CHAPTER II
FUNDAMENTAL RIGHT TO FREEDOM OF RELIGION UNDER ARTICLE 25


The Home Rule Bill of Annie Besant (1985) the first Constitution of India Bill, had envisaged for India a Constitution guaranteeing to every citizen the right to free speech, equality, liberty and property.\(^1\) From this point onwards, guaranteed constitutional rights was one of the anchor sheets of programme of Indian National Congress for India's political Freedom. The Nehru Report in the charter of non-withdrawable fundamental rights and besides the right to freedom of religion, a clause on non-discrimination on ground of religion. Shiva Rao has hailed it as an evidence of constructive Indian nationalism and bold facing of communalism.\(^2\) Under the Constitution, India is a secular state though it is still a land of many religions. India is not an anti-religious state. The Preamble refers specifically to liberty of... belief, faith and worship. Article 25 to 28 confer certain fundamental rights relating

1. Rao, B. Shiva, the Framing of India's Constitution - A Study (The Indian Institute of Public Administration, New Delhi, (1968), p. 74

2. Ibid., p. 175.
to religion and religious denominations. Out of the eight major religions, four have their origin in India. Followers of four other religions are also among Indian citizens. During the British regime, India was not completely a secular state.

In India there was no organized Church and there was no conflict between the religious power and the political power. At no time did the custodians of religion wield any influence on the kings. These spheres of activity were different and there was cooperation between them. If secularism means 'separation of the Church and the state', India had been a secular state throughout its history. The Constitution of India has accepted the principle of secularism. Secularism in India means that in the public affairs of the country, religion will not play any part.

(A) Nature and Scope of the Article 25

In Indian constitution, the composite right to religious freedom is enumerately* expressed, dividing into four categories: conscience, profess, practise and

3. Edward I had to fight with the archbishop of Canterbury for various reasons as the latter tried to exercise these powers in such a way as to hamper the administration of King. It is rightly observed that the struggle between the temporal and spiritual power was a prominent feature of the country in the 13th century.
propagate. These can be apportioned into two generic areas—belief and practice. Conscience means belief, faith, opinion, and to profess, in one sense, means to belong to membership, adherence, that is again faith, profess in the other sense of 'to declare' and to practise and propagate are the exercise aspect of the right.

In Ratilal, quoting Latham, CJ. He says the article protects acts done in pursuance of religious belief as part of religion. According to Gajendra Gadker, J. What is protected under Articles 25(i) and 26(b) respectively are the religious practices and the right to manage affairs in matters of religion. The guarantee under our Constitution not only protects the freedom of religious opinion, but it protects also acts done in pursuance of a religion.

Historically, every religion has developed its own cults. Every religious tenet has its own mode of worship, ways of expressing reverence to Supreme Being, or Intelligible First Clause or Sublime Goal. A religion prescribes certain disciplines it deems essential to

manifest the followers' acceptance of the Faith poised in that Philosophy. It also recommends certain moral and ethical rules that would his way and develop his faith in the spiritual teachings. It also lays down guidelines for his behavioural pattern in the society and chalk out alternative, optional routes as well, leading him ultimately to the approved path to Truth.

The religiosity of a practice depends upon its recognition in the tenets of the religion, and not on state recognition. If a sect or an individual emphasizes on rituals and ceremonies as Constituents, principal or ancillary, of the religion. The State cannot restructure the religion or belief. The Constitution expressly guarantees to freedom to practice religion just as the US Constitution confers right to free exercise of religion. The question of not recognizing the right to rites, or eliminating cults from the ambit of the Constitutional guarantee does not arise at all.7

Justice Mukherjea, delivering the judgement in the Shirur Math Case8 referred to this observation of Field J.

and said:

"We do not think that the definition of religion can be regarded as either precise or adequate, Article 25 and 26 of our Constitution are based for the most part upon Article (492) of the Constitution of Eire and we have great doubt whether a definition of 'religion' as given above could have been in the minds of our Constitution makers when they framed the Constitution".\(^9\)

The learned Judge then clarified that the Contents of religion may compromise not only ethical rules but rituals also, and the Constitution protects both opinion and acts as is made clear by the use of the expression 'practice of religion' in Article 25. These views are reiterated in Ratilal Case\(^10\) also. In his oft-quoted Speech on the ambit of religion, Ambedkar. When he advocated 'to limit the definition of religion to beliefs and such rituals as are essentially religious\(^11\) was also distinguishing between religion and religious practices. Chagla, C.J. no doubt sounds to conservative in asking to make a sharp distinction between 'faith and practice' and affording state protection to faith only; but the seems 'to mean to exclude only

such practices as "run counter to social well being". 12

(B) Does Article 25 of the Constitution Need Amendment

The Akali Dal, as a part of its agitation, raised for the first time a demand in January 1984, asking for an amendment of Article 25(2)(b) of the Constitution. Later, copies of the Constitution were burnt and mutilated. To quote Khuswant Singh, "the people who took oath to protect the Constitution later burnt the page of it." 13 The Akali Dal alleged that the provisions of Article 25(2)(b) are discriminatory to the interest of Sikhs and does not reflect the separate identity of Sikh religion. The demand was further linked with the idea of separate personal law for the Sikhs. The question is: Does the provision need any amendment? Why this issue has been raised after a successful functioning of our Constitution during the last 34 years? Why the issue has been raised after a successful functioning of our Constitution during the last 34 years?


13. These remarks were made at a Seminar on "Constitution and the Religion." See Indian Express, April 27, 1984 at p. 6. Following the act of burning the copies of the Constitution, certain akali leaders were arrested under the Prevention of Insult to National Honour Act, 1971 and later freed. -- See Indian Express, May 12, 1984, at p. 1.
Why the issue was not raised earlier when the Janata Government was in power at the Centre and the Akali Dal in Punjab? Let us answer the first question.

Article 25(2)(b) saves the power of State to make laws providing for "the throwing open of Hindu religious institutions of a public character to all classes of Hindus" includes a Sikh, Jain and Buddhist. Hence, Hindu, Sikh, Jain religious institutions come within the ambit of the above provision. The words "religious institutions of public character" as interpreted by the Supreme Court in Temple Entry case\(^\text{14}\) would include not only such institutions as are dedicated to the use of members of a particular religion but also would include institutions which are purely denominational. This wider interpretation of the provisions of Article 25(2)(b) clearly shows that the State can validly make a law throwing open a Jain temple to all Hindus, a Hindu denominial Mutt to all Hindus, Sikhs, Buddhists and Jains, and a Sikh Gurudwara to Buddhists. In fact, the idea of widening the scope of the provision was to eliminate any disfunction between one class and another class of Hindus.\(^\text{15}\)

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Hence, the interpretation of Article 25(2)(b) as given by the Supreme Court appears to be consistent with the intention of the framers of the Constitution. What about Explanation II. The explanation says that "in sub-Section (b) of clause (2), the reference to Hindus shall be construed as including a reference to persons professing the Sikh, Jain or Buddhist religion, and the reference to Hindu religious institutions shall be construed accordingly." Broadly speaking, the explanation means that institutions belonging to any of the above religions viz., Hindu, Sikh, Jain and Buddhist may be thrown open to the followers of all these religions. The other view can be that institutions belonging to any of the above religions may be thrown open to all those professing that particular religion. But, the latter view creates an impression that each of the above religions has institutions to which some classes are admitted and the other not.

It is submitted that there appears to be a flawing the drafting of the provision. Article 25 deals with individual religious freedoms whereas Article 26 provides for corporate religious freedom. Hence, the provisions contained in Article (25(2)(b) should have been incorporated in Article (26(b). It was no avoid the conflict in Temple Entry case gave a wider construction to the former provision and held
that Article 26(b) must be read subject to Article 25(2)(b).¹⁶

Lastly, the question raised by the Akali Dal that the provisions of Article 25(2)(b) Explanation II does not reflect the identity of the Sikh religion does not seem to carry much weight. In the submission of this writer the provision far from weakening the distinct identity of the Sikh Community has, in fact, given recognition to it. The provisions of Explanation II clearly provides that in the matter of religious institutions, its provisions shall be applicable to Sikhs, Jains and Buddhists in the same way at it is applicable to Hindus. Interestingly, Explanation I of this Article makes a very significant and discriminatory exception in favour of Sikhs. It gives them a fundamental right to "wear and carry Kirpans." The removal of this provision from the Constitution would, therefore, instead of benefiting them, deprive them of this constitutional privilege.

