CHAPTER IV
MEANING AND MATTERS OF RELIGION

Introduction

The Constitution of India has guaranteed the freedom of religion implied in the idea of a secular state. These freedoms are incorporated in two important Articles, 25 and 26, and they form the core of religious liberty in India. These Articles read:

**Article 25. Freedom of conscience and free profession, practice and propagation of religion:** (1) Subject to public order, morality and health and to the other provisions of this Part, all persons are equally entitled to freedom of conscience and the right freely to profess, practise and propagate religion.

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

(a) regulating or restricting any economic, financial, political or other secular activity which may be associated with religious practice:

(b) providing for social welfare and reform or the throwing open of Hindu religious institutions of a public

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1 i.e. Part III of the Constitution dealing with 'Fundamental Rights'.
character to all classes and sections of Hindu.

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

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

**Article 26. Freedom to manage religious affairs:** Subject to public order, morality and health, every religious denomination or any section thereof shall have the right -

(a) to establish and maintain institutions for religious and charitable purposes,

(b) to manage its own affairs in matters of religion;

(c) to own and acquire moveable and immovable property; and

(d) to administer such property in accordance with law.

In short, these two Articles grant freedom of religion and consequently permit individuals to practise religion and allow religious institutions to manage their own affairs in matters of religion. It would be worthwhile to understand, therefore, what the Judiciary means by 'Religion' and what it conceives as matters of religion or practices of religion.
Meaning of Religion

The term 'religion', whatever its best definition, clearly refers to certain characteristic types of data (beliefs, practices, feelings, moods), attitudes, etc.  
Paul Tillich defines religion as 'that which is concerned with the ultimate'. It is that habit of reverence towards Divine Nature whereby we are "enabled and inclined to serve and worship Him, after such a manner as we conceive most acceptable to Him." Neil A. McDonald points out effectively the universality of religion. He observes:

"Religion deals with the absolute in life. But the very act of conceiving an absolute draws with it a perception of the nature of the absolute. And since this absolute cannot be known through the sense or through reason, individuals are bound to have different ideas about it, based to some extent on their experiences. This is why men disagree about the nature of God and what God requires of man."  

The courts have always admitted the difficulty of

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2 Encyclopaedia of Religion and Ethics, Vol.10, p.662.
4 Tomlin's Law Dictionary.
5 Supra n. 3, p. 220.
defining the term religion. They have admitted that "It would be difficult if not impossible, to devise a definition of religion which would satisfy the adherents of all the many and various religions which exist or have existed, in the world." They have, however, tried to work out a definition acceptable at the time of the interpretation of constitutional law. The Constitution of India, like that of the U.S.A., has not defined the term religion and naturally Judges have been called upon to explain what religion means. Justice Field of the Supreme Court of the U.S.A. observed:

"The term religion has reference to one's views of his relations to his CREATOR, and to the obligations they impose of reverence for his being and character and of obedience to his will."

This definition, however, is too narrow and would exclude some religions which do not predicate religion on 'Creator' or 'God'. The Supreme Court of India does not accept this definition and says:

"Religion is certainly a matter of faith with individuals or communities and it is not necessarily theistic.


7  Davis v. Benson, 133 U.S. 333 at 342 (1889).

8  Theism implies belief in the existence of God with or without a belief in a special revelation."
There are well known religions in India like Buddhism and Jainism which do not believe in God or any Intelligence First Cause. 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 (sic) a doctrine or belief."  

The High Court of Bombay, prior to the decision of the Supreme Court of India in Swamiar case, accepted the view adopted by the Supreme Court of the U.S.A. in Davis V. Beason mentioned above, and said:

"Religion is a matter of man's faith and belief. It is a matter concerning a man's contact with his creator. It has nothing to do with the manner in which a practice is accepted or adopted as forming part of a particular religion or faith."  

The same view was accepted by the High Court of Bombay in State of Bombay V. Narsu Appa Mali and by the Calcutta High Court in Masud Alam V. Commissioner of Police.

10 Supra n. 9.
11 Supra n. 7.
12 Sardar Syedna Taher Saifuddin V. Moosaji 1953 Bom. 183.
13 A.I.R. (1952) Bom. 64.
Even though the Supreme Court of the U.S.A. related the term religion with a belief in God or Creator in 1889, the courts in the U.S.A. have accepted, more or less, a liberal approach and have treated as religion whatever the parties to the case call religion and it appears that the courts would have given the same constitutional protection to the religions which do not believe in God as they have done to Christianity. The definition of religion has been widened by the Supreme Court of the U.S.A. so as to include religions like Buddhism when it stated in a recent case 'Methodist Presbyterian or Episcopal ministers, Catholic priests, Moslem Mullahs, Buddhist monks could preach to their congregations in Pawtucket's Park with impunity'.

One possible explanation can be given for the narrow definition of the term religion adopted by the Supreme Court of the U.S. in 1889. 'The framers of the Constitution (of America) were learned men and not unaware of the world's variety of religions, the faiths with which they had personal experience, were almost exclusively those of the Judean Christian tradition. The only elements then in the population with fundamentally different religious backgrounds were the indigenous Indians, with a great variety of beliefs mostly in nature and its phenomena; and the slaves from Africa whose native religions were largely

15 Fowler V. Rhode Island 345 U.S. at 69 L.Ed, 828(1953).
animistic and idolatrous by Christian standards. Neither of these groups were citizens, and the Negroes were, in any case, normally converted to the Christian religion of their masters. Thus, when the early courts sought to define the meaning of the word 'religion' - it is not altogether surprising that while striving to make the definition broadly inclusive, the language used related to concepts of religion as understood and appreciated by them and failed to embrace religion in its universality.'16

This lacuna was, however, realized later and in due course it was left to the individual to determine what religion is for him. In the U.S. v. Ballard, the Supreme Court of the U.S. said:

