L.T. Swamiar} AIR 1954 SC 282.
\item \textsuperscript{74} Ibid at 290.
\item \textsuperscript{75} \textit{Pogakula Laxmireddy v. P.S. to Govt. of A.P.} AIR 1997 A.P. 6.
\end{itemize}
which was called as "Kala Gnanam" (knowledge of the future) on 'Talapatra' (palm leaves). The said writings were preserved in the house of Smt. Garinni Reddy Achamma and tamarind tree was planted at the place where Kala Granam was deposited in the earth. Thus a great sanctity was attached to the tamarind tree as its roots were spread on the Kala Granam and as time went on, the said place was named as Chintamanu Muttam. Daily Poojas and Aradhanas are being performed at the tree by the devotees of his holiness S.M.P. V.B. Swamy from all over the country especially from southern States. Thus, the Chintamanu Muttam became place of worship and it is believed that the Saint and Prophet S.V.B. Swamy codified the prophecies and made divine revelations. It is also believed that these revelations were kept underground in the Cellas where the tamarind tree is grown. The great saint after spending a few years in the house of Smt. Garimireddy Achamma left the place and proceeded to Kandi Malliahpali, which is now called as Brahmamgri Muttam, where he went to 'Jeeva Samadhi'.

An application was moved to state Govt. by S.V.B.BV. Raynla one of the respondents) stating that he is the incarnation of S.P.V.B. Swamy and requested the Govt. To

76. Ibid.
permit to excavate the Kala Gnanam from Chinata Manu Muttam. The Goct. passed necessary orders which are deemed to be permission to excavate the 'Kala Gnanam'. However, before this process of excavation could be initiated, a serious resistance was made by the devotees, local people and the public. Later on, keeping in view the gravity of the problem, the Govt. Kept its action and memo granting permission was kept in abeyance and the petitioner therefore, moved the instant proceedings in this court.77

The A.P. High Court taking the note of the Apex Court in the Emmanuel Case78 said that Article 25 is an article of faith in the constitution incorporated in recognition of the principle that the real test of a true democracy is the ability of even an insignificant minority to find its identity under the country's constitution. Notwithstanding the fact that a particular religions belief or practice does not appeal to our reason or sentiment, it would attract the protection of Article 25 subject, of course, to the inhibitions contained therein. When, the belief is genuinely and conscientiously held as part of the profession or practice of religion, our personal views and reactions are

77. Ibid, at 7.

irrelevant.\textsuperscript{79} Therefore, in the instant case, it is to be noted that the acts of the State touching the one's own religious conscience are violative of Article 25 and it can be safely concluded that the State is precluded from issuing any orders which directly or indirectly offer the religious sentiments or freedom of conscience. In this case, it is clear that Chintamanu Mutt was being treated as a place of worship by all sections of the society and since the Mutt is not covered by the Endowments Act, the Govt. or its subordinates have no power or jurisdiction to interfere with the religious practices. Preservations of Kala Gnanam Bhandaru under the tamarind tree is still a belief of one and all including petitioner, the 4th respondent and the Govt., yet great religious sentimental value has been attached to the place.\textsuperscript{80}

The court, however, said that the questions regarding the excavation of Kala Gnanam Bhandaru, the disclosure of the 4th respondent (Swamy), the issue of reincarnation and the propriety of the Swamy etc. over the place in dispute, are the questions which can not be decided by the High Court under Article 226 and the parties are, therefore, free to

\begin{itemize}
  \item \textsuperscript{79} Supra n. p. 12.
  \item \textsuperscript{80} Ibid at 13.
\end{itemize}
initiate other legal proceedings and recourse under the law.\textsuperscript{81}

Recently,\textsuperscript{82} the Authorities... have for the 11th year banned the annual six day Renukamba fair scheduled to begin on March 16 at Chandragutti village in Shimoga district of Karnataka where nude worship takes place.

Shimoga District Magistrate Lakshminarayana while banning the fair under Section 35 of the Karnataka Police Act to avoid any law and order situation, however, permitted all religious rites at the temple, including the Rathotsava.

Chandragutti witnessed a clash between the supporters and the opposers of the nude worship during the 1986 fair. Devotees worship goddess Renukamba in the nude for favours granted by the Goddess. Some of the devotees had even stripped before the police that year.

Nude devotees used to trek about half-a-kilometer to offer prayers to the Goddess Renukamba after taking bath in the nearby river. The practice, which had been in vogue for several years, was banned from 1987.

Jogathis, disciples of Goddess Renukamba, played a

\textsuperscript{81} Ibid.

\textsuperscript{82} "Nude Worship Banned", \textit{The Hindustan Times} (New Delhi) March, 14, 1997.
crucial rule in persuading rural illiterates, mostly women, to offer nude worship. Poor people from other districts in the State were forced to take part in the fair. 83

The judiciary has helped in curbing certain religions practices which are immoral or which has nothing to do with the tenets of a particular religion and/or which are not essential part of the religion. To maintain law and order or in public interest, the executive is required to take certain administrative measures, which the courts after a thread bare inquiry are reacting to reconcile and strike a nil balance between the conflicting issues of religions liberty vis a vis "public order", law and order, "public interest" and social interest.

In all India Democratic Women's Association and Janwadi smiti case 84 the Supreme Court was approached under Article 32 of the Indian constitution challenging therein the ad interim orders prohibiting performing Chunari ceremony within Ram Sati Mandir being violation of Article 26 of the Indian Constitution. The restraint on the performance of Chunri ceremony in the above said Sati Temple was imposed

83. Ibid.

84. All India Democratic Women's Association v. Union of India & Others, AIR 1989 SC, 1280.
under Section 2(1) (b) of the commission of Sati (Prevention) Act, 1988 as the same amount to glorification of 'sati' which is declared as an offence under the said Act. It was contended on behalf of the petitioners that 'Chunri', as such is not connected with glorification of sati and is a ceremony connected with the traditional form of offering worship known 'Sadash Upachar'. But the respondents have argued that in the State of Rajasthan 'Chunri ceremony' is always associated with glorifying 'Sati' and the celebration is a part of the traditional process of religions offerings in Sati temples. 85

The Apex Court laid down that the restraint imposed on holding the Chunri ceremony within the temple should continue without any variation. However, the court left the issue that whether 'Chunri' is a part of 'Sodash Upachar' without any opinion and said the same would be examined later on at appropriate time and care. 86

In the Atheist Society case 87 the petitioner, Atheist Society of India prayed for issuing a writ of mandamus

85. Ibid, at 1281.
86. Ibid.
directing the state Government to prohibit breaking of coconuts, performing of poojas, chanting of mantras of 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 blessing of Almighty for the success of the project undertaken. Such noble thought can not be found fault with as offensive to any one. May be that the petitioners society who claim to be atheist or do not appreciate the invocation of gods as they do not belief in God. There is no constitutional guarantee to the faith of the Atheist who worship barren reason that there is no God. It is not the object of the Constitution to turn the country into a religious place. A secular state does not prohibit the practices of religion. If that is prevented it will infringe the rights of crores of Indians which are granted to them under Article 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 traction and religious practices.
In the Anand Margas Case\textsuperscript{88} the Supreme Court held that the 'Tandava dance in procession or at public places by Ananda Margis carrying lethal weapons and human skulls was not an essential religious rite of the followers of Aanda Marga and hence, the order under Section 144, Cr. P.C. prohibiting such procession in the interest of "public" order and 'morality' was not violative of the rights of petitioner under Article 25 and 26 of the Constitution. Ananda Marga is not a separate religion but basically subscribe to the fundamental notions of Hindu religion and philosophy. But it is certainly a religious denomination within the meaning of Article 26. Anand Marg as a religious order is of recent origin and Tandava dance as a part of religious rites of that order is still more recent. Even accepting that Tadava dance is prescribed as a religious rite for every follower of Anand marga it does not necessarily imply that they have right to perform in it public places. The order under Section 144 did not ban procession or gatherings at public places even by Anand Margis. It only prohibits carrying of daggers, trishuls and skulls which poses danger to public order and is also

\textsuperscript{88} Acharya Jagsishwaranand Avadhuta v. Commissioner of Police, Caltutta, 1984, 4 SCC 522.
against morality.