It is further submitted that the Hindu religion is a reflection of the composite character of the Hindus, who are not one people but many. The development of this particular religion shows that from time to time saints and religious

¹⁶. Supra, note 69.
reformers attempted to remove from Hindu thought and practice elements of corruption and super situation which in fact led to the formation of different Hindus sects. Buddha preached Buddhism, Mahavir preached Jainism, Guru Nanak inspired Sikhism, Dayanand founded Arya Samaj and the teachings of Ramakrishna and Vivekananda gave it a dynamic content. Though the teachings of these saints may have varied and differed yet underneath that variance there was a wave of unity which kept them within the sweep of broad Hindu religion. All these saints had revolted against dominance of ritual and the power of the priestly class with which it came to be associated.

This is the reason why Hindu religion can be correctly termed not as a religion in its traditional approach but as a comprehensive, progressive, forward looking way of life, common to the whole people.

The inclusion of the Sikhs within the word "Hindus" in explanation II of Article 25(2)(b) does not mean that the Sikh religion's identity is lost. The words "professing the Sikh... religion" occurring in the above explanation are significant. Similarly, the words "profession of the Sikh religion" occurring in Explanation I of the above provisions

belie the argument of Akali Dal that the provision is causing some misgivings over separate identity of the Sikhs. Perhaps the Akali Dal is also denying the historically established fact that the word 'Hindu' is derived from the river Sindhu which flows from Punjab. Hence, there appears to be no justification for seeking an amendment of Article 25(2)(b) of the Constitution which recognizes not only the identity of the Sikh religion but other religions and accords them equal status and protection. We must realize that the interests of the nation are overriding and paramount and always come first. We have full faith that Sikhism has played a great role in fostering the concept of secularism in the country and also do hope that it will continue to maintain its traditions and help in building a better future.

C. Fundamental Freedom of Conscience

Article 25 of the Constitution of India deals with the right to free conscience and free exercise of religion. It upholds the Constitutional ground norms of equality by referring to all persons and qualifying the verb entitled by the adverb equality?. In the context of the Indian

18. See Monier Williams, Hinduism, (1951) at p. 1, Dr. S. Radhakrishnan, The Hindu View of Life, at p.13
Constitutional history and the most unfortunate persistence of the strains of separatism, this perspective is fundamental in understanding the quintessence of the law on religious freedom. In the Nehru Report of 1928 the right to freedom of conscience, profession and practice of religion was included explicitly to prevent one community domineering over another. Such rights were called Minority Rights in the early days of the Assembly, and they appear in the Constitution of Rights Relating to Religion, cultural and Educational Rights and also in Part XVII on language. The Sapru Committee (1945) also saw a two-fold necessity for the fundamental rights, namely, as guarantees to minorities and as of standard of conduct for Legislatures, Governments and courts. The Fundamental Rights Sub-committee drafted in various forms, proposals for the text of fundamental rights guaranteeing religious freedom to all the citizens (Munshi's draft) or to every Indian citizen (Ambedkar's

The Minorities Sub-Committee approached the fundamental right from the point of view of the minorities, as for example a heavy pressure was exerted by some members of a minority group to guarantee a right to convert. However, the entire range of the fundamental rights, including Article 25 were discussed in the Constituent Assembly from citizen's or persons point of view and (except in Article 29 and 30) the term minority was never used by the text of the various amendments proposed and considered in the body.

Thus, the provisions enshrines our Constitutional principle of equality of all religions and equality of all persons belonging to all religions. No one on account of his sect can demand a preferential status in the conceptual frame of Constitutional right to religious freedom, nor can the state impugn the religious freedom of any person because of his sect. Equally entitled means potentially enabled on equal footing, subject to individual inclination and constitutional limitations operating equally on all. This equal entitlement clause provides the substance to the rights of persons, denominations and groups to establish religious houses, to demand State assistance, to enjoy...

22. Ibid., pp. 76 and 87.
freedom of and from religious instruction, to enjoy cultural and educational rights and to establish denominational school. 23

While for conscience the Article uses the noun 'freedom', for its exercise it is the right. The import of these terms lies in their intrinsic scope. Freedom implies greater liberty than right. Thus, in the matter of belief, by its very nature, the state can have no say. Conscience in the sense of faith, the ethereal, spiritual part of religion can admit of no state control. The expression 'all person are equally entitled to freedom of conscience' signifies non-involvement of State in terms of State preference to any religion, absence from any State compulsion or coercion on the minds of the followers of different faiths. 24

There are on more face of the clause. It is not in abstract done that the term is used in the article. It is a term of art. The free conscience right has a tangible side also. Free conscience would have a legal meaning only if it can guide the behaviour of its keeper. In this sense 'free

conscience' is a right that can be manifested, and hence limitation also. Even freedom in law is a freedom under law. The conscience clause is a part of the whole article, and not independent of it.

Our Constitution expressly grants freedom of conscience. What in the U.S. Constitutional law is the outcome of the non-establishment clause. The first amendment embraces two concepts freedom to believe and freedom to act, said the U.S. Supreme Court in Cantwell V. Connecticut.\textsuperscript{25} The court highlighted in Abington Township V. Schemp\textsuperscript{26} the distinctness of the conscience aspect of the freedom thus: freedom of conscience and freedom to adhere to such religious organization or form of worship as an individual may choose cannot be restricted by law. We have right to profess separately conferred in Article 25.

Even without an express conscience clause in the First Amendment the U.S. Constitutional Law has constructed a supra structure of 'Conscientious objection' to war, military service and draft laws, blue laws (Sunday closure), medical treatment, flag, salute etc. The vicissitudes of the freedom of conscience in the U.S. would interest and puzzle

\textsuperscript{25} (1940) 310 U.S. 296, 94 L.Ed. 1213.

\textsuperscript{26} (1963) 374 U.S. 203, L.Ed. 2nd 844.
an Indian reader, for instance, while polygamy grounded on religious belief would 'Shock the moral judgment of the Community,' a statute authorizing withholding of the licence for films that are obscene, indecent, immoral, inhuman, sacrilegious, or tending to corrupt morals or incite might not be able to withstand the First Amendment religion clause objection.\(^28\)

Article 25 of our Constitution expressly subjects freedom of conscience to public order, morality, health and other provisions of part III. This clause has been inspired by Article 44 of the Irish Constitution, which provides--"freedom of conscience and the free profession and practice of religion are, subject to public order and morality, guaranteed to every citizen."\(^29\) The dictionary meaning of conscience is in most thought, consciousness, moral sense, scrupulousness, conscientiousness. The

\(^27\) Davis v. Beason, (1890) 133 US 333,332, Ed.637.

\(^28\) See Joseoh Burstvn v. Wilson (1952) 343 US 495, 96 C.Ed. 1098, where in film The Miracle was cleared of Blasphemy and Sacrilege charges by the Courts.

\(^29\) S. 116 of the Australian Constitution, which injunctions the Commonwealth not to make any law for establishing any religion, or imposing any religious observance, should preclude judicial inquiry into the veracity of a religious belief. But neither this nor the Russian, Pakistani, or Ceylonese Constitutions contain any 'Conscience' clause.
Constitutional connotation of term in which sense the Article uses it is belief, faith, the conceptual aspect of religion. It means thus the freedom or right to believe.