"Men may believe what they cannot prove (and) they may not be put to the proof of their religious doctrines or beliefs. The miracles of the New Testament, the Divinity of Christ, life after death and the power of prayer are deep in the religious convictions of many. If one could be sent to jail because a jury in a hostile environment found those teachings false, little indeed would be left of religious freedom."17

17 322 U.S. 76, 88 L.Ed. 1148 at 86-87.
Limitations on Freedom of Religion

It may be pointed out that where questions of religious freedom were involved, the Constitution of the U.S. did not provide for limitations on this freedom with the result that an adjustment of the competing demands of the interests of government and constitutional freedom of religion was always a difficult task. This also contributed to a variety of decisions by the American courts. The limitation clause of Article 25 of the Constitution of India, on the other hand, has provided a framework of limitations within which the freedom of religion is to be exercised by the citizens in this country vis-à-vis, subject to public order, morality and health and to the other provisions of Part III of the Constitution.

The limitations mentioned in the clause are so wide that they do cover a very wide field of social behaviour and permit the executive enough latitude in taking action against those who are likely to or who do misuse freedom of religion. In such a case, it is with the courts to decide whether the particular action in question has really impaired public order, morality and health. In India, public order, morality and the requirements of health may pose different standards than in the U.S. But the theory on which the state may interfere is the same in both countries. 18

18 Harry Groves, supra n. 16, p. 195.
The Supreme Court of India, in the Swamier case says:

"... the language of Articles 25 and 26 is sufficiently clear to enable us to determine without the aid of foreign authorities as to what matters come within the purview of religion and what do not."\(^{19}\)

**Matters of Religion and Religious Practices**

An important controversial question before the courts in India has been to decide what matters constituted religious practices. The question came first before the High Court of Bombay in the State of Bombay V. Narasu Apps Mali,\(^{20}\) where the court pointed out:

"A sharp distinction must be drawn between religious faith and belief and religious practices. What the state protects is religious faith and beliefs." As regards religious practices, the court maintained that if they run contrary to public order, morality or health or a policy of social welfare upon which the state has embarked, then the religious practices must give way before the good of the people of the state as a whole. This implies that the court made a distinction between freedom of conscience and freedom of religious practices and considered freedom of conscience as an absolute right and viewed freedom of

\(^{19}\) Supra n. 9, p. 351.

\(^{20}\) I.L.R., 1951 Bom. 775.
religious practices as subject to restrictions mentioned in the Constitution. This view was asserted by the Bombay High Court in Satilal Gandhi v. State of Bombay when it said: "Religion may have many secular activities and secular aspects but these secular activities and aspects do not constitute religion as understood by the constitution."21 This approach was the basis of the judgment of the Bombay High Court in Syedna Taher Seifuddin V. Moosaji Koicha22 when the Bombay High Court held The Bombay Prevention of Excommunication Act of 1949 as valid. It may be pointed out that this view of the Bombay High Court was in line with the approach of Dr. Ambedkar who in the Constituent Assembly23 had expressed a similar view when he said -

"There is nothing extraordinary in saying that we ought to strive hereafter to limit the definition of religion in such a manner that we shall not extend it beyond beliefs and such rituals as may be connected with ceremonials which are essentially religious."

This view of confining the interpretation of religion to religious beliefs and not religious practices was, however, not accepted by the Supreme Court of India.

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22 Ibid., p. 183.
The judgment of the Supreme Court in the Swamiar case, marks a radical departure from this view. As this judgment has value as an important precedent and is extensively quoted by the Supreme Court in many cases that followed, the main argument of the Court in the Swamiar case is, here, considered in detail.

The Supreme Court says:

"Article 25, as its language indicates, secures to every person, subject to public order, health and morality, a freedom not only to entertain such religious beliefs as may be approved of by his judgement and conscience but also to exhibit his belief in such outward acts as he thinks proper and to propagate or disseminate his ideas for the edification of others."  

While challenging the contention of the Attorney General, in the Swamiar case that all secular activities, which may be associated with religion but do not really constitute an essential part of it, are amenable to state regulation, the Supreme Court said:

"Religion is certainly a matter of faith with individuals or communities and it is not necessarily theistic.

24 Supra n. 9.
26 Ibid., p. 349. Italics mine.
... 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 forms and observances might extend even to matters of food and dress. ... The guarantee under our constitution not only protects the freedom of religious opinion but it protects also acts done in pursuance of a religion and this is made clear by the use of expression 'Practice of religion' in article 25.  

On the question of determining the essential part of religion, the Supreme Court said -

"What constitutes the essential part of a religion is primarily to be ascertained with reference to the doctrines of that religion itself. If the tenets of any religious sect of the Hindus prescribe that offerings of food should be given to the idol at particular hours of the day, that periodical ceremonies should be performed in a certain way at certain periods of the year or that there

27 Ibid. Italics mine.
should be daily recital of sacred texts or oblations to
the sacred fire, all these would be regarded as parts of
religion and the mere fact that they involve expenditure
of money or employment of priests and servants, or the use
of marketable commodities would not make them secular
activities partaking of a commercial or economic character:
all of them are religious practices and should be regarded
as matters of religion within the meaning of Article 26(b).

In the Swamiar case, the Supreme Court of India
relied very heavily on the decision of the High Court of
Australia while arriving at the approach adopted in the
above-mentioned case. Latham C.J. of the High Court of
Australia was dealing with a case arising out of the
interpretation of Section 116 of the Constitution Act, 1900, when he maintained:

28 Ibid.

29 Adelaide Company v. The Commonwealth 67 C.L.R. 116,
127.

30 Section 116 of the Constitution Act, 1900 reads as follows -

'116. The Commonwealth shall not make any law for
establishing any religion, or for imposing any religious
observance, or for prohibiting the free exercise of any
religion, and no religious test shall be required as a
qualification for any office or public trust under the
Commonwealth.' - The case is known as 'Jehovah's Witnesses'.