In the Cow Stangular Case respondent challenged the validity of the exemption of slaughter of cows from the operation of the West Bengal Animal slaughter Control Act, 1950, on Bakrid day. The petitioners contended before the High Court that the operation of the Act, the slaughter of healthy cows on the occasion of Bakrid on the ground that such exemption was required to be given for the religious purpose of Muslim Community. Following its decision in the case of Mohd. Hanif Quareshi v. State of Bihar the High Court held that the slaughter of cows by members of Muslim Community on Bakrid days was not a requirement of Muslim religion and therefore such exemption was invalid. The respondents, the State of West Bengal and the Muslim Community filed an appeal in the Supreme Court against the judgement of the High Court.

The Supreme Court approved the decision of the High Court and dismissed the appeal. The court held that before exercising the power of exemption under Section 12, it must, be shown that such exemption is necessary to be granted for subserving an essential, religious, medicinal or research purpose. If granting of such exemption is not essential or

necessary for effectuating such a purpose no such exemption can be granted so as to bypass the thrust of the main provisions of the Act. For such an exercise non-essential religion practices can not be made the basis. The slaughtering of cows on the Bakrid day is optional and not obligatory. It is not essential or required for religious purpose of Muslim. Article 25 deals with essential religious practices.

(C) Untouchability and Caste-Discrimination

Article 17 of Indian Constitution declares that "Untouchability" is abolished and its practice in any form is forbidden. The enforcement of any disability arising out of untouchability shall be an offence punishable in accordance with law. Therefore, the constitution has out-rightly abolished the untouchability and its practices in any form are prohibited. It further provides that the enforcement of any disability arising out of untouchasility shall be an offence punishable in accordance with law.

The term untouchability has not been used in its grammatical sense and the subject matter of the Article is the practice as it has developed historically in this country.

The scope of term, therefore, in its wide import refers to and include those persons and groups which are treated as
"untouchables for various reasons such as their suffering from an epidemic contagious disease or on account of social observance such as one associated with birth or death or on account of social boycott resulting from caste other disputes. The imposition of untouchability in such circumstances has no relation to the causes which regulate certain classes of people beyond the pale of caste estimate. 90

A careful examination of this Article leads to the fact that there is an apparent overlap between Article 15 and Article 17 so far as the purview and subject matter is concerned. Under Article 15, the State discrimination on grounds only of religion, race, caste, sex, place of birth or any of them is prohibited. Similarly, citizens shall not be subjected to any disability, liability, restriction or condition with regard to access to shops, public restaurants, hotels and places of public entertainment, 91 or the use of wells, tanks, bathing ghats, roads and places of public resort maintained wholly or partly one out of State funds or dedicated to the use of the general public. 92

Therefore, access to 'shops' or a doctors clinic, a lawyers Chamber, public restaurant, places of entertainment including cinema theater, cafe, circus, fair, exhibition, music Hall, race course etc. can not be denied to citizens as well as these places can not be exclusively reserved for members of a particular caste or religion. In the *Lakshmidhar Case*, the Privy council has held that there can not be a dedication of a public place only to a limited section of the public like the inhabitants of a village, though such right can be claimed on the ground of custom.

Under Article 23, individuals are protected against the State as well as against private citizens with reference to the evil of 'begar'. More so, there is positive obligation on the State to take steps to abolish the evils of 'traffic in human beings and 'begar' and other forms of forced labour, where ever they are found or practised. The various State laws make it an offence to compel a person to work against his will or without payment of wages to any work. For instance, Section 3 of the U.P. Removal of Social Disabilities Act, 1947 provides that "no person shall refuse to render to any person merely on the ground that he belongs to a Scheduled Caste, any service which such person

already renders to other Hindus on the terms on which such service is rendered in the ordinary course of business". Any person contravening provisions of this Act is liable to be punished with imprisonment and fine. In the Banwari Case, the respondents challenged the validity of the U.P. Removal of Social disabilities Act. In this Case, certain 'Dhobies' and 'Barbers' had refused to wash the clothes and to shave the Harijans. They were, convicted under Section 6 of the Act. Upholding the constitutionality of the Act, it was held by the Allahabad High Court that the Act did not contravene Article 23 of the Indian constitution. The court further laid down that where a person is prohibited from refusing to render service merely on the ground that the person asking for it belongs to a Scheduled Caste, he is thereby subjected to forced labour. Likewise, the payment of Wages Act, 1926 which provides that employer is responsible for payment of wages to his employees, has been declared constitutional and valid. The State of Bihar has also passed a similar legislation in the name 'Bihar Harijan (Removal of Social

94. State v. Banwari AIR 1951 All. 615.
The parliament has passed The Untouchability (offences) Act, 1955. In 1976, the Act was amended in order to make the law more stringent to remove untouchability from the society. It has now been renamed as the Protection of civil Rights Act, 1955. The expression 'Civil right' is defined as 'any right accruing to a person by reason of the abolition of untouchability by Article 17 of the constitution. After amendment, the Act provides that any discrimination on the ground of Untouchability will be deemed and covered as an offence. It imposes a duty on public servants to investigate such offences. It provides that if a public servant willfully neglects the investigations of any offence punishable under this Act, he shall be deemed to have abetted the offence punishable under this Act. The Act prescribes punishment to various offences which may extend to imprisonment up to six months and also with a fine which may extend to five hundred rupees or both for any one enforcing, on the ground of "Untouchability", religions

95. The Constitution of the USA (XIVTH Amendment) contains a similar provision. It states that "neither slavery or involuntary servitude, except as a punishment for a crime whereof, the party shall have been duly connected, shall exist within the United States or any place subject to their jurisdiction."
disability or social disability like.

1. Preventing any person from any place of public worship or from worshipping or offering prayers therein.\(^96\)

2. Access to any shop, public restaurants, hotels or places of public entrainment.\(^97\)

3. Refusing to admit persons to hospitals,\(^98\) and

4. Refusing to sell goods or render services to any person etc.\(^99\)

In the Krishan Case,\(^100\) two barbers refused to shave a Balai Harijan and were held to be rightly prosecuted under the M.B. Harijan disabilities Removal (amendment Act, 1950.
The court further held that, the provision of the constitution and related laws passed to achieve the desired goal of Article 17 would be applicable to private citizens also keeping in view the nature and scope of the 'practice'. Customs too can not be justified, in case, there are directly in conflict with the civil rights of 'certain

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\(^96\) The Protection of Civil Rights Act, Sec. 3. See also Supra n.

\(^97\) Section 4.

\(^98\) Section 5.

\(^99\) Section 6.

\(^100\) Madhya Bharat v. Krishan AIR 1955 MB 207.
persons'. In the Souriyar Case, \textsuperscript{101} the Madras High Court refused to issue declaration in favour of caste Hindus restraining the Harijans from using the burial ground customarily reserved by the former for their use. \textsuperscript{102} In the Bhaishankar Case, \textsuperscript{103} the Bombay High Court was called upon to decide the issues relating to segregating practices in the canteen services provided by the weaving mills to the workers. The Harijan employer were required to be seated separately in the canteen served by Harijans waiters separately and in the separate utensils which were kept and reserved for them only. The Bombay High Court laid down that this kind of segregation is offensive of the provisions of the Bombay Harijan (Removal of Social Disabilities) Act, 1947 and observed that the aim of the state law was removal and eradication of social disabilities and the ban on certain practices which are prejudicial to the interests of Harijans and the application and scope of the said legislation is extended to the elimination of discrimination in all its forms and shapes. The law has been passed to provide treatment and cure for the mischief of various

\textsuperscript{102} Ibid, see also Supra n. 21. at 326.
\textsuperscript{103} State of Bombay v. Bhaishanker, AIR 1956 Bom. 660.
undesirable restrictions against Harijans from which the social conscience recoiled.\textsuperscript{104} In the Bahari Lal Case,\textsuperscript{105} the Allahabad High Court held that refusing a person to take water from a public tap because the person belonged to scheduled caste, to be an offence under Section of (1) (b) of the Untouchability Offences Act, 1955.

An interesting case relates to the necessity of the ingredient of compulsion to constitute an offence under the law. The U.P. Removal of Social disabilities Act, 1947 made it an offence to make a bride or bride groom belonging to Scheduled caste alight from Dola Palki or obstruct it at a public place notwithstanding any custom to the contrary. In the Gulab Singh Case,\textsuperscript{106} it was held by the Allahabad High court that where a bride groom belonging to the Scheduled Caste, on being told of the custom, voluntarily alighted to respect it, no offence was made against the accused who only pointed out the custom but did not use any coercive method, even if he persuaded.\textsuperscript{107}

\begin{itemize}
\item 104. Supra n. p. 326.
\item 107. Supra n. 21 p. 327.
\end{itemize}
In *The Ramchandaran Pillai Case*, the Head master of a girls High School constituted a separate section for the IXth standard students comprising only the Harijan girls. The court held it to be a discriminatory act denying equal treatment. The petitioner's plea that he only constituted a special case unit was neither accepted nor supported in view of the fact that no weak student of other caste was included in the class, Section 5 of the Untouchability offences Act does not require that to constitute an offence, the basis of impugned action should be practice of 'Untouchability' solely; it may be just one of the causes, still it is punishable. In essence, any denial of equal treatment amounts to discrimination. Therefore, in the instant case, Untouchability appears to be one of the criterion of segregation, the offence was held to be established.