The religious beliefs and opinions are protected by our Constitution, announced Justice Mukherjea. it may be noted at the beginning that freedom of conscience as such was not in issue directly in the Shrivur Muth Case. The point in issue in this Case was the ambit of religions practices and matters of religion coverable under the Constitutional guarantee to the right to practice religion, by individual or a denomination. This explains the anxiety of the court to immediately conjunct the dicta on belief with the assertion: but it would not be correct to say that religion is nothing else but a doctrine or belief; and that: the guarantee extends to not only religious opinion but also acts done in pursuance of a religion.

The religious susceptibilities of a class of persons are not to be based on their acceptability by another class or their rationality in court's judgment; the courts have to pay due regard to the feelings and religious emotions of different classes of persons with different beliefs. These

observations relating to conscience in the sense of religious beliefs, were made by Justice B.P. Sinha in the DMK Case, where in the High Court Judge's observation that since the image of God Ganesh broken by the defendant was not consecrated one the offence under Section 295 of Indian Penal Code (I.P.C.) could not be constituted— was disapproved by the Supreme Court as an erroneous view of the language of that Section, viz., any object held sacred by class of persons. Without directly or exclusively applying the conscience clause of Article 25, the above cases uphold the freedom of conscience by protecting the religious beliefs from assault. The Mahavir Nirvan Anniversary Case also indirectly uphold the sanctity of the freedom of conscience, though on facts it was held not trespassed. In 1974 the Government of India announced its programme to celebrate the 2500th Anniversary of Bhagwan Mahavir's Nirwan on Government expenses. Interestingly, some orthodox Jains along with a Hindu challenged the legality of the programme


33. It punishes malicious acts intended to outrage religious feelings of any class by insulting its religion or religious.

34. Suresh Chandra v. Union of India, AIR 1975, Del. 168.
in *Suresh Chandra v. Union of India*. The freedom of conscience argument preferred was not articulated very emphatically and was more practice oriented. The Jains' objection was that observance of death anniversary was appropriate in respect of only mortals liable to rebirth, while Mahavir had obtained Nirvan, i.e. salvation; He was a Parmatma (super Being). This objection was weakened by fact that the Government itself had named the celebrations a MahaNirvan anniversary. Further, the Jains claimed that the mode of celebrations was not in accordance with the Jain scriptures and thus violated their religious practice. The conscientious objection to the programme was in fact expressed in terms of the impugnment that it, violated the Jain religious practice, and right to manage its religious affairs. Thus it was contended that the way adopted by the Government to celebrate the Nirvana was not the true Dharma, the propagation of the knowledge of the Jain scriptures could be done only by the Jain Sants and not by the committee for the celebrations; naming of parks and child government and the committee for the celebrations; naming of parks' and child centres after Mahavir and publishing Jain scriptures by Government were not contemplated by Jain

35. AIR 1975 Delhi 168.
religion and they hurt the religious sentiments of the Jains, nor did their religion allow imparting of religious knowledge to non-Jains.\(^{36}\)

*Bijoe Emmanuel v. State of Kerla\(^ {37}\)* is the first Case decided by our Supreme Court in which the applicant anchored his claim basically to the conscience clause in Article 25. **This case also presents for the first time a situation in which a state compulsion on an individual to perform secular activity was challenged to violate his religious conscience.** The two circulars issued by the director of Public Instruction, Kerala, required two national (contra sacramental) ceremonies to be performed in a school (i) whole school participation in the singing of the National Anthem and (ii) taking in one voice, the National Pledge before marching to the classes. The circulars charts everyone to love the country and let this love stand above on's party or religious affiliation. The appellant children members of the Jehovah's witnesses sect, were expelled from the school on their refusal, founded on their conscientious objection, to participate in the singing of the National anthem. In this appeal against the Kerala High Court

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37. (1986) 3 SCC 615.
decision. The Supreme Court held that the circular had no force of law and any compulsion to join in the singing despite genuine conscientious religious objection would clearly contravene the rights guaranteed by Article 19 (1) and Article 25 (1). 38

2. The Fundamental Right to Freely Profess and Practice any Religion.

The right to profess religion is necessarily consequent to the freedom of conscience. Freedom of conscience is something internal and concerns only the individual himself. To profess religion is publicly to affirm one's belief and faith both by word of mouth and other conduct. Freedom of conscience allows a persons to follow any religion or faith of his choosing, whereas the right to profess religion entitles him publicly to State his creed if he so desires. Thus a Hindu, Muslim or Christian is not only entitled to hold whatever Hindu, Muslim or Christian religious beliefs respectively, commend themselves to his judgment or conviction, but also may manifest his belief freely and openly before others. A Hindu may profess his religion by wearing a sacred thread or a mark on his forehead; a Sikh

38. Ibid. p. 624.
may profess his religion by wearing and carrying Kirpan, and a Muslim may do the same by observing a month-long fast.

A. Right to Profess Religion

The right to profess religion necessarily implies freedom to follow any religion or belief. No person in India is bound to remain a member of a particular sect or religious group against his wishes. He may, if he so desires, changes his religion, and if the question arises as to which religion he profess it will be recognized that he is a member of which new faith he has embraced.

The main components of the right to profess religion are:

(i) The right to religious procession

(ii) The right to give religious exhortation; and

(iii) The right to public worship.

These rights, as we shall see are not absolute.

(i) The right to religious procession

Constitution of India does not specifically enunciate the right to engage in our organize religious

39. Kirpan is a sword, one of the five emblems which an orthodox Sikh must wear. Explanation I of Article 25 states that the wearing of Kirpan shall be deemed to be included in the profession of Sikh religion.

processions. However, such a right is quite implicit in the guarantee of freedom to profess religion.\textsuperscript{41} In the past, particularly before the partition of India, religious processions were not only disruptive of peace and tranquility but also ignited serious communal riots. The playing of music by Hindu processionists passing a mosque, the killings of cows for sacrifice during the Muslim 'Bakrid' festival, the performance of 'Matam' (mourning) by Shias while Sunnis are offering prayers in a mosque have led to countless bloody riots.\textsuperscript{42}

Before the adoption of the Constitution, regulation of religious processions was a simple matter of law and order because the Government of India Act 1935 did not guarantee a right to religious procession. The right was recognized under statutory law which simultaneously allowed for a number of restrictions.\textsuperscript{43}

Thus a total prohibition of religious processions could be imposed if there was any danger to peace or

\textsuperscript{41} Constitution of India, Article 19(1)(b) and (c).

\textsuperscript{42} D. Smith, India as a Secular State (New Jersey, Princeton Uni: Press, 1963) 222.

The law also provided for the licensing of religious processions. The courts in India considered some reasonable restrictions on the right to participate in religious procession as legitimate.

In the 1882 Case of Parthasaradi v. Chinna Krishna Ayyanoar, Turner C.J. held that members of all sects are liberty to conduct religious processions through public streets so long as they do not interfere with the ordinary use of such streets by the public. In two later decisions, the Madras High Court took a similar view that public streets were open to persons of all sects and creeds. But the court also held that a magistrate had the power to regulate religious processions on public roads in order to prevent the obstruction of through fares and avoid breaches of public peace.

45. Sections 30, 30A of the Police Act 1861.
46. (1882) 5 Madras 301, 305.
The Privy Council in the Case of Saiyid Manzur Hussain v. Saiyid Muhammad Zaman, expressly approved the right of a person to lead a procession through a public street provided it did not interfere with the ordinary use of such streets by the public. This Case arose out of dispute between the two Muslim sects: the Shias and Sunnis. The P.C. held that the magistrate had the power to pass such an order if there was an apprehension of disorder.

In the present situation so far as the question of scope of this right is concerned the Indian Supreme Court as well as some State High Courts, have followed the ruling of the Judicial committee of the privy council in Saiyid Manzur Hassan v. Saiyid Muhammad Zaman and have held that there is right to conduct religious processions with appropriate observances on the highway. In Sheikh Piru Bux v.