'Jehovah's Witnesses' was an association established
in various countries of the world including the U.S.A.
and Australia. This association regarded the liberal
interpretation of the Bible as fundamental to proper
religious beliefs. This belief in the supreme authority
"It is sometimes suggested in discussions on the subject of freedom of religion that, though the civil government should not interfere with religious opinions, it nevertheless may deal as it pleases with any acts which are done in pursuance of religious belief without infringing upon the principle of freedom of religion. It appears to me to be difficult to maintain this distinction as relevant to the interpretation of Section 116. The section refers in express terms to the exercise of religion, and therefore it is intended to protect from the operation of any Commonwealth laws, acts which are done in the exercise of religion. Thus the section goes far beyond protecting liberty of opinion, it protects also acts done in pursuance of religious belief as part of religion."

of the Bible influenced their political ideas and they refused to take the oath of allegiance to the king or other constituted human authority and even refused to respect the national flag and decried all wars and all kinds of war activities. In 1941, a company of Jehovah's witnesses incorporated in Australia commenced proclaiming and teaching matters which were prejudicial to war activities and the defence of the commonwealth and therefore steps were taken against them under the National Security Regulations of the state. The legality of the action of the government was challenged by writ petition before the High Court and the High Court held that the action of the government was justified and that section 116, which guaranteed freedom of religion under the Australian Constitution, was not in any way infringed by the National Security Regulations. Because, according to the court these were undoubtedly political activities though arising out of religious belief entertained by a particular community.

31 Supra n. 29. Italics mine.
The Supreme Court of India maintains that these observations of Latham C.J. apply fully to the protection of religion as guaranteed by the Indian Constitution.

In Adelaide Company V. Commonwealth, the High Court of Australia further contended that -

"The provision for the protection of religion was not an absolute protection to be interpreted and applied independently of the provisions of the constitution. These privileges must be reconciled with the right of the state to employ the sovereign power to ensure peace, security and orderly living without which constitutional guarantee of civil liberty would be a mockery." 32

In Ratilal Gandhi V. The State of Bombay and others, 33 a case which was decided by the Supreme Court of India in the same year of the Swaminar case, the Supreme Court adopted the same reasoning and said:

"Religious practices or performances of acts in pursuance of religious belief are as much a part of religion as faith or belief in particular doctrines. Thus, if the tenets of the Jain or Parsi religion lay down that certain rites and ceremonies are to be performed at certain times and in a particular manner, it cannot be said that these

32 Ibid.
are secular activities partaking of commercial or economic character simply because they involve expenditure of money or employment of priests or the use of marketable commodities. No outside authority has any right to say that these are not essential parts of religion and it is not open to the secular authority of the state to restrict or prohibit them in the manner they like under the guise of administering the trust estate. ... The distinction between matters of religion and those of secular administration of religious properties may, at times, appear to be a thin one. But in cases of doubt, as Chief Justice Latham pointed out in the case\(^3^4\) referred to above, the court should take a common-sense view and be actuated by considerations of practical necessity.\(^\star\) It is in the light of these principles that the Supreme Court proceeded to examine the different provisions of the Bombay Public Trusts Act, the validity of which was challenged on behalf of the appellants in the Ratilal Gandhi case.\(^3^5\)

The Supreme Court points out that, what sub-clause (a) of clause (2) of Article 25 contemplates is not state regulation of religious practices as such which are protected unless they run counter to public health or morality, but of activities which are really of an economic, 

\(^{3^4}\) Supra n. 29.

\(^{3^5}\) Supra n. 33. Italics mine.
commercial or political character though they are associated with religious practices.

It can be pointed out that if the Article is properly interpreted, it confines the right to three aspects of religion, namely freedom of conscience, profession and practice of religion and expressly excludes from its scope the secular activities such as financial, political and economic, associated with religion. Article 25 makes a clear distinction or demarcation between religious practices and secular activities associated with the said practices. The constitution attempts to separate religious from secular practices. The religious practices are left to the exclusive province of the individual and the secular practices associated with the religion are made amenable to the interference by the state.

In Venkatesaramana Nevuru V. State of Mysore, the appellants challenged the constitutional validity of the Madras Temple Entry Authorisation Act of 1947 according to the section 3 of which, persons belonging to the excluded classes were entitled to enter any Hindu Temple and offer worship therein in the same manner and to the same extent as Hindus in general. The appellants contended that

37 This case refers to the controversial relationship between two provisions viz. Article 25(b) and 26(b) and therefore is analysed in detail.
this section of the Act was in contravention of Article 25(b) and maintained that, being a denominational and public institution, they were governed by Article 26(b). They admitted that under the provisions of Article 25(2)(b), all sections of Hindus were entitled to enter into the temple for worship but they also held that 'it was evident that there were certain religious ceremonies and occasions during which the Gowda Sswasoth Brahmins alone were entitled to participate, and that this particular right was protected by Article 26(b). This accordingly reserved the rights of the appellants to exclude all members of the public during those ceremonies and on those occasions. The question arose, therefore, whether the appellants were entitled to exclude other communities from entering into it for worship on the ground that it was a matter of religion within the protection of Article 26(b). The Solicitor-General, on behalf of the State of Mysore, argued that exclusion of persons from entering into the temple cannot, ipso facto, be regarded as a matter of religion, whether it is so, must depend on the tenets of the particular religion which the institution in question represents.39

The Supreme Court reiterated its stand taken in the

38 The contention that it was a private temple was not accepted by the court. For this analysis see infra Chapter VI on 'Hindu Religious and Charitable Endowments: Temples'.