In *The Pavdai Case*, however, the acquisition of land by the State to be set apart for constructing an exclusively Harijan colony, that is a classification solely on the basis of caste, was not deemed to violate Article 17 because the

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109. Supra n. 21 at 327.

State step did not result in imposing a disability, rather was a positive conferment of benefit.\textsuperscript{111}

In \textit{Benudhar Case},\textsuperscript{112} it was held that scope of the untouchability (offences) Act, however, does not extend to private property and private well etc. In the instant case, the charges against the petitioners were "refusing two Harijan boys the permission to draw water from the former private well".\textsuperscript{112} It was laid down by the court that the Act had no application to private property and the well. The prosecution, in such cases, must affirmatively prove that the public had a right to access to or to use the well.\textsuperscript{113} In \textit{Kendra Setni Case},\textsuperscript{114} the complainant had been prevented by the accused persons from participating in a Kirtan held on private premises and as a private function. It was laid down that the Act had no application in private premises or function.

To sum up, the constitution of India guarantees the equality before law and equal protection of laws to every

\begin{itemize}
\item \textsuperscript{111} Ibid.
\item \textsuperscript{112} \textit{Benudhar Sahu v. State of Orissa}, (1972) ILR, Cut. 256.
\item \textsuperscript{113} \textit{Suprâ n. 21} p. 327.
\item \textsuperscript{114} \textit{Kendra Sethi v. Mitra Sahu} (1963) ILR, Cut. 435.
\end{itemize}
citizen worth in the territory of India and the subsequent provisions in the constitution supporting the omnibus "equalitarian clause" treats every Indian as an individual and not as a member of any religious, racial or caste community. These provisions have their own importance if viewed and analyzed from the historical background of the nation as well as the fact that Britishers had introduced the system of communal electorate and communal reservations in public services. Indeed, some unsuccessful efforts were made to retain the system even under the present constitution. But, the founding fathers of the Indian constitution, after initial hesitations, ultimately rejected the demand except in the cases of depressed classes and weaker sections of the society so that they could be rejoined and associated in the mainstream of national growth and development.

But it is generally alleged that the system of giving special protections, reservations and the favour has, to some extent, helped in the accentuation of the problem.


because of caste and religion based politics. Further, it has been complained many a times that it is economically far more advantageous to be a Hindu Harijan than a Christian of Harijan background\textsuperscript{118} and the present discrimination in the treatment of Hindu and non-Hindu can operate as a powerful deterrent for any Harijan who is contemplating conversion.\textsuperscript{119} The concession and reservation were given to Harijans in view of the fact that they were the 'depressed' classes of the society in past and these provisions may help in their upliftment but there is no denying the fact that there is an "inherent contradiction" between the governments objective of a caste less society- and its policy of granting special aid on the basis of caste.\textsuperscript{120}

The "Untouchability abolition" provisions of the constitution has been strictly interpreted by the courts to eradicate the social evil and to punish the offenders, wherever the court found the existence of the "practice" in any form. In the \textit{E.R.J. Swami Case},\textsuperscript{121} the amendment of T.N.

\begin{itemize}
\item \textsuperscript{118} Smith, D.E., \textit{India as a Secular State}, (1963) p. 234.
\item \textsuperscript{119} Ibid, at 234.
\item \textsuperscript{120} \textit{Supra} n. 47. p. 592.
\item \textsuperscript{121} \textit{E.R.J. Swami v. State of T.N.}, AIR 1972 SC 1568.
\end{itemize}
Hindu Religious and Charitable Endowments Act, 1959, the hereditary principle of appointment of 'Pujaris' and 'Archakas' was abolished. The statement of objects and reasons showed that amendment was done with a view to abolishing the monopoly of certain castes in the matter and to enable the people belonging to other castes including the scheduled castes to be appointed. As such, the amendment was certainly in line with the general object of Article 17 of the constitution. But, during the course of hearing, the advocate general refused to be bound by the statement of objects and reasons regarding appointments in accordance with usage of the temple and said that the only departure contemplated by the amendment was that the usage of hereditary appointment would not be recognized. The court, held that the amendment was valid and the usage of hereditary appointment of pujaris was secular and not a religious usage. Therefore, the hon'ble Apex Court, in order to achieve the object of caste less society, has nationalism the "hereditary pujari institution" in favour "other castes, and people" without specifically mentioning the Harijans. Therefore, the courts are supporting, the state laws which are directed to eradicate the social evil of untouchability, with the help of vibrating judgments.
Ex-Communication and "Hukka-Pani Bandh":

Ex-communication and 'Hukka Pani bandh' are the social and extra-judicial punishments inflicted by Heads of religious group or denomination, Sardar of a Kabila and the Mukhia of a caste when the members of such groups or denomination or caste do not abide them with the rules of social conduct prescribed by the aforesaid institutions. The person, who violates the prescribed norms of the said institutions is dealt with in accordance with the rules and regulations self-imposed by such groups and sometimes such person is expelled from "their society" and is treated by them like untouchables. The punishment of 'Hukka-Pani Bandh' is inflicted by the Mukhias or Sardars or 'Khaps' of a particular caste on a person who violates certain rules of observance by these castes in case of marriages, other social, secular or religious functions or rites. Though, such types of punishments are becoming redundant in view of modernization the development of scientific temperament and in the democratic scenario yet, are not very uncommon even in the present era. The caste-Mukhias sometimes force the offenders to leave the village or to live in exile by the operation of "Hukka-Pani Bandh" orders.

Under Article 26(b) of the Indian constitution, a religious denomination or organization is free to manage its
own affairs "in the matters of religion". The State can not interfere in the exercise of this right unless they come in conflict with or run counter to public order, health or morality. Accordingly, to a greater extent, every religious denomination or organization enjoys complete freedom in the matters of determining what rites and ceremonies are essential according to the tenets of their religion. But, the right is not absolute as already indicated and therefore, the courts, has the right to determine whether a particular rite or ceremony is regarded as essential by the tenets of a particular religion. This freedom is confined to "matters of religion" which includes religious practices, rites and ceremonies considered essential for practice of religion. But under Article 25(2) (b) the state has got power to regulate the secular activities associated with the religion for social welfare or for the protection of the interests of weaker Sections of the society or depressed classes. Dr. Ambedkar in the Constituent Assembly said: 123

The religious conceptions in this country are so vast that they cover every aspect of life, from birth till death. There is nothing which is not religion...There is nothing extraordinary in saying that we ought to strive hereafter to limit the definition of

religion in such a manner that we shall not extend beyond beliefs and such rituals as may be connected with ceremonials which are essentially religious... After all, what are we having this liberty for? We are having this liberty in order to reform our social system, which is so full of inequities, so full of inequalities, discriminations and other things, which conflict with our fundamental rights.”

In the Saifuddian Case, the petitioner who was the Sardar (Mukhia) or Head of the Dawoodi Bohra community challenged the constitutionality of the Bombay Prevention of Ex-Communication Act, 1949, on the ground that the provisions of the Act infringed his rights guaranteed in Arts. 25 and 26. The petitioner claimed that as the head of the Dawoodi Bohra community he had the right to excommunicate a member and this power was an integral part of the religious faith and belief of the Dawoodi Bohra Community. The Supreme Court struck down the impugned provision as violative of Articles 25 and 26 of the constitution. The majority said that where an excommunication was itself based on religious grounds such as lapse from the orthodox religious creeds or doctrine or

124. Ibid.
breach of some practices considered as an essential part of religion by a community it formed part of the management of the community, through its religion's head, "of its own affairs in matters of religion." The impugned enactment which took away this right of the head of the community to ex-communicate even on religious grounds was violative of Article 26(b). The position of the Dai-ul-Mutlaqu is an essential part of the creed of the Dawoodi Bohra sect. Faith in his spiritual mission and in the efficacy of his administration is one of the Bonds that hold the community together as a unit. The power of ex-communication is vested in him for the purpose of enforcing discipline and keep the denominating together as an entity. The purity of fellowship is secured by the removal of persons who has rendered themselves unfit and unsuitable for membership of the sect. The majority observed, "The mere fact that certain civil rights which might by lost be members as a result of ex-communication made on religious grounds which the Act protects, does not offer sufficient basis for a conclusion that it is a law "providing for social welfare and reform" within Article 25(b). P. Sinha C.J., however, gave a dissenting judgment. He was of the view that the right of ex-communication was not a purely religious matter and that it had its social implications in making the ex-communicated
person a sort of "untouchable" in his community, which would be contrary to the injunctions mentioned in Article 17 of the Constitution by which untouchability has been abolished.