48. (1925) AIR PC 36.
51. (1925) AIR P.C. 36.
Kalindi Pati Rao,\textsuperscript{52} the S.C. held that the P.C. 's decision in Saiyid Manzur Hassan's Case,\textsuperscript{53} had settled the law and there is no reason why that decision should not be followed. The court, however, declared that the right to conduct processions, religious or non-religious, is subject to the orders of the competent authorities in charge of the maintenance of law and order and regulation of traffic.\textsuperscript{54} A Magistrate could fix the time and rule for holding a religious procession or prohibit a procession if he was satisfied that a break of the peace could not be averted unless he so ordered.\textsuperscript{55}

In \textit{Laxmikant Balvant Rao Deshmukh v. Emperor},\textsuperscript{56} Hindu processionists were ordered by the police under Section 30(4) of the Police Act to desist from music within 40 paces of a certain Mosque. This order was upheld by the High Court on the ground that police

\begin{itemize}
\item \textsuperscript{52} (1970) AIR SC 1885.
\item \textsuperscript{53} (1925) AIR SC PC 36.
\item \textsuperscript{54} Of. Babulal Parati v. State of Maharashtra (1961) AIR SC 2486.
\item \textsuperscript{55} Mohammad Siddique v. State of U.P. (1984 AIR Allahabad, 756.
\item \textsuperscript{56} (1943) AIR Nagpur 199.
\end{itemize}
authorities had the right to regulate the playing of music on public highways and that, therefore, they would prohibit the use of music at a particular time. But the police cannot entirely ban the playing of music on highways. Thus, a prohibitory order issued by the police that during a Hindu music on public highways and that, therefore, they would prohibit festival no crowd attended by music should pass within certain parts of the city was held to be invalid. Finally, it should be observed that the legislation which attempts to regulate the right to religious procession would be Constitutionally valid; most of these laws can be justified under the restrictive clauses of Article 25 and 919 (i) (b) and (c).

(ii) Right to Religious Exhortations

It would appear that Article 25 entitles a person to give religious exhortations in public places. There are no direct Indian Cases on this point, but there are a number of American Cases, which will have great persuasive value.

57. Sankar Singh v. Emperor (1929) AIR Allahabad 201.

This right will, of course, be subject to similar limitations as the right to lead religious processions. Thus, the state might require a person who wishes to give a public exhortation, to obtain prior permission from the appropriate authorities. However, if a statute conferred unflattered discretion on the authorities in the matter of issuing of licenses, such direction would be found unconstitutional.

In Neimatka v. State of Maryland\(^{59}\) some members of Jehovah's witness wanted to give Bible talks in a Maryland public park. They applied for a permit to the Park Commissioner for times but the permission was refused each time without any reason being recorded. The U.S. Supreme Court held that the appellant had the right to conduct religious worship in a public park. The court also held that the licensing statute which empowered certain efforts to grant or refuse to grant permission in the absence of clearly drawn reasonable and definite standards for the official to follow, must be invalid.

\(^{59}\) (1951) 340 US 268.
(iii) Right to Religious Worship

In India the right to worship in a temple has long been curtailed by priests and temple administration. Recently the so-called low class or low caste Hindus, the untouchables, were not allowed to enter Hindu temples and worship there. Article 17 of the Constitution abolishes untouchability and the (untouchability offences) Act 1955 makes it offence to prevent any person from entering places of public worship on the ground of untouchability. Further, Article (2592)(b) provides for social welfare and reform, and for the throwing open of Hindu religious institutions of a public character to all classes of Hindus. The term 'Hindus' in sub-clause (b) of clause (2) of Article 25, the Constitution explains. 'Shall be construed as including a reference to persons professing the Sikh, Jaina (Jain) or Buddhist religion, and the reference to Hindu religion shall be construed accordingly.60

Thus, the public Hindu Temples, Sikh Gurudwaras, Jain Temples and Budhiviharas can certainly be thrown open respectively to all sections of Hindus, Sikhs, Jains and Buddhists. But Article (26(b) confers the

60. Explanation 11 of Article 25(2)(b).
fundamental right on every religious denomination and any section thereof to manage its own affairs in matters of religion. The difficult question is how far the right of a Hindu or Hindu priest to restrict or regulate temple entry (which he can claim under the right to profess religion sanctioned by clause (1) of Article 25 and the right to manage religious affairs permitted by clause (b) of Article 26 has been curtailed by Article 17 and Article 25(2)(b).

This question of conflict between the two articles arose before the Supreme Court in the case of Sri Venkataranana Devani v. State of Mysore. The court found that there was an apparent conflict between the two provisions but by applying the rule of harmonious construction it held that Article 26(b) must be read as subject to Article 25(2)(b). The result of the judgment is that the state can constitutionally provide for the opening of the Hindu religious institutions to all class of Hindus. It should, however be interesting to note that some states had laid down this rule even

61. (1958) AIR SC 255.
before the introduction of the Constitution. For example, the Uttar Pradesh Removal of Social Disabilities Act, 1947 provided that a person could not prevent another from having access to any public temple or enjoying the advantages, facilities and privileges of any such temple to the extent to which the same are available to other Hindus. The object of the Act was to enable the so called untouchables or the Harijans to enter temples like high caste Hindus. But the validity of the Act was challenged before the Allahabad High Court in the famous Vishwanath Temple Case. For a long time the Harijans sought to enter into the main temple, but the orthodox order resisted such entry. Upon their arrest and detention under the Act, they contended that the law was unconstitutional. The Allahabad High Court rejected their contention and declared that the impugned Act was valid.

In the case of Sri Venkatarammana Devaru v. State of Mysore J. Aiyar accepted that the temple in

63. S. 3(d).


65. (1958) AIR SC 255.
question was a denominational temple meant only for the Gowda Saraswat Brahmins, but observed that public institutions under Article 25(2)(b) would mean not merely. Temples dedicated to the public as a whole but also those founded for the benefit of sections there of and denominational institutions would be comprised therein."66

The High Court of M.P. had to resolve the problem of temple entry in *State v. Puranchand*.67 There a Jain Pujari (priest) was punished under the untouchability (office) Act 1955 for preventing the entry of a Harijan into a Jain temple. This Act also defined the word Hindu as including a Buddhist, Jain and Sikh. But the court held that the Act did not create any new rights in favour of the Harijans to enter a Jain temple, and that it only prohibited exclusion of a Harijan on the ground of untouchability from a public place of worship open to other professing Hindu religion.

It should be noted that though the Constitution


permits opening of Hindu religious institutions of a public character to all classes of Hindus, it does not enable the state to allow non-Hindus, to enter such temples for pleasure, social, artistic or architectural evaluation. In Kalyan Das v. State, Rule 4-A of the Rules framed under Tamil Nadu Temple entry Authorization Act, 1947, which provided that persons who are not Hindus shall be admitted into temples under certain conditions was held ultra virus.

Although the Constitution provides for opening of Hindu temples, it must be remembered that there could be no such thing as unrestricted right of entry in a public temple or other religious institutions for such persons who are not connected with the spiritual functions of such institutions. It is a traditional custom universally observed not to allow access to any outsider to the particularly sacred part of a temple, as for example, the place where the deity is located, the 'holy of holies'. There are also fixed hours of worship and rest for the idol when no disturbance by

any member of the public is allowed. Further, under ceremonial rules, on special occasions, home except the priests are permitted to stay in the temple.

B. The Right to Practise Religion

The practice of religion is the manifestation and practical expression of a person's belief. The expression 'right to practise' in Article 25 does not appear to have been used in a narrow sense: it does not only mean a right to perform religious rites and ceremonies. The Australian and American courts have also grappled with this question.

In Australia in 1912 in Kryagar v. Williams, the question arose as to the extent of the protection offered to the free exercise of religion provided for under Section 116 of the Australian Constitution. In that case plaintiff objected to compulsory military training, alleging that his religious belief forbade him from participating in any military affairs whatsoever.