39 Supra n. 36, p. 389.
Swamiar case and maintained that the expression 'Matters of religion' embraced not merely matters of doctrine and belief pertaining to the religion but also the practice of it or to put it in terms of Hindu Theology, not merely its Jnana but also its Bhakti and Karma-kandas. The Court then proceeds to analyse the views expressed in the ancient scriptures of Hindus, Vedas, Upanishads and Puranas regarding the question of excluding persons from entering temples and points out that there is no agreement on this issue. In Taittiriya Upanishad is contained a passage which says that the gods have distinct forms ascribed to them and their worship at home and temples is ordained as certain means of salvation. Since then temples were constructed all over the country and daily worship in the temple came to be regarded as one of the obligatory duties of a Hindu. With the growth of temple worship, more attention was devoted to the ceremonial law relating to the construction of temples, installation of images, conduct of worship of the deity, etc., and these are contained in the AGAMAS. These also contain rules as to where several classes of worshippers are to stand and worship. One of the Agamas points out:

40 Ibid., p. 389.
41 Taittiriya Upanishad, Brigu Velli, First Anuvaka, quoted Ibid., p. 390.
"In the Nirvashanapaddhati it is said that Siva-dwijas should worship in the garbhagriham, Brahmins from the ante chamber or Sabha Mantabham, Kshatriyas, Vysias and Sudras from the Mahamantram and the castes yet lower in scale should content themselves with the sight of the Gopuram."

According to the Agamas, violation of these rules results in defiling of the image and Semprokshana ceremony has to be performed for restoring the sanctity of the temple. On the basis of this analysis the Court maintains:

"Under the ceremonial law pertaining to the temples, who are entitled to enter into them for worship and where they are entitled to stand and worship and how the worship is to be conducted are all matters of religion."

In this case, the court deals with a very important question - whether the right guaranteed under Article 26(b) is subject to a law protected by Article 25(2)(b) throwing the suit temple open to all classes and sections of Hindus. The court holds 'that matters of religion in Article 26(b) include the right to exclude persons who are not entitled

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42 In Gopala Muppanar V. Subramania Iiyar (1914) 27 M.I.J. 253.
43 In Sanakralinga Nadan V. Raja Rakeshwar Dorsai (1908) L.R. 35 I.A. 176; I.L.R. 31 Mad.
44 Supra n. 36, p. 390.
to participate in the worship according to the tenets of the institutions.' Under Article 26(b), therefore, the appellants are entitled to exclude all persons other than Gowds Saraswath Brahmans from entering into the temple for worship. Article 25(2)(b), on the other hand, enacts that a law throwing open public temples to all classes of Hindus is valid. Thus the two Articles appear to be apparently in conflict.

On behalf of the appellants, it was contended that this conflict could be avoided if the expression 'religious institutions of a public character' had been understood as meaning institutions dedicated to the Hindu community in general, though some sections thereof might be excluded by custom from entering into them. This contention was based on the stand taken by the Madras High Court in two cases: Venkatachalapathi V. Subbarayudu and Gopala Muppanar V. Subramania Aiyar. In the former, the court approved the rule of the Agamas —

"Temple, of course, is intended for all castes, but there are restrictions of entry. Pariahs cannot go into the court of the temple even. Sudras and Baniyas can go into the hall of the temple. Brahmans can go into the holy of the holies."
In the latter case, the court observed:

"... That temples were intended for the worship of people belonging to all the four castes without exception. Even outcastes were not wholly left out of the benefits of temple worship, their mode of worship being however, made subject to severe restrictions as they could not pass beyond the Dwajasastambam (and sometimes not beyond the temple outer gate) and they could not have a sight of the images other than the procession images brought out at the times of festivals."

These contentions of the appellants were not accepted by the court which maintained that the purpose of the Madras Acts was "to remove disabilities imposed by custom and usage on certain classes of Hindus in respect of their entry into and offering worship in Hindu temples." The court also pointed out that this purpose had inspired the framers of the constitution to abolish untouchability under Article 17 of the constitution. The court says:

"It is undoubtedly true that the right conferred under Art. 26(b) cannot be abridged by any legislation, but the validity of section 3 of Act V of 1947 does not depend on its own force but on Article 25(2)(b) of the

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48 For details see infra Chapter XII on 'Religious Non-discrimination'.
The very constitution which is claimed to have rendered section 3 of the Madras Act void as being repugnant to Article 26(b) has, in Article 25(2)(b) invested it with validity, and therefore, the appellants can succeed only by establishing that Article 25(2)(b) itself is inoperative as against Article 26(b).”

The intention of the court in the statement referred to above was to point out the apparent conflict in the provisions of Articles 25(2)(b) and 26(b). The court maintains that though Article 25(1) deals with rights of individuals, Article 25(2) is much wider in its contents and has a reference to the rights of communities, and controls both Article 25(1) and Article 26(b). It says:

“The result then is that there are two different provisions of equal authority, neither of them being subject to the other. The question is how the apparent conflict between them is to be resolved. The rule of construction is well settled that when there are in an enactment two provisions which cannot be reconciled with each other, they should be so interpreted that, if possible, effect could be given to both. This is what is known as the rule of harmonious construction. Applying this rule, if the contention of the appellants is to be accepted, then Article 25(2)(b) will become wholly nugatory in its

application to denominational temples, though as stated above, the language of that article includes them. On the other hand, if the contention of the respondents is accepted, then full effect can be given to Article 26(b) in all matters of religion, subject only to this, that as regards one aspect of them, entry into a temple for worship, the rights declared under Article 25(2)(b) will prevail. While, in the former case Article 25(2)(b) will be put wholly out of operation, in the latter, effect can be given to both, that provision and Article 26(b). We must accordingly hold that Article 26(b) must be read subject to Article 25(2)(b).”