The judgment delivered by the Apex Court, it is submitted has tried to separate the issues of social welfare and religions welfare. The regulatory powers of the State is welcomed in the arena of social welfare but it is certainly doubtful in the field of protection of civil rights under Art 26(b), as Article 26(b) is not subject to civil rights of individuals, except with reference to temple entry and right to 'darshan'. Justice Das Gupta stated in this case that barring of ex-communication on religions grounds, pure and simple, can not however, be considered to promote social welfare and reform and consequently the law in so far as it invalidates ex-communication on religions grounds and takes away the Dai's (Head)... can not reasonably be considered to be a measure of social welfare... it must be held to be in clear violation of the right of the Dawoodi Bohra Community under Article 26(b).\textsuperscript{126}

In the Chinnamma Case,\textsuperscript{127} a nun, working as a teacher

\begin{itemize}
\item \textsuperscript{126} Ibid at 8770.
\item \textsuperscript{127} Chinamme v. Regional Deputy Director of Public Instruction, Guntur AIR 1964 AP 277.
\end{itemize}
in a Roman Catholic School, was expelled by the Bishop of
the Diocese from sisterhood for her conduct unbecoming of a
nun. In defiance of the Canon law she persisted in wearing
the religions habit of a nun after her expulsion. The
management of the school dismissed her from the services.
She was reinstated on the intervention of the civil
authorities subject to the condition that the Catholic
Mission managing the School could prohibit her from wearing
the nun's dress. The petitioner pleaded her right to freedom
in this regard. The mission, however, on the other hand
strongly claimed its right to manage its religions affairs
and also the right to manage the school under Article 30
(1). The High Court of A.P. upheld both the claims and laid
down in this case that the mission could legally expel the
petitioner from the community of sisters. The direction to
an expelled nun "not to wear the " religious habit" of a nun
could not be questioned when undisputedly nuns have a
separate and distinct dress. The court further said that
there is nothing in Fundamental rights given Part III, where
under, such a right to wear a nun's dress is expressed or
could be inferred, particularly, when she ceased to be a
nun.128

128. Ibid., at 279.
E. Secular Administration of Denominational and other Like Properties:

A religious denomination has the right to acquire and administer properties under Article 26. The right to administer property owned by a religious denomination is a limited right, and it is subject to the regulatory power of the State in Clause (2) (a) of Article 25 and also any general property law. Thus there is a clear distinction between the right to manage its own affairs in 'matters of religion' and the right to 'manage its property' by a religious denomination. The right of a religious denomination to manage its property has thus been placed on a different footing from the right to manage its own affairs in matters of religion. The former is a fundamental right which cannot be taken away except on grounds mentioned in Article 25, while the latter can be regulated by law, that is, it can be abridged or taken away by a valid law.\(^{129}\)

It is to be noted that the rights under clauses (c) and (d) of Article 26, are confined to the existing rights to administer its property where they had already been vested in a religious denomination. Clauses (c) and (d) do not create any new rights but they simply protect the

\(^{129}\) S.P. Mittal v. Union of India, AIR 1983 SC I.
continuance of the existing rights. The existing rights to administer its property by a religious denomination cannot be destroyed or taken away completely. It can only be regulated by law with a view to improve the administration of property for the better utilization of the endowment property. Thus the law must leave the right of administration of property to the religious denomination itself subject to such restrictions and regulations as it might choose to impose. Thus in Rati Lal Case,\textsuperscript{130} a law which took away the right of administration altogether from religious denomination and vested it in other secular authority was held to be violative of the right guaranteed by Article 26 (d). However, if the right to administer property had never vested in the denomination or had been validly surrendered by it or had otherwise been lost, Article 26 will not create any such right in religious denomination.

In \textit{The Aurobindo Ashram Case},\textsuperscript{131} the petitioners challenged the validity of the Aurobindo (Emergency Provisions) Act. 1980, on the ground that it was violative of their rights to freedom of religion under Article 25 and

\textsuperscript{130} Rati Lal v. State of Bombay, AIR 1954 SC 388.

\textsuperscript{131} Supra, n. 129.
26 of the Constitution. Sri Aurobindo originated the philosophy of cosmic salvation through spiritual evolution and propagated the theme of integral yoga. He and his disciples formed the Aurobindo Society, which was registered under the West Bengal Societies Registration Act, 1961. The Society preaches and propagates the ideas and teachings of Sri Aurobindo and the Mother through its numerous centres in India and abroad. After his death the mother proposed a project of setting up an international cultural township, Auroville in Pondicherry. The society received large funds as grants from the Central and State Governments and different organizations in India and abroad for development of the township. But after the death the Mother the government received complaints about the mismanagement of the affairs of the society, and accordingly enacted the Auroville (Emergency Provisions) Act, 1980, providing for taking over the management of auroville for a limited period. The Supreme Court by a majority of 4 to 1 (Chinnappa Reddy dissenting on this point only) held that the memorandum of Association of Society and repeated uttering of Sri Aurobindo and the Memorandum of Association of society and repeated utterings of Sri Aurobindo and the Mother that the Society and Auroville were not religious institutions and other documents make it clear that either the Society nor
Auroville constituted a "religious denomination and that teachings of Sri Aurobindo did not constitute a "religion" and therefore taking over of the Aurobindo Ashram by the Government did not infringe the petitioner's (society) right under Arts. 25 and 26 of the constitution. The teachings of Sri Aurobindo only represented his philosophy and not a religion. The opinions of theologians, professors, reverence books and new agencies, treating the teaching of Sri Aurobindo as religious are not conclusive. Nor it is sufficient that the followers have a common organization, a distinct name after the founder have specially prepared mantras, a special symbol for identification and a sanctified place of pilgrimage or that there is uniqueness or innovations in the philosophy and the teachings. The lack of exclusivity and distinctiveness that the membership of the Society was open universally to any one subscribing to its aim and objects without losing his own religion militates against the plea that it is a religion. further, it was held that even if it was assumed that the Society right under Article 25 or 26. The Act has not taken away the right of management in matters of religion of a religious denomination under Article 26(b). It has only taken away the
right of management of property of Auroville, e.g. in respect of its secular matters, which can be regulated in accordance with law.

In *Birla Kishore Dev case*, the Shri Jagannath Temple Act took the management of secular activities of temple from the Raja of Puri and vested it in Committee constituted under the Act. The Court held the Act valid as it did not affect the religious aspect.

In *the Babri Masjid Case*, the Supreme Court by a majority has held that the State can in exercise of its sovereign power acquire places of worship like Mosques, Churches, Temples etc. which is independent of Article 300 A of the constitution if it is necessary for maintenance of law and order. Such acquisition per se does not violate Arts. 25 and 26 of the Constitution. What is protected under Arts. 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. While offer of prayer or worship is a religious practice, its offering at very location where such prayers can be offered would not be an essential religious practice.

132. *AIR 1964 SC 1501*.

Status of mosque in secular India is same as and not higher than that of places of worship of other religion such as temple, church etc. A Mosque is not an essential part of the practice of the religion of Islam and Namaz (prayer) by Muslim 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 Babari Mosque at Ayodhya, law and order in the country was disturbed in order to defuse the crisis, the Union Government acquired the whole property surrounding the mosque. This was challenged by the petitioners on the ground that it was violative of "Arts. 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.
There has been a recent controversy regarding the "dikshidars" (Poojaries) of Nataraja Temple, Chidambaram (T.N). The DMK government in Tamil Nadu was interfering with the administration of the famous Nataraja Temple at Chidambaram, and was not going by orders of the Madras High Court.

Replying to a special mention by Mr. K.S. Alagiri, the Chidambaram Tamil Maanila Congress (TMC) MLA. in the state assembly, Mr Karunanidhi said based on the court's interim orders, a Hindu religious and charitable Endowments Department official had assumed charge on March 20 as the temple's executive officer.