The High Court, however, held that s. 116 did not protect any such religious objector. Griffith C.J. observed that free exercise of religion protects:

69. Ibid.
71. (1912) 15 CLR 336.
"the doing of acts which are done in the practice of religion. To require a man to do a thing which has nothing at all to do with religion is not prohibiting him from a free exercise of religion." 72

This observation implies that S.116 protects religious observances in a narrow sense. 73 However, this interpretation of S.116 was not accepted by the High Court in its later decisions. In Judd v. McKeon, 74 the significant question whether a socialist had a valid and sufficient excuse for failing to vote at an election on the grounds that all the candidates were capitalists. Higgins J. Held: "I might add that in my opinion, if abstention from voting were part of the elector's religious duty as it appeared to the mind of the elector this would be a valid and sufficient reason for his failure to vote." 75

In Adelaide co of Jehorah's Witnesses v. Re Commonwealth, 76 the High Court finally repudiated Krygger v. Williams. 77 In this later case the validity of wartime

72. Ibid.
73. Sawer, G. Australian Federalism in the Court, 169, Pannam, 68.
74. (1926) 38 CLR 380.
75. Ibid.
76. (1943) 67 CLR 110.
77. (1912) 15 CLR 336.
regulations which gave power to the Governor-General to dissolve subversive bodies was called into question. Under those regulations a group of Jehovah's Witnesses was declared to be subversive and its property was seized. The interpretation of S.116 given by C.J. Latham, held that S.116 was to be interpreted broadly and was to be given a very wide scope.

In determining the scope of Article 25 and 26 of the Indian Constitution, the Supreme Court approved the observations of Latham C.J. in Commr. H.R.E. v. L.T. Swamiar speaking for a unanimous court Mukherjea held:

"A religion may not only lay down a code of ethical rules for its followers to accept, if might prescribe rituals and observances, ceremonies and modes of worship which are regarded as integral part of religion, and these forms and observances might extend even to the matters of food and dress."79

Religious practices, however, cannot remain absolutely immune from interference. If every individual could exercise his religion completely free of all legal impediments then anarchy would be upon us. In Reynolds v. The U.S.,80 the


79. Ibid.

80. (1878) 98 US 145.
American Court held that Congress was deprived of all legislative power over mere opinion but was left free to control actions which were seen to be in violation of social duties or subversive of the greater good. The classic statement of Waite C.J. is as follows:

"Laws are made for the Government of actions, and while they cannot interfere with mere religious beliefs and opinions; they may with practices... can a man excuse his practices... because of his religious beliefs? To permit this would be to make the professed doctrines of religious beliefs superior to law of the land and in effect to permit every citizen to become a law up to himself. Government could exist only in name under such circumstances."\(^{81}\)

In *Davis v. Beason,*\(^{82}\) Field J. affirmed the belief/practice dichotomy invented in Reynolds when he said that however free the exercise of religion may be it must be subordinate to the criminal laws of the country passed with reference to actions regarded by general consent as properly within the realm of punitive legislation. Fifty years later, Roberts J. again endorsed the concept of the belief practice dichotomy in the following words:

The Amendment embraces to concepts-

\(^{81}\) Ibid.

\(^{82}\) (1989) 133 US 333, 342, 343.
freedom to believe and freedom to act. The first is absolute but, in the nature of things, the second can not be, conduct remains subject to regulation for the protection of the society."  

It should observe that the belief/practice dichotomy enunciated by the American Courts has resulted in a serious restriction in the meaning of the word "exercise of religion." The vaguest scintilla of an overriding social interest is seen as being sufficient to justify the regulation of religious freedom. Many writers are not prepared to concede that the state in the U.S. is invested with so much legislative power: they argue that the First Amendment gives a very large measure of freedom of action in pursuance of one's religious beliefs.  

In recent years the American Courts have adopted a balancing technique. The task the court sets himself is to identify the secular and social interests served by the

83. Ibid.

84. e.g. Legislation which prohibits the use of rattlesnakes in Church services, provides for fluoridation of the water supply, compels vaccination, penalises parental failure to obtain medical attention for their children, limits the consumption of sacramental wine and forbids commercial fortune telling by members of spiritual Churches, have been upheld valid: Pannam, 66-67.

85. e.g. Kurland, of Church and State and the Supreme Court 29, University of Chicago, Law Review (1962) 1.
challenged law underlying the individuals right to free exercise of religion and to balance them against each other.\textsuperscript{86}

The application of the balancing technique has not always been satisfactory. Although the plaintiff succeeded in \textit{Sherbert v. Lerner},\textsuperscript{87} he failed in \textit{Sunday Closing Case}.\textsuperscript{88}

In those cases there was conflict between the laws prescribing Sunday as a day of rest for all, and the religious belief of Jews and some others who observe a day other than Sunday as a day of rest and worship. The court adopted a different approach, in \textit{Brownfields v. Brown}.\textsuperscript{89} The court held that if the state regulates conduct by enacting a general law within its power, the purpose and effect of which is to advance the State's secular goals, the statute is valid despite its on indirect burden on religious observance, only if the state can not accomplish its purpose

\textsuperscript{86} \textit{Sherbert v. Verner} (1963) US 398.

\textsuperscript{87} Ibid.


\textsuperscript{89} (1961) 366 US 420.
by means which do not impose such a burden.  

The theory of balancing competing interests may, however, substitute subjective judgment for objective standard. Kauper says that the balancing of interest theory represents the dominant philosophy of the modern era, but e suggests that balancing must be done in such a way that does justice to Constitutional values.  

The right to practice religion in India is also not absolute. The Constitution itself enumerates the number of grounds (e.g. public order, morality, etc.) on this freedom can be abridged. This freedom has been further curtailed by the Supreme Court by stating that the Constitution protects only essential and integral practices of religion.

The idea that Article 25 and 26 protect only essential parts of a religion, enunciated rather vaguely in early cases, gradually became a dominant philosophy influencing the Indian Courts for the purpose of restricting religious


92. e.g. Bombay v. Narasu Appa (1952) AIR Bombay, 84.
freedom.\(^{93}\)

In the first leading case, Comm. H.R.E. v. L.T. Swamiar,\(^{94}\) on this topic, the Attorney General of India argued before the Supreme Court that all secular activities which may be associated with a religion but which do not really constitute an essential part of it are really constituting an essential part of it are amenable state regulation. This contention, however, was rejected by the court, in the following words:

In the first place, what constitutes the essential part of a religion is primarily to be ascertained with reference to the doctrines of religion itself.\(^{95}\)

This view of the Supreme Court was affirmed in later decision. In Ratilal v. State of Bombay,\(^{96}\) the court warned that no outside authority has any right to say that they are not essential parts of religion and it is not open to the secular authority to restrict or prohibit them in any manner.


\(^{94}\) (1954) AIR SC 282.

\(^{95}\) Ibid. 290.

\(^{96}\) (1954) AIR S.C. 388. See also (1958) AIR SC 731.
they like. In the Hanif Quareshi's Case\textsuperscript{97} in which the impugned legislation had prohibited cow-slaughter. In holding the legislation valid, Das C.J. stated that cow-slaughter was not an obligatory act for Muslim.\textsuperscript{98} In Durgah Committee \textit{v. Syed Hussain Ali},\textsuperscript{99} the Supreme Court emphasized that a religious practice which seeks constitutional protection should not only be an essential part but should also be an integral part of the proponent's religion.

Who is to decide whether a practice is or is not an essential or integral part of a religion and on what basis is this decision to be made? In Commr. H.R.E. \textit{v. L.T. Swamiar},\textsuperscript{100} S.C., as we saw, held that the question must be answered with reference to doctrine of the particular religion. However, if there is conflict of opinion, who will resolve it? The S.C. held in \textit{Shri Govindlalji Maharaj v. State of Rajasthan}:\textsuperscript{101}

\begin{itemize}
\item \textsuperscript{97} Mohammad Hanif Qureshi \textit{v. State of Bombay} (1958) SC 731.
\item \textsuperscript{98} Ibid.
\item \textsuperscript{99} (1958) \textit{AIR SC 731}.
\item \textsuperscript{100} (1954) \textit{AIR SC 28}.
\item \textsuperscript{101} (1963) \textit{AIR SC 1638}.
\end{itemize}
"This question will always have to be decided by the court, and in doing so the court may have to enquire whether the practice in question is religious in character, and if it is, whether it can be regarded as an integral part or essential part of religion, and the finding of the court on such an issue will depend upon the evidence advanced before it is as to the Conscience of the community." 102

Thus, legislation forbidding a practice which lies at the periphery of a religion cannot be challenged even though the legislation interferes with religious freedom and even though it can not be justified under any of the restrictive clauses. The Constitution does not, it should be pointed out again, confer a right only to practice the essential parts of religion.