The court is of the view that the right to enter a temple for purposes of worship, protected under Article 25(2)(b) should be construed liberally in favour of the public but that it should not be taken to mean that, that right is absolute and unlimited in character. The court maintains that no member of the Hindu public could, for example, claim under this article, that a temple must be kept open for worship at all hours of the day and night, or that he should perform those services which these Archakas alone could perform. In this connection the court also refers to the well-known practice of religious institutions of all denominations to limit some of its services.

to persons who have been specially initiated, though at other times, the public in general are free to participate in the worship. About the inter-relationship of these two articles — Article 25(2)(b) and Article 26(b) the court concludes that: **The right recognised by Article 25(2)(b) must necessarily be subject to some limitations or regulations and such limitation or regulation must arise in the process of harmonising the right conferred by Article 25(2)(b) with that protected by Article 26(b).** The right of a denomination to wholly exclude members of the public from worshipping in the temple, though comprised in Article 26(b), must yield to the over-riding right declared by Article 25(2)(b) in favour of the public, to enter into a temple for worship. But where the right claimed is not one of the general and total exclusion of the public from worship in the temple at all times, but of exclusion from certain religious services, they being limited by the rules of the foundation to members of the denomination, then the question is not whether Article 25(2)(b) over-rides that right so as to extinguish it, but whether it is possible so to regulate the rights of the persons protected by Article 25(2)(b) as to give effect to both the rights. The overall effect of this interpretation was that the court recognised the rights of the denomination in respect

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of matters which are strictly denominational, leaving the rights of the public in other respects unaffected.

The question then was to decide whether the rights claimed by appellants were strictly denominational in character and whether after giving effect to them, what was left to the public of the right of worship was substantial. Here the Supreme Court analyses the evidence put forth by public witnesses and points out that this evidence showed that during certain ceremonies and on special occasions, only members belonging to the Gowda Saraswath Brahmin community had the right to participation and others were excluded therefrom. The Supreme Court thus supports the decree when it says:

"On the facts, therefore, it is possible to protect the rights of the appellants on those special occasions, without affecting the substance of the right declared by Article 25(2)(b), and in our judgment, the decree passed by the High Court strikes a just balance between the rights of the Hindu public under Article 25(2)(b) and those of the denomination of the appellants under Article 25(b) and is not open to objection."52

N. A. Subramanyam points out that "there was no way of avoiding an apparent conflict between two provisions of

the constitution (i.e. Article 25(2)(b) and Article 26(b)) the court applied the rule of harmonious construction and held that Article 26(b) must be read subject to Article 25(2)(b), that is to say, of the denominational rights conferred by Article 26(b), as regards one particular aspect of them, viz. entry into temples for worship, the rights declared under Article 25(2)(b) should prevail. In other words, the court interpreted Article 25(2)(b) as if it were included in Article 26 and not in Article 25. It is difficult to understand why the provision empowering the throwing open of religious institutions has been inserted in Article 25 which deals with personal or individual rights. Article 26 which deals with the rights of religious institutions would appear to be the appropriate place. This defect in drafting had to be set right by a process of judicial interpretation. 53

P. K. Tripathi on the other hand points out that the non-obstante clause should be read as incorporated in Article 26 as its integral part, which according to him is the correct way of reading these two Articles 25(2)(b) and 26(b). He is not ready to admit that there is any constitutional anomaly or conflict in the provisions of these two articles. He maintains that the Supreme Court was right in Swamiar case, when it considered Articles 25 and 53 Journal of the Indian Law Institute, Vol. 3, No. 3 (1961), pp. 334-35.
26 together, as constituting a single theme. He says:

"A serious distortion of the constitutional scheme crept in when having invested 'matters of religion' in article 26(b) with the content of the rights enshrined in clause (1) of article 25 the impairment to which that content was subjected by clause 2 of the same article, the non-obstante clause, was completely overlooked. Article 26(b) thus emerged impregnated with the prospects of offering all that clause (1) of article 25 had to offer, with the added attraction of freeing the contents from the trammels of the provision of the non-obstante clause. The result, hardly surprising has been that article 26(b) came to threaten clause (1) of article 25 with atrophy, and non-obstante clause of the same article with eclipse." 54

He attributes the fallacy of considering Articles 25 and 26 as anomalous to the failure of the Court to appreciate that the rights guaranteed to the denominations in Article 26 are ancillary to the rights guaranteed to the individual in Article 25. He maintains that the guarantees in Article 26 were not actuated by any concern for the religious denominations or for religion in general. Instead, the denominational rights were guaranteed in order to compliment the individual's freedom in matters of religion.

enshrined in article 25. The rights in article 26 are ancillary to the rights guaranteed by article 25 to the individual, whose liberty and rights alone are the primary concern of the constitution.

C.H. Alexandrowicz points out that in the Venkataramana Devaru case, the court has considered admission to a temple a matter of internal autonomy of a religious body in the context of the provision of Article 26(b) and that Article 26 should be considered jointly with Article 25 which provides expressly for access of all classes and sections of Hindus to Hindu religious institutions of a public character, and the court has concluded that in the issue of internal autonomy and freedom of religion as formulated in Article 25 the latter must prevail. He maintains:

"If we are allowed to assume that this decision lays down a general principle of joint interpretation of individual and collective freedom of religion the consequences of such interpretation are far reaching. For, if the internal autonomy of religious entities is to be understood as being subject to Article 25, it would be qualified not only by the freedoms in that Article but also by the restrictions which the state can impose on these freedoms.

55 Ibid., p. 185.

This would mean an authorisation for the state to legislate on social reform and welfare, notwithstanding the internal autonomy of religious bodies in Article 26.57

He further contends that the policy behind this development reflects the same tendencies which in the last century eliminated the Church in Europe from its wider field of activities and reduced its privileges and immunities. The same process has now been initiated in India mainly with a view to reforming Hindu Society and of breaking down the caste system which still remains a considerable social force.58

The position adopted by the Supreme Court about the relationship between Articles 25 and 26 is this: The scope of the expression 'Religion' in clause (b) of Article 26 cannot be construed dehors the scope of that expression in Article 25. It cannot also be freed from the limitations imposed thereon in clause 2 of Article 25.