Everything had been done only as per law, and if the dikshidars (the traditional priests who have been administering the temple for centuries) had any grievances over it, they were free to approach the High Court, he said.

Mr Karunanidhi said Mr Alagiri, who had voiced the anguish of the devotees and the people over the government's move, should advise the aggrieved persons suitably so that they could find a solution to the issue through the court.

There was nothing that the government could do at this stage, the Chief Minister said.

Earlier, Mr 'Alagiri said the Dikshidars had been preserving a two millennia-old tradition, and acute poverty had not affected their service. It was wrong to believe that they were dominant forces because they formed the priestly class.

They were in an impoverished state, as neither the returns from the temple lands nor jewellery came under their control. Their income was in small sums garnered by way of contributions from devotees, he said.

There were separate officers for checking the jewellery and administering the accounts. At this stage, the requirement that the Dikshidars should submit their accounts once in 45 days to the newly appointed executive officer amounted to harassment by HR and CE officials, the MLA said.

Mr Alagiri wanted the government to ensure that officials did not interfere with the temple's day-to-day administration, and if necessary, a special law could be enacted for this.

Mr Karunanidhi said the Dikshidars had obtained a stay from the court in 1982 against the then government's notice to them to show cause why an executive officer should not be appointed in view of charges of mismanagement against
them.

While dismissing the petition in 1987, the High Court had observed that the interest of the public was more important than that of 250 dikshidars, he said. On regular submission of accounts, he said if it was true that there was practically no income to be disclosed, this could be informed to the official from time to time.

Radical Changes have also been introduced in the Wakf law and a uniform Wakf Act, 1995 have been passed on the subject.

Prior to enactment of Wakf Act, 1995., the following enactments dealt with the administration and supervision of wakfs:

(i) Wakf Act, 1954;
(ii) UP Wakf Act, 1950;
(iii) Bengal Wakf Act, 1934;
(iv) Bihar Wakf Act, 1937;
(v) Bombay Public Trusts Act, 1950;
(vi) Durgah Khwaja Saheb Act, 1955; and
(vii) Section 92 of the Code of Civil Procedure.

The Wakf Act, 1954, was in force in all States except Bihar, West Bengal and UP which had their own corresponding enactments. The Bombay Public Trusts Act, 1950, which applies equally to endowments of every community is in force
in Maharashtra (excluding its Marathwada area) and Gujarat (excluding its Kutch area). Section 112 of the Wakf Act of 1995 has repealed not only the Wakf Act 1954 but also the State enactments having law corresponding to the 1995 Act. The Durgah Khwaja Saheb Act, 1955 provides for supervision and administration of the endowments of the Durgah of Ajmer.

The Wakf Act, 1995 provides\textsuperscript{135} for the establishment of a Board of Wakfs for each State. The board for a state and the Union Territory of Delhi consists mostly of non-official members, some of whom are elected by certain electoral colleges. Other members of the Board are nominated by the State Government. An officer of the State Government not below the rank of Deputy Secretary is also included in the Board. In the case of the Union Territory other than Delhi the Board consists of appointees of the Central Government. The members of the Board elect the Chairperson.

The Boards are bodies corporate having perpetual succession and a common seal with power to acquire, hold and transfer property and can sue and be sue.\textsuperscript{136} The general superintendence of all Wakfs in the State vests in the

\begin{flushleft}
\textsuperscript{135} Sec. 14. \\
\textsuperscript{136} Sec. 13(3).
\end{flushleft}
Board. The Board can appoint and remove mutawallis in accordance with the provisions of the Act.

The Wakf Act, 1995 places numerous checks on mutawallis. For example, the Act makes it obligatory on mutawallis to let the wakf property and its accounts be audited by auditors appointed by the Board and at the discretion of the State Government, also by the State Examiner of Local funds or any other officer designated for that purpose by the State Government, to furnish reports, returns and other documents to the Board to obey the directions given by the Board to prepare and submit annual budget to the Board and the Board can given such directions for making alterations, omissions or additions in the budget as it deems fit consistent with the objects of the Wakf and the provisions of the Act. Mutawallis are barred from compromising any suit or proceeding in any court relating to title to wakf property without the sanction of

137. Sec. 32.
138. Sec. 57(2)(g).
139. See Sections 46 and 47.
140. See Section 32(2)(i) & (m) and 50(b) & (c).
141. See Sections 32(2)(c) and 50(a).
142. See Section 44(I) & (3).
the Board. Under Section 61, the Mutawalli may be penalized for failure to do the acts specified therein. Under Section 64 the Mutawalli can be removed from his office. The said provisions read as follows:

"61. Penalties- (1) if a mutawalli fails to-

(a) apply for the registration of a wakf;

(b) furnish statements of particulars or accounts or returns as required under this Act;

(c) supply information or particulars as required by the Board;

(d) allow inspection of wakf properties, accounts, records of deeds and documents relating thereto;

(e) deliver possession of any wakf property, if ordered by the Board or Tribunal;

(f) carry out the directions of the Board;

(g) discharge any public dues; or

(h) do any other act which he is lawfully required to do by or under this Act, he shall, unless he satisfies The Court or the Tribunal that there was reasonable cause for his failure, be punishable with fine which may extend to eight thousand rupees.

143. See Section 93.
(2) notwithstanding anything contained in sub-section (1), if-

(a) a mutawalli omits or fails, with a view to concealing the existence of a wakf, to apply for its registration under this Act,-

(i) in the case of a wakf created before the commencement of this Act, within the period specified therefore in sub-Section (8) of Section 36;

(ii) in the case of any wakf created after such commencement, within three months from the date of the creation of the wakf; or

(b) a mutawalli furnished any statement, return or information to the Board, which he knows or has reason to believe to be false, misleading, untrue or incorrect in any material particular, he shall be punishable with imprisonment for a term which may extend to six months and also with fine which may extend to fifteen thousand rupees.

(3) No court shall take cognizance of an offence punishable under this Act save upon complaint made by the Board or an officer duly authorized by the Board in this behalf.

(4) No court inferior to that of a Metropolitan magistrate or a judicial magistrate of the first class shall try
any offence punishable under this Act.

(5) Notwithstanding anything contained in the Code of Criminal Procedure. 1973 (2 of 1974), the fine imposed under sub-Section (1), when realized, shall be credited to the Wakf fund.

(6) In every case where offender is convicted after the commencement of this Act, of an offence punishable under sub-section (1) and sentenced to a fine, the court shall also impose such term of imprisonment in default of payment of fine as is authorized by law for such default.

6A. Removal of Mutawalli.- (1) notwithstanding anything contained in any other law or the deed of wakf, the Board may remove a mutawalli from his office if such mutawalli-

(a) has been convicted more than once of an offence punishable under Section 61; or

(b) has been convicted of any offence of criminal breach of trust or any other offence involving moral turpitude, and such conviction has not been reversed and he had not been granted full pardon with respect to such offence; or

(c) is of unsound mind or is suffering form other mental or physical defect or infirmity which would render him
unfit to perform the functions and discharge the duties of a mutawalii; or

(d) is an undischarged insolvent; or

(e) is proved to be addicted to drinking liquor or other spirituous preparations, or is addicted to the taking of any narcotic drugs; or

(f) is employed as a paid legal practitioner on behalf of or against, the wakf; or

(g) has failed without reasonable excuse, to maintain regular accounts for two consecutive years or he failed to submit, in two consecutive years, the year statement of accountants, as required by sub-Sectic (2) of Section 46; or

(h) is interested, directly or indirectly, in a subsisting least in respect of any wakf property, or in any contract made with or any work being done for, the wakf or is in arrears in respect of any sum due by him to such wakf; or

(i) continuously neglects his duties or commits any misfeasance, malfeasance, misapplication of funds or breach of trust in relation to the wakf or in respect of any money or other wakf property; or

(j) willfully and persistently disobeys the lawful order made by the Central government, State government, Board
under any provision of this Act or rule or order made thereunder;

(k) misappropriates or fraudulently deals with the property of the wakf.

(2) the removal of a person from the office of the mutawalli shall not affect his personal rights, if any, in respect of the wakf property either as a beneficiary or in any other capacity or his right, if any as a Sajjadanashin.

(3) No action shall be taken by the Board under sub-Section (1), unless it has held an inquiry into the matter in a prescribed manner and the decision has been taken by a majority of not less than two-thirds of the members of the Board.