3. The Freedom to Propagate Religion

It was Ambedkar's draft that introduced the words "the right preach and to convert within the limits compatible with public order and morality." 103 Earlier, Munshi's draft had made penal any conversion brought about by coercion, undue influence and inducement, and of a minor without the

102. Ibid.
103. B. Shiva Rao, A Study Vol. II. p. 87.
permission of the guardian. The recommendations of the sub-committee on fundamental rights also did not contain the express right to propagate. It was the recommendation of the Minorities Sub-committee (Ruthnaswamy, M.) that certain religions like Christianity and Islam were prosily-Haring faiths and hence should be permitted to propagate their faith. The Advisory Committee accepted this proposal and incorporated the right in its draft.

Those who drafted this Constitution have taken care to see that no unlimited right of conversion has been given. People have freedom of conscience and, if any man is converted voluntarily owing to freedom of conscience, then well and good. No restriction can be placed against it. But if any attempt is made by one religious community or another to have mass conversions through undue influence either by money or by pressure or by other means the state has very right to regulate such activity.

The Supreme Court interpreted this word in its pulpitarian sense when Justice Mukherjee observed in Shirur

104. Ibid. p. 76.
106. CAD Vol. VII 834-35.
Muth Case\textsuperscript{107} that Article 25 secured to every person, subject to public order, health and morality, a right to inter-alia, propagate or disseminate his idea for the edification of others. Relating this right to the Mathadhipati he said:

"It is duty to practise and propagate the religious tenets of which he is an adherent and if any provisions of law prevents him from propagating his doctrines, that would certainly affect the religious freedom which is guaranteed to every person to under Article 25. Institutions, as such can not practise or propagate religion, it can be done only by individual persons and whether these persons propagate their personal view or the tenets for which the institution stands is really immaterial for Article 25. it is propagation takes place in a Church or monastery, or in a temple or parlour meeting."\textsuperscript{108}

Generally speaking, propagation of religion aims at converting others to one's own point of view. It may involve dissemination by a person of his own beliefs or faith or sharing by him of his spiritual experience with others or attempts by him to convert others to his own religion.

\textsuperscript{107} (1954) AIR SC 282, p. 289. His observations in Ratilal are also to the same effect. (1954) AIR SC 388, p. 391. \textsuperscript{108} Ibid.
Various methods are used for propagating religion, such as publication of religious material, its distribution and dissemination.

No doubt, the right to propagate religion does not entitle a person to use undue influence or coercion against another to change his view. Nor does it give sanction to a person to exploit the economic poverty of another person to effect change in this religion. But the possibility of the misuse of this right and consequent law and other problems are quite likely to occur. The legitimate aspects of propagation of religion can always be protected under the freedom of speech and expression and the free exercise of profession or practice of religion. In the United States, where the Constitution does not expressly guarantee the right to propagate religion, this right is claimed either under the 'Free exercise of religion' clause or under the freedom of speech and of the press.

109. Time and again complaints have been made by the Hindus that Christian foreign missionaries were exploiting the misery and poverty of Hindus. See Northern India Patrika, June 29, 1967 and April 19, 1968.

110. See, e.g. Lester Follett v. Town of McCormish South Carolina (1944) 321 US 573; Clara Schneider v. State (Town of Irvington) (1939) 308 US 147.
After India achieved Full Independence and introduced its Constitution in 1950, several unsuccessful attempts were made by some Hindu members of the National Parliament to restrict and regulate freedom to change religion or convert others. The main reason why they could not succeed was that all such attempts were opposed by the more progressive section of the Hindus. In 1968, however, the province of Orissa passed the Freedom of Religion Act, 1968. Section 3 of the Act provided:

"No person shall convert or attempt to convert, either directly or otherwise, any person from one religious faith to another by the use of force or by inducement or by any fraudulent means nor shall any person abet any such conversion."\(^{111}\)

Although direct attempts to further legislatively restrict the right to convert others have been unsuccessful, it may be pointed out that this right has been considerably affected by a number of post-Constitution legislative measures.\(^{112}\)

Judicial decisions mainly deal with such questions as

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the extent to which the right to convert or otherwise propagate religion can be validly regulated by legislature or executive. In this area the Indian cases are fewer than the American, but are well worthy of Study.

Yulitha Hyde v. State\textsuperscript{113} directly raised the question regarding the extent to which the state could regulate conversion of persons from one religion to another. The Orissa Freedom of Religion Act 1968, noted earlier, made it an offence to convert or attempt to convert, either directly or otherwise, any person from one religion to another by the use of force or by inducement or by any fraudulent means. The Act also makes it an offence to abet any such conversion.

Some cases raise the problem of balancing freedom to propagate religion with the maintenance of public order. Sometimes the proponent has sought to spread unpopular view of religion, which has the tendency of causing a breach of peace. In Ramji Lal Modi v. State of Uttar Pradesh,\textsuperscript{114} the validity of S. 295 A,\textsuperscript{115} was challenged on the ground that interfered with a citizen's right to freedom of speech and

\textsuperscript{113} (1973) AIR Orissa, 116.
\textsuperscript{114} (1957) AIR SC 620.
\textsuperscript{115} Section 295A of Indian Penal Code.
expression guaranteed under Article 19(1)(a). Article 19(1)(9), subject to certain limitations, guarantees to all citizens the right to freedom of speech and expression. This right, it has been held, includes the liberty of the press. Thus, a citizen cannot be stopped from publishing or distributing any book, pamphlets and other literature, religious or otherwise, unless his action over-reaches the limitations imposed on this right.

It should be noted that, although Ramji Lal's case did not specifically raise the question of freedom of propagation of religion under Article 25, it is very important for our purpose as Article 25 is subject to Article 19, therefore limitations on freedom of the press are equally and perhaps with more force, applicable to freedom of propagation of religion.

Attitudes of Some Other Constitutions

The attitudes of some other Constitutions to the question of the right to propagate religion may be grouped in four categories.

In the first category we may put Constitutions which subject to necessary limitations, specifically guarantee a right to propagate religion. It should be noted that very few Constitutions in world categorically confer this right. Perhaps, before the enactment of the Indian Constitution, other Constitutions recognized the right to propagate religion as a fundamental right.\footnote{\textit{Pylee, M.V. India's Constitution} (Bombay: Asia Publishing House, 1962) 115; see CAD Vol VII, pp. 822,824.}

In the second category we place Constitutions of some of the predominantly Islamic states which guarantee a right to propagate religion but restrict the propagation of non-Islamic doctrines among persons professing the Muslim religion. For example, Article 11(i) of the 1957 Federal Constitution of Malaya provides that, every person has the right to profess and practice his religion, and subject to Clause(4) to propagate it. And Clause(4) states that "State law may control or restrict the propagation of any religious doctrine or belief among persons professing the Muslim religion.

In the third category, we may refer to the Constitutions of some of the socialist countries which do not deny to the citizens of those countries a right to
freedom of religion but at the same time permit them to conduct anti-religious propaganda or spread atheism. For example, we quote the following constitutional provisions:

1. Section 124 of the 1936 Soviet Constitution provides that freedom of religious worship and freedom of anti-religious propaganda is recognized for all citizens.

2. Article 28 of the 1975 Constitution of the People's Republic of China states that citizens enjoy freedom to believe and freedom not to believe in religion and to propagate atheism.