57 Freedom of religion in clause 1 of Article 25 is, inter alia, subject to the provisions of Part III thus including Article 26. But clause 2 allows social reform, notwithstanding the provisions of clause 1 in so far as the latter refers to religious practice. Ref. Footnote 31, Ibid., p. 288.

58 He refers to the difficulties arising in this respect from the constitutional point of view as evidenced by cases relating to the admission of members of various castes and sections of society to educational institutions and public employment under the provisions of Articles 14, 15, 16 and 29 of the constitution. These cases will be considered in detail in the chapter on Religious Non-discrimination. See infra Chapter XII.
The management by a denomination of its own affairs in matters of religion cannot prevent the state from regulating the secular activities associated with the said matters. The said regulation may bring into conflict the claims of the state and the denomination, the former claiming that a particular activity is a religious practice and the latter claiming that the said activity is a secular one. That question is a justiciable one and the assertion by one or the other is not final. If it was final, Articles 25 and 26 may come in conflict: If the individual claims that an activity is a religious practice and the state asserts it as a secular practice, it becomes justiciable; if the claim of the denomination to the same effect becomes non-justiciable, the individual could put his untenable claim through the denomination. There may also be a conflict between the individual's freedom of conscience and the exclusive power of the community to manage its affairs. Both the provisions could be reconciled only if the expression religion in Article 26 is given the same meaning which that expression bears in Article 25. If that be so, whenever, a dispute is raised, by whomsoever it may be, whether a particular practice is a part of religion or not, it is justiciable.59

It is likely to happen that the individual may attempt to enlarge the scope of religious practice by indirectly bringing within the ambit of religion the right to deal with property, either movable or immovable. He would also try to bring within the meaning of the term "the religious practice" not only the rituals involved in it and forming part of it, but also the cobwebs built around it by superstition and avarice. On the other hand, the state may also try to reach genuine religious practices on the assertion that they are secular practices. It would be a difficult question for a court to decide when it is called upon to do so, whether a practice is religious practice or is secular activity directly or indirectly connected with a religious practice. The assertion of the one or the other in this regard is not final and is a justiciable issue.\(^60\)

In Sarup Singh v. State of Punjab, the Supreme Court held that - "Under article 26(b) a religious denomination or organisation enjoys complete autonomy in the matter of deciding as to what rites and ceremonies are essential according to the tenets of the religion they hold. In this case the court laid special emphasis on the word essential. This emphasis later on created controversy over essential and non-essential practices."

\(^{60}\) Ibid., p. 4.
In Sarup Singh V. State of Punjab, the petitioners who practised and professed the Sikh faith alleged that they were interested in the maintenance and management of Sikh Gurdwaras scheduled and notified under Sikh Gurdwaras Act of 1925. Their main contention was that section 148-B of the above act violated the fundamental right granted to them under Article 26(b) of the constitution to every religious denomination or section thereof including the Sikh denomination. The petitioners argued that article 26(b) gives to every denomination the right to manage its own affairs in matters of religion and that in the said case the right is given to all members of the denomination and not to any particular members thereof, to manage Sikh Gurdwaras; therefore, the right must be exercised by all Sikhs, and they alone must elect their representatives to manage the Sikh Gurdwaras and to the extent that section 148-B departs from the aforesaid principle, it constitutes an infringement of the right guaranteed to the petitioners under article 26(b) of the constitution. The respondent state on the other hand contended that "Matters of religion in the sense of essential beliefs and practices of the Sikh religion were left untouched by section 148-B. The court contended that the

62 Ibid.

63 Section 148-B outlines the method of electing the members of the Board of management of Sikh Gurdwaras.
petitioners failed to establish that direct election of the members of the board of the gurdwara by the entire Sikh community itself is a matter of the Sikh religion. The court said: 64

"However great our respect may be for the democratic principle of election, we do not think that having regard to the provisions of the principal act, the principle of direct election on universal denominational suffrage can be raised to the pedestal of religion within the meaning of article 26(b) of the constitution ... obviously, these are not matters of religion, and we say without meaning offence to anybody that to treat these as matters of religion is tantamount to confusing religion with current politics. ... The method of representation to the board ... is not a matter of religion. The circumstances that some members of the electorate are in their turn elected by constituencies consisting of Sikhs and non-Sikhs is far too remote and indirect to constitute an infringement of freedom of religion." 65

It has been pointed out that the Supreme Court till 1958 had taken more or less a consistent stand in regard to its interpretation of the term matters of religion and the consequent distinction between religious practices and

64 Supra n. 61, p. 1123.
65 Ibid., p. 1124. Italics mine.
the secular activities connected with religious practices (till 1958). But this could not be considered the final judgment on this issue and the Court appears to have treated it as a justiciable issue and, therefore, subject to further reflection on the matter as is noted in the cases that now follow.

In Durga Committee, Ajmer and another V. Syed Hussein Ali and others the appellants challenged the validity of the Durga Khawaja Sahib Act of 1955 alleging that the said act violated the various provisions of the constitution affecting the freedom of religion embodied in Article 26(b), (c), (d) of the Constitution. While delivering its judgment in this case, the Supreme Court quotes with approval the substance of the judgments in Swamier and Devanur cases but sounds a note of warning when it says:

"... whilst we are dealing with this point it may not be out of place incidentally to strike a note of caution and observe that in order that the practices in question should be treated as a part of religion they must be regarded by the said religion as its essential and integral part; otherwise even purely secular practices which are not an essential or an integral part of religion, are out

67 Sspra n. 9.
68 Supra n. 36.
to be clothed with a religious form and may make a claim for being treated as religious practices within the meaning of Art. 26. Similarly, even practices though religious may have sprung from merely superstitious beliefs and may in that sense be extraneous and unessential accretions to religion itself. Unless such practices are found to constitute an essential and integral part of a religion, their claim for protection under Art. 26 may have to be carefully scrutinised; in other words, the protection must be confined to such religious practices as are an essential and an integral part of it and no other. 69