(4) A mutawalli who is aggrieved by an order passed under any of the clauses(c) to (i) of sub-Section (1), may, within one month from the date of the receipt by him of the order, appeal against the order to the Tribunal and the decision of the Tribunal on such appeal shall be final.

(5) Where any inquiry under sub-Section (3) is proposed, or commenced, against any mutawalli, the Board may, if it is of opinion that it is necessary so to do in the interest of the wakf, by an order suspend such
mutawalli until the conclusion of the inquiry:
Provided that no suspension for a period exceeding ten
days shall be made except after giving the mutawalli a
reasonable opportunity of being heard against the
proposed action.

(6) Where any appeal is filed by the mutawalli to the
Tribunal under sub-Section (4), the Board may make an
application to the Tribunal for the appointment of a
receiver to manage the wakf pending the decision of the
appeal, and where such an application is made, the
Tribunal shall, notwithstanding any thing contained in
the Code of Civil Procedure, 1908 (5) of 1908), appoint
a suitable person as receive to manage the wakf and
direct the receiver so appointed to ensure that the
customary or religious rights of the mutawalli and of
the wakf are safeguarded.

(7) Where a mutawalli has been removed from his office
under sub-Section (1), the Board may, by order, direct
the mutawalli to deliver possession of the wakf
property to the Board or any officer duly authorized in
this behalf or to any person or committee appointed to
act as the mutawalli of the wakf property.

(8) A mutawalli of a wakf removed from his office under
this Section shall not be eligible for re-appointment.
as a mutawalli of that wakf for a period of five years from the date of such removal."

The income of the wakf must be applied for the following purposes in the order they are mentioned below:

(i) for the preservation and protection of wakf property;
(ii) for carrying out the objects of the wakf as laid down by the Wakf,
(iii) for doing what is essential for the general purposes of the specified objects; and
(iv) where it is not possible to apply the income for the purposes specified by the wakif), for objects as near as possible to those intended by the wakif.

In All Indian Imam Organization v. Union of India\textsuperscript{144} by a petition under Article 32 of the Constitution of India, the Imams of the Mosques sought direction to the Central and State Wakf Boards to treat them as employees and to apply them basic wages. The Wakf Boards disputed the manner of their appointments, the right to receive payment and asserted absence of master and servant relationship.

The Delhi Wakf Board pointed out that Mosques can be categorized in five categories: (1) Mosques which are under direct control or management of the Government such as the

\textsuperscript{144}. (1993) 3 SSC 584.
Mecca Masjid or Mosques situated in public gardens which are not governed or regulated by the Muslim Wakf Boards. (2) Mosques which are under direct management of the Wakf Boards. (3) Mosques which are under control of Mutawallis under various Wakfs according to the wishes of the Wakif as the creator of the Wakf. (4) Mosques not registered with Wakf Board and managed by local inhabitants. (5) Mosques which are not managed by Mutawallis or the Muslims of the locality. It was claimed that the Imams of the fourth and fifth categories were not regular features and any Muslim could lead the prayers, whereas the third category Mosques were having regular Imams.

Some Wakf Boards contended that the Imams or muazzins were appointed by Mutawallis, and the Wakf Boards had nothing to do either with their appointment or working and that under Islamic religious practice they were not entitled to any emoluments as a matter of right, as the Islamic law ordained the Imams to offer voluntary service. According to the Karnataka Some Wakf Boards raised the plea of financial difficulty as well. The petition was opposed by the Union of India also. It stated that the Islam did not recognize the concept of priesthood. The Supreme Court rejected the contention of the Respondents.
The Apex Court held—In Muslim countries Mosques are subsidized by the State, in non-Muslim countries by the individuals. They are administered by their founder or by special funds. In India the Wakf Act, 1954 was passed for better administration and supervision of Wakfs; even financial power vests in it. One of its primary duties is to ensure that the income from the Wakf is spent on carrying out the purposes of the Wakf. Mosques are Wakfs and are required to be registered under the Act over which the Board exercised control. According to the Board the Imams are appointed by the Mutawallis and therefore any payment by the Board was out of question. Prima facie it is not correct as the letters of appointment issued in some States are from the Board. Right to life enshrined in Art, 21 means right to live with human dignity. It is too late in the day to claim or urge that since Imams perform religious duties they are not entitled to any emoluments. Whatever may have been the ancient concept but it has undergone a change and even in Muslim countries Mosques are subsidized and the Imams are paid their remuneration. The Court refused to accept the grounds of absence of statutory provision for emoluments, or financial difficulties or large number of Mosques would entail heavy expenditure as sufficient to deny them the emoluments. If the Boards have been entrusted with the
responsibility of supervising and administering the Wakf then it is their duty to harness resources to pay those persons... to perform the most important duty, namely, leading community payer in a Mosque, the very purpose for which it is created.

In the circumstances, the Court said the petition was allowed and following directions issued-

(i) The Union of India and the Central Wakf Board will prepare a scheme within a period of six months in respect of different types of mosques some detail of which has been furnished in the counter-affidavit filed by the Delhi Wakf Board.

(ii) Mosques which are under control of the Government shall not be governed by this order. But if their Imams are not paid any remuneration and they have no independent income the Government may fix their emoluments on the basis as the Central Wakf Board may do for other mosques in pursuance of our order.

(iii) For other mosques, except those which are not registered with the Board of their respective States or which are not manned by members of Islamic faith the Scheme shall provide for payment of remuneration to such Imams taking guidance from the scale of pay prevalent in the State of Punjab and Haryana.
(iv) The State Boards shall ascertain income of each mosque and the number and nature of Imams required by it namely full-time or part-time.

(v) For the full-time, Punjab Waqf Board may be treated as a guideline. That shall also furnish guideline for payment to part-time Imam.

(vi) In all those mosques where full-time Imams are working they shall be paid the remuneration determined in pursuance of this order.

(vii) Part-time and honorary Imam shall be paid such remuneration and allowance as is determined under the scheme.

(viii) The scheme shall also take into account those mosques which are small or are in the rural area or are such as mentioned in the affidavit of Pondicherry Board and have no source of income and find out ways and means to raise their income.

(ix) The exercise should be completed and the scheme be enforced within six months.

(x) Our order for payment to Imams shall come into operation from December 1, 1993. In case the scheme is not prepared within the time allowed then it shall operate retrospectively from December 1, 1993.
(xi) The scheme framed by the Central Wakf Board shall be implemented by every State Board.

In the Gulam Abbas Case, it has been held that the direction given by the Supreme Court for shifting a property connected with religion to avoid clashes between two religious communities or sections does not affect religious rights being in the interest of public order. In that case the facts were that there had been a long standing dispute between the Shias and Sunnis of Mohalla Dosshipura. Varanasi regarding the performance of religious rites by members of Shia sect on certain plots and properties situated in the Mohalla. There had been violent clashed between the two religious communities leading to proceeding and several petitions before the Supreme Court. To find a permanent solution to the problem of the supreme Court appointed a committee of 7 persons consisting of 3 nominees of Shias and 3 nominees of Sunnies and the Divisional Commissioner as Chairman. The committee recommended that the shifting of two graves of Sunnies so as to separate the places of worship of Shias and Sunnies was feasible. The Sunnies challenged the implementation of the recommendation on the ground that it was violative of their rights under Article 25 and 26 of the

Constitution.

The Supreme Court, however, rejected their contentions and held that the order of the court for implementing the Committee's recommendations was not violative of the rights of the petitioners under Arts. 25 and 26. The exercise of fundamental rights under Arts. 25 and 26 is not absolute but subject to the maintenance of public order and the impugned suggestion for the shifting of graves was in the larger interest of the Society for the purpose of maintaining public order on the occasion of the performance of religious ceremonies and functions by members of both sects. If the Court finds that the implementation is in the interest of maintenance of public order the consent of parties would be immaterial. Though the Shariat law is against shifting of graves but the religious rights of every person and religious denomination are subject to "public order", the maintenance whereof is paramount in the larger interest of society. The order for shifting the graves was therefore necessary for maintaining public order. The ecclesiastical edict or right not to disturb an interred corpse is not absolute as is clear from Section 176 (3), Cr.P.C. which permits its exhumation for the purpose of crime detection, a provision applicable to all irrespective of the personal law governing the dead.
4. Review:

The preamble to the constitution of India declares India as a "secular state". Indian secularism respects and treats all religious faiths on equal footing and the State does not have its own religion but it gives due protection to all religions. Freedom of religion enshrined in the constitution under Arts. 25-28 includes freedom of conscience, freedom to practice and propagate the faith and freedom to manage religions affairs. However, Article 27 puts a bar on the might of the State that it can not compel the citizens to pay 'tax' for the advancement of any religion or maintenance of religious denomination.