3. Article 53 of the 1971 Constitution of the People's Republic of Bulgaria reads: 'the citizens are guaranteed freedom of conscience and creed. They may perform religious rites and conduct anti-religious propaganda.

4. Article 54 of the 1973 Constitution of Korean People's Democratic Republic ordains that citizens have religious liberty and freedom of anti-religious propaganda.

In the fourth category, we may mention such constitutions which permit profession and practice of religion but forbid conversion. In this regard the 1975 Constitution of Greece furnishes an outstanding example. It provides that freedom of religious conscience
is inviolate, but states that proselytism is prohibited.

Constitutions which do not guarantee a right to propagate religion is not difficult to explain. So far as socialist countries are concerned, it is common place that they give no significant place to religious creeds and doctrines. On the other hand, most of the predominantly Muslim countries do not wish to encourage the spread of non-Islamic doctrines. The reluctance of other countries include specifically in their Constitutions a right to propagate religion often results in a person eulogizing his own religion and reviling that of another.

4. Constitutional Restriction on the Freedom of Religion

Freedom of religion, like any other freedom, cannot be absolute. Perhaps, the complete protection of all religion beliefs might result in the disappearance of organized and orderly society. it might also interfere with social reforms aimed at eradicating objectionable practices perpetuated in the name of religion. Even in countries like USA and Australia whose Constitution confers religious freedom in absolute terms many limitations have been imposed on this freedom by judicial interpretation. In India, however, the Constitution itself imposes drastic limitations on the freedom guaranteed by Article 25. This Article contains six grounds for restricting religious freedom. We shall briefly
discuss each of them.

A. Restrictions on Ground of Public Order, Morality and Health

(i) Restriction on Ground of Public Order

Public Order' is an expression of wide connotation. It signifies a state of tranquility which prevails among the members of a political society.

No freedom can flourish in a state of disorder. Justice Holmes of the US Supreme Court states that the essential rights guaranteed to a person are subject to the elemental need for order without which the guarantee of civil rights would be a mockery.\(^{118}\)

Restriction on this ground implies that the State could pass a law to regulate religious meetings or processions in public places like roads, streets and parks.\(^{119}\) Under Article 19\(^{120}\) all citizens have freedom to assemble for any purpose. This freedom also includes a right to assemble for religious purposes. However, this right is subject to a number of conditions, viz., the assembly must be peaceful, it must be unarmed and it must be held subject to the

\(^{119}\) See, Part IIIRd of the Chapter.
\(^{120}\) Clause (1)(c).
requirement of public order. Sections 295 to 298\textsuperscript{121} of the Indian Penal code, 1860 decrees certain acts to be an offence if they tend to wound the religious feelings of any class of persons. Section 153A of the Code also makes it an offence to promote, on the grounds of religion, race, language, caste or community, disunity between different religions, racial or language groups. This section also declares an act to be a criminal offence if it is prejudicial to the maintenance of harmony between different religious groups or is likely to disturb public tranquility. These sections are protected under the restrictive head of 'public order'.

In India, the Hindus regard the cow as very sacred. Several states, therefore, have passed legislation prohibiting the slaughter of cows with a view to maintain communal harmony.\textsuperscript{122} One of the Directive Principles of State Policy\textsuperscript{123} also lays down that the State shall endeavour to take steps for prohibiting the slaughter of

\begin{itemize}
\item For detail, See Appendix III.
\item See, Bombay Animal Preservation Act, 1948, the Bihar Preservation and Improvement of Animal Act, 1955, the UPPrevention of Cow Cattle Act, 1955, the Central Province and Behar Animal Preservation Act, 1948.
\item Article 37, Part IV of the Constitution of India, Article 37.
\end{itemize}
The cow-protection legislation has been held valid. Similarly, laws prohibiting propagation of religion for the purposes of conversion, by for e, fraud, inducement or allurement, it has been held, do not violate Article 25, because such activities could cause law and order problems.\textsuperscript{125} But preservation and maintenance of public order would not justify State interfere in. all circumstances. In Tejraj Chhogal Gandhi v. State of M.B.\textsuperscript{126}, the respondents installed a Shivalinga in a Jain temple to please Hindus, enraged over the alleged theft of an idol from the temple which was claimed to have been enshrined there long ago. It was held that the action of the respondents was not protected under the restrictive heads of public order.

(ii) Motility:

On the ground of morality, State legislation can validly prohibit immoral practices, although they may be approved by religion. The Hindu religion has sanctioned certain practices which would appear to be immoral. In South

\begin{itemize}
  \item \textsuperscript{124} Ibid, Article 48.
  \item \textsuperscript{125} Stainislus v. State of M.P., (1977) AIR SC 908.
  \item \textsuperscript{126} (1958) AIR M.P. 115.
\end{itemize}
India many orthodox Hindus held the belief that religious merit could be attained by dedicating girls to temples. Such girls were called Devadasis (i.e., Servants of the God). However, in the course of time, this led to temple prostitution. The practice of 'Sati' (Whereby a widow burnt herself to death on the funeral pyre of her husband) was also considered to have basis in religion. Again, gambling during the Deepavali festival (i.e. festival of lights) is considered to have the approval of Hindu religion.\[^{127}\] However, these and other practices can be declared illegal or regulated by the State.

(iii) Public Health:

Cases have arisen in western countries where persons endanger life by refusing blood transfusion on religious ground. In Durroll Labrong v. Illinois ex rel. Wallace\[^{128}\], the parents of a child who were Jehovah's witnesses objected to transfusion of blood to their child on the ground that it was equivalent to eating or drinking of human blood which was forbidden by the Bible. In India, likewise the practice of Nirvan (i.e., attaining salvation through torturing oneself to death) like 'Sati' also had religious

\[^{127}\] Ibid.
\[^{128}\] (1952) 344 US 824.
However, the right to religious freedom does not mean that a person could validly indulge in such practice. Nor does it mean that the State legislation which prohibits such practices can be constitutionally attacked. Indeed in all these cases where a person attempts to give up his life by refusing blood transfusion, practising blood transfusion, practising 'Sati' or by starving, he could be prosecuted for attempting to commit suicide. Again, a law can be validly passed to provide that all pilgrims visiting certain places of pilgrimage shall have to get inoculation against smallpox, cholera and typhoid. In *Ramachandra v. State* the validity of the Ganga Sagar Mela ordinance of 1975 which was promulgated to enable the State of West Bengal to the measures for safeguarding the health, safety and welfare of pilgrims attending the Ganga Sagar Mela (fair) was attacked. However, the court observed that the ordinance came within the scope of restrictions permitted by Article 25.


B. Restrictions Imposed by Part III:

Part III\textsuperscript{132} of the Constitution guarantees a number of fundamental rights to individuals which may conflict with the freedom of religion secured by Article 25. However since the freedom under Article 25 has been made specifically subject to the provisions of Part III if there is any conflict between the two, provisions of Part III will prevail over Article 25.\textsuperscript{133} Thus the practice of untouchability forbidden by Article 17\textsuperscript{134} could not be protected under Article 25.

C. Restrictions on Secular and Economic Activities Associated with Religion

Management of property attached to a religious institution or endowment is a secular activity which can be regulated by the State. However, matters such as what offerings of food should be given to the idol or when oblation be offered to fire, are given to the idol or when oblation be offered to fire, are essentially religious and

\textsuperscript{132} Part III Comprises of Article 12 to 35.


\textsuperscript{134} Article 17 reads: 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.
the mere fact that they involve expenditure of money would
not make them secular activities.

In the case of Avtar Singh v. State\textsuperscript{135}, the petitioner
challenged the Constitutionality of the Jammu & Kashmir Sikh
sought to regulate the administration of the property of
Sikh Gurdwaras and conferred rights management of these
properties by a committee, the members of which belonged to
the Sikh religious denomination. It was, however, contended
that the Act violated the petitioner's fundamental right to
practise his religion. Jalal-ud-din J. agreed that the
impugned Act had given power to the committee to control the
economic, financial and secular affairs connected or
associated with religious practices but held that the
legislature was competent to enact the law under Article
25(2)(a).