The question was further examined by the Supreme Court in Tilkeyat Shri Govindlalji Maharaj v. State of Rajasthan, 70 wherein the appellants challenged the validity of the Nathdwara Temple Act of 1959 of the Government of Rajasthan alleging that the said act contravened the right of the Tilkeyat to own property as guaranteed by the Articles 25 and 26 of the constitution. It was contended that the temple and the properties connected therewith belonged to the denomination according to its usages and traditions, and therefore the management of the said temple and the properties cannot be transferred to the Board envisaged in the Nathdwara Temple Act. The

69 Supra n. 66 at p. 1415.
appellants argued that this contravened the right guaranteed to the denomination by article 25(1), to practise its religion freely and also the article 26(b) and (d) to manage its own affairs in matters of religion and to administer its property in accordance with the law. The Supreme Court summarizes the stand adopted by it in previous cases and states: 71

"In deciding the question as to whether a given religious practice is an integral part of the religion or not, the test always would be whether it is regarded as such by the community following the religion or not. This formula may in some cases present difficulties in its operation. Take the case of a practice in relation to food or dress. If in a given proceeding, one section of the community claims that while performing certain rites white dress is an integral part of religion itself, whereas another section contends that yellow dress and not the white dress is the essential part of the religion, how is the court going to decide the question? Similar disputes may arise in regard to food. In cases where conflicting evidence is produced in respect of rival contentions as competing religious practices, the court may not be able to resolve the dispute by a blind application of the formula ... that the community decides which practice is an integral

71 Ibid at pp. 740-41.
part of its religion, because the community may speak with more than one voice and the formula would, therefore, breakdown. **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 essential and integral part of the religion, and the finding of the court on such an issue will always depend upon the evidence adduced before it as to the conscience of the community and the tenets of its religion.**\(^{72}\)

The court further points out that the question of the determination of religious practices presents difficulties because 'sometimes practices, religious or secular, are inextricably mixed up'. This is more particularly so in regard to the Hindu religion because, as is well known, under the provisions of ancient Sārītīs, all human actions from birth to death and most of the individual actions from day to day are of a religious character. Though the task of disengaging the secular from the religious practices may not be easy, it must nevertheless be attempted in dealing with the claims for protection under articles 25(1) and 26(b). If the practice which is protected under the former is a religious practice and if the right which is protected under the latter is the right
to manage affairs in matters of religion, it is necessary that in judging the merits of the claim made in that behalf, the court must be satisfied that the practice is religious and the affair is in regard to a matter of religion.

The appellant's reference to the observation of Latham C.J. in Adelaide Company v. Commonwealth, that 'What is religion to one is superstition to another' is pointed out to be irrelevant by the court in the case under consideration and it maintains that if an obviously secular matter is claimed to be a matter of religion, or if an obviously secular practice is alleged to be a religious practice, the court would be justified in rejecting the claim because the protection guaranteed by Article 25(1) and Article 26(b) cannot be extended to secular practices and affairs in regard to denominational matters which are not matters of religion; and so, a claim made by a citizen that a purely secular matter amounts to a religious practice, or a similar claim made on behalf of the denomination that a purely secular matter is an affair in matters of religion, may have to be rejected on the ground that it is based on irrational considerations and cannot attract the provisions of Article 25(1) or Article 26(b).

On behalf of the appellants it was urged that

73 supra n. 29 at p. 123.
throughout the history of the temple, its properties had been managed by the Tilkaayat and so such management amounted to a religious practice under 25(1) and constituted the denomination's right to manage the affairs of its religion under Article 26(b). The Supreme Court rejects, without hesitation, this argument of the appellants and says:

"The right to manage the properties of the temple is a purely secular matter and it cannot, in our opinion, be regarded as a religious practice so as to fall under Article 25(1) or as amounting to affairs in matters of religion."75

The court further points out that the management of the property by the Tilkaayat is a matter of pure historical tradition and that the tenets of the religious cult (Vallabha) does not require as a matter of religion that the properties must be managed by the Tilkaayat. Such a course of conduct, therefore, according to the Court cannot be regarded as a religious practice under Article 25(1).

As regards the contention of the appellants that the Nathdwara Temple Act violated the right of the denomination under 26(d), the court maintained that Article 26(d)

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74 Shrinathji temple at Nathdwara. For the ruling of the court on the character of the temple whether private or public see infra Chapter VI on 'Hindu Religious and Charitable Endowments : Temples'.

75 Supra n. 70, p. 742.
justified the enactment of a law to regulate the administra-
tion of the denomination's property and that was
precisely what the Nathdwar Temple Act had purported to
do in the instant case. It repelled the contention of
the appellant by saying:

"If the clause 'affairs in matters of religion' (in
Article 26(b)) were to include affairs in regard to all
matters, whether religious or not, the provision under
Article 26(d) for legislative regulation of the adminis-
tration of the denomination's property would be rendered
illusory."\(^76\)

This judgment is significant in view of the fact
that the Supreme Court has elaborated its approach towards
'matters of religion' and has admitted the justiciability
of the same.

The reasoning followed by the Supreme Court in
Swaminar\(^77\) and Ratilal Gandhi\(^78\) cases was adopted by the
majority in its judgment in Seifuddin Saheb V. State of
Bombay.\(^79\) In this case the petitioner who was the reli-
gious head of the Dawoodi Bohra Community, traditionally
known as the Dei-ul-Mutlaq, challenged the constitutional

\(^76\) Supra n. 70, p. 743.

\(^77\) Supra n. 9.