Like other fundamental rights, the 'freedom of religion is also not absolute in character and one is not free to do 'anything' in the name of religion. There has been a lot of controversy regarding the protection of national interest on one side vis a vis the religious liberty on the other side. The Apex Court, in the National Anthem Case,\(^\text{146}\) was called upon to decide a similar controversy,. The court, following a judgment of the U.S. Supreme Court in the West Virginia State Board Case,\(^\text{147}\) gave predominance to the religions

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146. Supra n.2.
147. Supra, n.9.
freedom as against national respect, national interest and national values. The hobb'ble Supreme Court, perhaps, did not give much credence to the fact that we are 'Indians' first and thereafter Christians or 'Jehovas' or Muslims etc. We all owe a national duty, in addition to the fundamental duties that we must respect our national flag and song. The instant ruling of the Apex Court will only add fuel to the fire and is likely to be interpreted as a licence for 'all' to disregard the sanctity of the National Anthem, National Flag and other National marks of the country which may endanger national integrity and unity of the country. It is, therefore, estimated that the judgment of the High Court in this case appears to be more sound.

In the Ismail Faruque Case, the majority judgment of the Supreme Court appears to be more sound as the State under its sovereign powers can acquire any land in public interest. The area and structure around 'Babri Masjid - Ram Janambhoomi' has been a constant point of severe ethnic clashes and riots between Hindus and Muslims and, therefore, the Government has rightly intervened in the matter in the interest national solidarity and public order, after all the freedom or right to perform pooja or pay 'Namaj' can not be

148. Supra, n. 11.
permitted at the cost of bloodshed.

In the Adelail Co. Case, the Australian Supreme Court has rightly laid down that anti-war propaganda can not be allowed in the guise of religion or under the pretext of religions propagation, especially, when the nation is at war. Religions liberty is subject to national Security.

If, we look at the 'religions fabric' of our country, them it becomes clear that it is so vast and wise to cover everything from birth to death of a person. Therefore, power has been given to the State to regulate this freedom and to provide for social welfare, especially to eradicate social evil prevalent in the society for centuries together. The reformative zeal in the arena of religions faith and practices was must and envitable because of fanatisies guiding most of the religious faith even to the extent of child or human sacrifice for religious benefit. Such activities, can, even be heard in the media reports of modern society. The concept of social reforms was inherited by the Indian constitution under Article 25 (2) (b) without impairing the religions freedom. But, the process of reformation, it appears, has been more in case of the Hindus society, whereas, the State has taken a precautionary

149. Supra n. 17.
approach in the field of orthodox Muslim society.

In the Narasu Appamali Case, the Bombay High Court upheld the Bombay Prevention of Hindu Bigamous Marriages Act, 1946 which declared "the contracting of bigamous marriage by a Hindu", a penal offence but on the other hand same was permitted among Muslims. The court laid down that it is to be seen by the State that it want to bring about the reforms stages by stages or by community wise or territory-wise and the same can not be applied uniformly to all communities. The court, further made it clear that the two communities can not be treated absolutely alike as both are governed by separate and distinct personal laws based upon their separate religions texts. More so, polygamy has never been recognized among Hindus and monogamous marriage is, therefore, a rule without exceptions.

In the Srinivase Case, also the Madras High Court followed the principle laid down in the Narasu Case while upholding the validity of the Madras Hindu (Bigamy Prevention and Divorce Act, 1949 and made it clear that bigamous marriage can not be permitted as a policy among

150. Supra n. 22.
151. Supra n. 30.
Hindus. In the *Ram Prasad Case*, the Allahabad High Court laid down that a person can not be permitted and allowed to contract second marriage even on the failure of first wife to bear a son for ‘pindadan’ and continuation of race and the name of the family. In such cases, the law permits adoption of a son, if the family really desire to have a son. as the adopted son being an equally efficacious alternative to a natural son and within the framework of monogamous marriage. In short, the legislatures have laboured hard for the reformation of Hindu practices and to ward off any attempts towards plural marriages by giving solid legal justifications.

However, in the Muslim society, it appears, the approach of the legislature has been sluggish for reformation of various ‘secular’ practices associated with the religion, though on many occasions, the courts have tried to regulate such ‘secular’ practices amidst strong protests and objections raised by Muslim fundamentalists. In the *Badruddin Case*, the Allahabad High Court laid down that “under the personal law of Muslims a Muslim may have as many as four wives but having more than one wife is not part

152. *Supra* n. 32.
153. *Supra* n. 37.
of religion. There is no authority which precisely laid down that a 'Musalman' must have more than one wife always or it is obligatory upon him to have four wives at time."

In the Sahulameedu Case, the Kerala High Court made it clear that the benefits of a rule under Section 488 (3) Cr.P.C. regarding the maintenance can not be denied to a Muslim wife who is staying away from husband after his second and subsequent marriages. In the ShahBano Case, a lot of hue and cry was raised by the Muslim fundamentalists, over a controversial judgment delivered by the Apex Court while dealing with the right of a divorced Muslim wife under Section 125 Cr. P.C. The court laid down that Section 125(1) (b) which defines 'wife' as including a divorced wife, contains no words of limitation to justify the exclusion of Muslim women from its scope. Therefore, a divorced Muslim woman, as long as she has not remarried is 'wife' for the purposes of Section 125 and the statutory right available to her under this Section is unaffected by the provisions of the personal laws applicable to her. But, due to the pressure exerted by the Muslim fundamentalists on the ground that the judgment of the Apex Court is in violation of

154. Supra, n. 46.
155. Supra, n. 48.
Shariat Law, the parliament has diluted the impact of the judgment by passing of the Muslim Woman (Protection of rights and Divorce) Act, 1986 amidst strong protests and agitations. Therefore, it is amply clear that the Muslim society resist the reformation and do not permit any one to look into their "religions affairs and practices" under the pretext of religions freedom and liberty.

As pointed out earlier, the freedom of religion is not absolute in nature and is certainly subject to power of the State to make laws for social welfare and social reforms. Therefore, the freedom of religion certainly can not prevent State from throwing open all "Hindu Religions Institutions of Public Character" to all classes and sections of Hindus without any favour or discrimination. Undisputedly, the aforesaid right conferred by Article 25 (2) (b) is a right of "all classes and Sections of Hindus" to enter into a public temple and to have 'darshan'. The Scope and unqualified terms would cover individuals under Article 25 (2) and a 'denomination' under Article 26(b). Therefore, the right to enter a 'temple' shall be available against individuals and against denominations. The fact is that, though Article 25 (1) deals with the right of individuals, Article 25(2) is much wider in scope and ambit, and has reference to the rights of communities, and controls Article
25(1) and 26(1). Article 25 (2) (b), therefore, prescribed a right to enter into a temple or other like institutions of public character (which are dedicated to the public as a whole or those founded for the benefit of Sections or denominations thereof) for the purposes of 'darshan' and pooja, though subject to such regulations made by the Management in this behalf.

In the Vekataramana Devaralu Case,\textsuperscript{156} while upholding the right of public to have 'darshan' and 'pooja' in a denominational temple, the court said that, however "no member of the public could claim as a part of rights protected by Article 25 (2) (b) that a temple should be kept open for worship at all hours of the day and night, or that he should be allowed personally to perform the services of 'Archaks' (poojaries) or 'special pooja' on certain occasions. The right of public will be not absolute in nature and is subject to such limitations which are made out by the denomination. But, simultaneously, the denomination can not bar the public at large, absolutely, to have darshan and pooja in the religions institutions of public nature or temples. Further, the instrument or deed of dedication of a denomination will be guiding piece of evidence in

\textsuperscript{156} Supra n. 53.
determining the public vis-a-vis denominational rights over such institutions in the matters of internal discipline and manner of pooja etc.

The judgment of the Apex Court, is, however being criticized by some critics on the ground that it would have been better if the Apex Court would have read Article 25(2) (b) as an integral part of Article 26(b), without applying the principle of harmonious construction for validating temple entry laws, as the same would have been more justified and logical. In the Yagnapurushdasji Case, Apex Court laid down that the Harijans can not be refused entry into a public temple on superstitions, ignorance and complete misunderstanding of the teachings of Hindu religion and of the real significance of the tenets and philosophy taught by "Swaminarayan" himself.