D. Restriction on the Ground of Social Welfare and Reform:

In India the life of the people is interwoven with
religious practices. To a great extent religion has
regulated domestic and social relations. But religious
practices may be repugnant to commonly accepted social and
moral standard of the day. In such cases, the State may make

\textsuperscript{135} (1977) AIR J & K 4,10.
laws under Article 25(2)(b) in respect of social welfare and reform notwithstanding the freedom of religion guaranteed by Article 25 (1).

In enacting sub-clause 2 (b) of Article 25 the fathers of the Indian Constitution appear to have been influenced by the American precedents. In America many legislative measures have been passed to introduce social reform although they conflict the Congress\textsuperscript{136} although at that time polygamy was freely practised by adherents of a religious sect, the Mormon. Again, many States have passed laws providing for the dissolution of marriage on various grounds although some of the Churches in the United States, particularly the Roman Catholic, regard marriage as indissoluble and do not permit divorce under any circumstances. it will, however, be observed that in passing such laws, states have not really interfered with the individual's religious practices, for a person can still treat his marriage as indissoluble.

\textsuperscript{136} Section 53, United State Revised Statutes.
In India, many Acts\textsuperscript{137} have been passed, perhaps by virtue of Article 25(2)(b) to effect extensive modifications of Hindu personal law which covers topics such as marriage, divorce, adoption, succession, inheritance, minority, guardianship, etc., and for providing extensive state supervision of temple administration.

Even before the enactment of the Constitution in 1950, many states had passed to forbid polygamous marriages amongst the Hindus.\textsuperscript{138} These laws were challenged on the grounds of their infringement of religious freedom. However, as we shall see later, they have been upheld constitutional by the Court\textsuperscript{139} on the ground that they were passed in the interest of social welfare and reform. In 1949 in the old

\begin{itemize}
\item \textsuperscript{137} e.g. Hindu Marriage Act, 1955; The Hindu Succession Act, 1956; the Hindu Minority and Guardianship Act 1956; the Hindu Adoption and Maintenance Act, 1956, the Dowry Act, 1962; the Madras Hindu Religious and Charitable Endowment Act, 1953; the Madras Devadasis (Prevention of Dedication) Act, 1947; the Madras Temple Entry Authorization Act, 1947.
\item \textsuperscript{138} See, Bombay Prevention of Hindu Bigamous Marriage Act 1946; the Madras Hindu (Bigamy Prevention and Divorce) Act 1949. These Acts were repealed by the Hindu Marriage Act 1955. See also Section 494 of the IPC, 1860.
\item \textsuperscript{139} The Bombay Prevention of Hindu Bigamous Marriage Act 1946 was held constitutional in \textit{The State of Bombay v. Narasu Appa} (1952) AIR Bomb. 48, and the Madras Act was held constitutional in \textit{Srinivas Aiyer v. Saraswati Anal} (1952) AIR Madras 193.
\end{itemize}
state of Bombay, excommunication for any offence by any caste tribunal was prohibited by the Bombay Prevention of Excommunication Act. Excommunication was used as a weapon of caste discipline, on religious grounds, the excommunicated person was almost completely excluded from important social activities of his caste. This Bombay Act was also attacked on the ground that it was 'ultra virus', among others, Article 25, but the High Court140 of Bombay upheld the validity of the act.

E. Throwing Open of Hindu Religious Institutions.

Article 25(2)(b) protects the right of every member of the Hindu Community to enter into a public temple. The provision saves the power of the State to take laws for "the throwing open of Hindu religious institutions of a public character to all classes and sections of Hindus." Since the word "Hindu" included a Sikh, Jain and Buddhist,141 hence, all their religious institutions come within the scope of the provision. The expression "public character" includes not merely temples dedicated to the public as a whole but also those founded for the benefit of sections thereof and


141. Section 25(2) Explanation II.
denominational temples. 142

5 Review

While the religiosity of a practice is the concern of the religion, the sociology of a practice is that of the state; the limitation clause expressly states this. It is a natural consequence of framing a freedom into a legal guarantee. The legal perimeters of the terms like religion, religious practices, matters of religion, etc., in the course of practical application of the constitutional guarantee are to be marked by the judiciary with a view to safeguard individual liberty and protect social interests.

An aggravated form of insult to religious feeling was bound to disrupt the public order and that statute which penalizes such activities was within the protection of Clause(2) of Article 19. The court also referred to the fact that the guarantee of religious freedom was subject to reasonable restriction under Article 19(2). 143 Thus, propagation of religion can be regulated not only in the interest of public order but also on the ground of the sovereignty and integrity of India, the security of State,

friendly relations with foreign state, public order, decency or morality, contempt of court, defamation or incitement to an offence.

The provisions of the Indian Penal Code, the Code of Criminal procedure and the Police Act confer very wide powers on the authorities to prevent the disturbance of public peace and tranquility; sometimes they are also authorized to take preventive measures. But the action or preventive measures taken under statutory provisions could conflict with the right to propagate religion. In fact, there has been a number of cases dealing with the free expression aspect of propagation in which the freedom was balanced with the state power to regulate its misuse threatening public order. Article 19(1)(a) confers fundamental right to freedom of expression, which, by Clause (2) is made subject to restrictions in the interest of public order.

The Indian judiciary has applied the rule of 'essential religious practice' even-handedly to all claimants under Article 25 and 26 and there was and is no need to depart from it in favour of any group. The option of adoption determined the dispensability of the claim to polygamy in the case of the Hindus. In the case of ban on cow slaughter in difference to the claim of cow's religious status as
`aghnya' (that cannot be killed) there was no alternative or substitute to her life. There can be no adopted quasi-cow in place of the cow. His criticism also suggests that the religious precepts accepted by the court were not unimpeachable. 'The diversity in scriptural and doctrinal opinions' in Kane that he refers\(^{144}\) has itself been settled by Kane at the same place by concluding that from at least Atharva Veda onwards cow sacrifice was not only never recommended but positively condemned as sin.

While the philosophical concepts are regarded permanent, the cults has worn varying hues. The changing contents of cults in a particular religion reflect the continuous process of making that religious system a living organism in the society. Absolution of religious practices is very much a formula of continuous socialization of cultus. Similarly, multiplicity of rites, ceremonies and sacramental duties are the devices of the cultus in a religion to allow enough scope to the individual to express his belief in manner suitable and practicable for him and the inbuilt alternatives enable him to derive the mental satisfaction of having obeyed the dictates of religion

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\(^{144}\) "The Little Done, the Vast Undone"-- Some Reflections on Reading Granville Austin's The Indian Constitution, 9 JILI (1967) 322 p. 354.
according to prescription. Religious systems themselves distinguish between the essentials and the ceremonials to combine rigidity with flexibility, soul with ornaments. In strenuously balancing individual liberty with social interests, rigidity protecting the core religious commands while allowing restrictions on paraphernalia.

While interpreting the conscience clause, the court must bear in mind these new dimensions and projections the clause is poised to take. It is suggested that just as the courts require that to claim protection under Article 25 and 26, it has to be established that the activity in issue is an essential matter of religion, and that there is no option or alternative, similarly when religious objection is claimed against a state imposed duty, the court should probe if an alternative course of action can be easily adopted by the plaintiff, and if yes, he may be asked to adopt it to avoid the public duty.

Further, it may be noted that the provisions of the Indian Constitution regarding the right to religious liberty cover all the freedoms relating to religion set forth in the Universal Declaration of Human Right, which was adopted

by the General Assembly of the United Nations at the Palais de Chaillot, Paris, on December 10, 1948. Article 18 of this important document states, "Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief, and freedom, either alone or in community with others, and in public or private, to manifest his religion or belief in teaching, practice, worship and observance." Since the General Assembly has proclaimed this Declaration of Human rights as a common standard of achievement for all peoples and all nations, Indians may well be proud that at least in the matter of religious freedom their constitution represents a world ideal.