In E.R.J. Swami Case, the court has tried to nationalize the institution of priesthood (poojaries) by holding that the act of appointment of a 'poojary' in a temple is a secular act and is not a religious practice, and, therefore, the monopoly of certain castes in the

157. Supra n. 64.
158. Supra n. 65.
159. Supra n. 69.
appointment of poojaries is bad. The people of other castes and the scheduled castes, therefore, can not be refused appointment of 'poojaries' or 'Archakas' merely on the grounds of caste. It is submitted that the decision of the court appears to be too much technical in the instant case. The courts were right and justified when they were trying and justifying the temple entry laws by enforcing the "Omnibus equality clause" but to prescribe reforms in the area of religion or to eliminate the hereditary usage ensuring denominational qualifications of the "Archaka or poojary" are apparently unjustified and, therefore, amounts to judicial encroachment of the religions liberty of a denomination.

In the Pogakula Laxmi Reddy Case, the A.P. High Court, while upholding the right of the public to worship a 'Tarmind Tree' and the nearby place like a temple, refused the excavation of the place for taking out Kala Gnanam Bhandaru (knowledge of the future) on the basis of the disclosures made by s Swami that he is 'reincarnate' of some saint who had been the founder of that temple or disputed place in 4th century, and therefore, now he want to get back the preserved treasure i.e. Kala Gnanam Bhandaru (Knowledge

160. Supra n. 75.
of the future). The court declared the public right of worship. The A.P. High Court laid down that the court cannot decide the questions regarding the excavation of Kala Gnanam Bhandaru, the disclosures of Swamy, the issue of reincarnation of Swamy and the propriety of the Swamy over the place in dispute etc., under Article 226 of the Indian constitution.

The judiciary has played a vital role in the reformation of certain "so-called" religious practices. In the A.I.D. Women Association and Janwadi Smiti Case, the Supreme Court upholding the restraint orders of the Government, on the "performance of chunri ceremony" in the Ram Sati Ji Mandir laid down that Section 2(1) (b) of the Commission of Sati (Prevention) Act, 1988 prohibits the glorification of Sati "in any form".

But, in the Atheist Society - Case, however, the court refused to interfere and to issue a writ of mandamus to prohibit breaking of coconuts, performing of poojas, chanting of 'mantras' or 'sutras' of different religions at State functions. The A.P. High Court rejected the prayer of the petitioners and held that these activities have been a

161. Supra n. 85.
162. Supra no. 89.
part of the Indian tradition and are meant to provoke the blessings of the Almighty for the success of the project undertaken.

In the Anand Margis Case,\textsuperscript{163} the practice of procession with "Tandva Nritaya" in the busy streets of Calcutta and in the Cow Slaughter Case,\textsuperscript{164} the practice of slaughtering of cows and distribution of cow-flesh among Muslims on 'Bakrid', were not appreciated and considered as part of the religion by courts, and, therefore, not protected under Art. 25 of the Indian constitution.

To implement the mandate of omnibus equalitarian clause, Ar. 17 of the Indian constitution abolished 'untouchability' and prohibited its practices in any form. It is further provided that "enforcement of any disability arising out of "untouchability" shall be an offence punishable in accordance with law.

In the Banwari Case,\textsuperscript{165} the Allahabbd High Court upheld the convictions of certain "Dhobies" and "Barbers" under U.P. (Removal of Social Disabilities) Act, who had refused to render the personal services to 'Harijans'. In the

\textsuperscript{163} Supra n. 90.
\textsuperscript{164} Supra n. 95.
\textsuperscript{165} Supra n. 104.
Souriyar Case, the Madras High Court refused to issue declaration in favour of Caste Hindus restraining the Harijans from using the burial ground, customarily, reserved by the former for their use. In the Bhaishankar Case, the Bombay High Court declared that the Segregation practices followed in the canteen of certain mills, thereby, serving separately to Harijans and other caste workers, is offensive of the Bombay (Removal of Social Disabilities) Act, 1947. In the Behari Lal Case the Allahabad High Court held that refusing a person to take water from a public tap because the person belonged to scheduled caste, to be an offence under Section 7 (1) (b) of the Untouchability offenses Act, 1955. In the Ramchanderan Case the head-Master of a Govt. Girls School was convicted for his discriminatory action in constituting a separate section of Harijan girls students of IXth standard without any justification.

Therefore, it is clear from the above discussion that judiciary is playing a pivotal role in strictly applying the provisions of laws directed to eradicate the social evil of

166. Supra 104.
167. Supra n. 106.
168. Supra n. 109.
169. Supra n. 122.
'untouchability'. In the E.R.J. Swami Case,\textsuperscript{170} the Court has even gone to extent that while appointing "poojaries or 'Arfchakas' of temples the monopoly and favour of certain traditional castes in exclusion of other castes and Harijans, is discriminatory.

For the enforcement of "omnibus equalitarian clause", the judiciary has not appreciated the power of 'Dadas', 'Sardars' or Dai' to excommunicate a person from a tribal or a kabila or a community. The practices of 'Hukka-Pani Bandh' or expulsion from caste or community are outdated and requires reconsideration in the modern and civilized communities. More so, neither the "freedom to manage the religions affairs" or protection under personal laws would validate the action of "Dadas" and "Sardars" who intent to expel persons of their tribal or Kabila or community on grounds of disobediance of commands of such 'Sardars' or for the violation of 'rules' of such 'kabilas' or communities. In the Saifuddin Case,\textsuperscript{171} the Apex Court has laid down by a majority decision that the 'head' of a community can not excommunicate a person from their society while "managing their religions affairs" under Article 26 (b), as expulsion

\textsuperscript{170} Supra n. 125.

\textsuperscript{171} Supra n. 125.
of a person from a community reduces such person like an 'untouchable' and the practices of untouchability and caste based disfavours have already been abolished. Similarly, the practices of "Hukka-Pani Bandh", though very common in villages, are devoid of any legal force and sanctity.

A lot of reformation has been done by the Union and State Governments. in the financial administration or secular administration of denominational or other like properties. The courts have also backed the executive orders and the legislations in this behalf. More so, the role of Union Govt. is certainly praiseworthy in providing the facilities for yatries to Amaranth, Vaishnu Devi, Kailash-Mansarovar, Haz, Badrinath, Neelkanth etc.

In the Aurbindo Ashram Case,\textsuperscript{172} the Apex Court has upheld the constitutionality of Aurbindo (Emergency Provisions) Act, 1980,Wherein the Govt. Took over the secular administration of the 'Ashram' as the 'management' of the Aurbindo Ashram was engaged in corrupt practices and was guilty of mismanaging the affairs of Ashram. The Govt. had received numerous complaints in this behalf. Similarly in the Bia Kishore Case,\textsuperscript{173} the Supreme Court upheld the

\textsuperscript{172} Supra n. 131.

\textsuperscript{173} Supra n. 132.
action of taking over the secular administration of Shri Jagan Nath Temple from the Raja of Puri and Vesting it in a committee. In the Babri Masjid Case,\textsuperscript{174} the Apex Court has upheld the governmental action to acquire the disputed structure and the adjoins land under its sovereign powers to avoid the probable blood-shed and Hindu-Muslim riots till the matter is finally disposed of by the Apex Court. In the Gulam Abbas Case,\textsuperscript{175} the court wisely ordered the shifting of the two graves of Sunnies to avoid the clashes between Shias and Sunnies and in larger interest of society as there had been long-standing controversy over these graves and many a times tensions prevailed in the communities, though Shariat law is against shifting of graves.

In the All India Iman Organization Case,\textsuperscript{176} the Apex Court has delivered a land mark judgment and came to the rescue of Imams for the payment of some honorarium for their subsistence so that they could better manage the Muslim religions places.

The parliament has recently passed a Uniform Wakf Act, 1995 for better management and proper administration of wakf

\textsuperscript{174} Supra n. 133.
\textsuperscript{175} Supra n. 144.
\textsuperscript{176} Supra n. 143.
properties and to check the possible misuse and maladministration of such properties.

In last, the Parliament must take up the initiative of framing a Uniform civil Code by taking the Muslims in confidence and without injuring their religions tenets and freedom.

Furthermore, we must keep in mind that "freedom of religion" is given to choose a path to attain 'Moksha' or to purify your soul or to get religious advantage and the same can not be permitted to be misused for ulterior objectives. Lastly, we are Indians first, and, thereafter Hindus, Muslims, Sikhs or Christians, therefore, national interest and solidarity must predominate over other issues including religion.