\(^78\) Supra n. 33.

validity of the Bombay Prevention of Excommunication Act which invalidated all excommunications of the members of any religious community, maintaining that this Act violated the freedom of religion guaranteed to religious denominations under Article 26. The Government of Bombay objected to the petitioner's case on the ground that the rights and privileges of the Dhi to regulate the exercise of religious rights do not include the right to excommunicate any person so as to deprive him of his civil rights and privileges. It was also denied that the right to excommunicate is a religious practice. On behalf of the petitioner it was argued that the Dawoodi Bohra Community is a religious denomination within the meaning of Article 26 of the constitution and as such is entitled to ensure its continuity by maintaining the religious unity and discipline, which would secure the continued acceptance by its adherents of certain tenets, doctrines and practices. The right of such a community involves the right to enforce discipline, if necessary, by taking the extreme step of excommunication.

It was also argued that the power to excommunicate the dissidents is a matter of religion within the meaning of Article 26(b) and the Act violates the fundamental right of the petitioner under Article 26 in so far as it takes away the power of the head of the denomination to enforce discipline and thus compel the denomination to accept the dissidents as having full rights of membership in the
community. The Supreme Court by majority reversed the decision of the High Court of Bombay and held the Bombay Prevention of Excommunication Act as void as it violated Article 26(b) of the constitution in so far as it destroyed the right of the Dal of excommunication of any member of the Bohra Community on religious grounds. The Supreme Court laid down the following rule -

"Where an excommunication is itself based on religious grounds such as lapse from the orthodox religious creed or doctrine (similar to what is considered heresy, apostacy or schism under Canon Law) or breach of some practice considered as an essential part of religion by the Dawoodi Bohra community in general, excommunication cannot but be held to be for the purpose of maintaining the strength of the religion. It necessarily follows that the exercise of this power of excommunication on religious grounds forms part of the management by the community, through its religious head "of its own affairs in matters of religion" guaranteed under Article 26(b)."

Just as the activities referred to in Article 25(2) are obviously not of the essence of religion, similarly the saving in Article 25(2)(b) is not intended to cover the

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60 Ibid., p. 534. It may be noted, however, that Justice Sinha (dissenting) pointed out that 'the right of excommunication is not a purely religious matter' and he held the Bombay Prevention of Excommunication Act as valid. According to him, the position of an excommunicated person becomes like that of an untouchable in his community, and if that is so, the Act in declaring such practices to be void has only carried out the strict injunction of Article 17 of the Constitution, which abolishes untouchability.
basic essentials of the creed of a religion which is protected by Article 25(1).

The Supreme Court relied upon the presumption that once it is established that the Dai had the customary right to excommunicate a member of the sect, the question whether excommunication for dereliction of particular rules of behaviour was a matter of religion or not, could be decided only according to the beliefs of the particular sect, which in this case happened to be represented by the Dai himself as the religious head of the Dawoodi Bohra Community. In effect, therefore, the declaration by the Dai that this power of excommunication was a matter of religion was enough to preclude the courts from further investigation concerning its nature, and the state from making any law giving protection to the citizen against such excommunication and the disabilities resulting therefrom. 81

Justice Das Gupta maintains:

"The main principles underlying these provisions (Articles 25 and 26) have by these decisions (in Swamiar, Devaru and other cases) been placed beyond controversy. The first is that the protection of these Articles is not limited to matters of doctrine or belief, they extend also to acts done in pursuance of religion and therefore contain

a guarantee for rituals and observances, ceremonies and modes of worship which are integral part of a religion. The second is that what constitutes an essential part of a religion or religious practice has to be decided by the courts with reference to the doctrine of a particular religion and include practices which are regarded by the community as a part of a religion." 82

As regards the violation of civil rights of the excommunicated person by the order of the Dal, Justice Das Gupta says:

"It might be thought undesirable that the head of a religious community would have the power to take away in this manner the civil rights of any person. The right given under Article 26(b) has not, however, been made subject to preservation of civil rights. The express limitation in Article 26 itself is that this right under several clauses of the Article will exist subject to public order, morality and health." 83

In this connection P.K. Tripathi argues that the approach of the court is an oversimplification of the issues involved and that the court has not addressed itself to most sensitive issues involved in the case, namely that of balancing the freedom of the individual against the right of the denomination. 84

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82 Supra n. 79, p. 533.
83 Ibid., p. 534.
84 Supra n. 81.
In *Swamier*, *Rerilal*, and *Devaru* cases, the Supreme Court had considered that the question whether a particular matter or practice is a 'matter of religion' or not will be primarily decided by the religion itself. But in *Durga Committee* and *Tilkayat* cases, the Supreme Court has deviated from its stand and has pointed out that the matter is justiciable and consequently a subject for a close scrutiny by the court. The approach adopted by the Supreme Court in the former group of cases could be described as Doctrine of Autogenesis of denominational powers and this doctrine was restricted though not completely abandoned by Justice Gajendragadkar in *Durga Committee* and *Tilkayat* cases. The autogenesis doctrine left the court no voice in the determination of what are 'matters of religion', comprising the zone of denominational autonomy. P. K. Tripathi points out that "The thought that such a complete surrender to denominational aspirations would consecrate as religion almost anything that a religious head would choose must have worried his lordship with the grim prospect of a reversal with the aid of the Constitution and the Court at that of the entire

85 *Supra* n. 9, p. 28.
86 *Supra* n. 33.
87 *Supra* n. 36.
88 *Supra* n. 66.
89 *Supra* n. 70.
process of social renaissance in this country in which the state and the elite of the socio-religious communities in India had collaborated for over a century, a renaissance commencing perhaps with the abolition of Sati by Lord William Bentink and culminating through the leadership of Gandhi and Nehru into salutary constitutional provisions like the ones embodied in clause 2 of Article 25 itself.  

In a secular state, it is usually admitted that the constitution is intended to grant protection to religious freedom and that secular matters should not be allowed, as far possible, to get mixed up with matters of religion. It is also admitted that the court must have the authority to interpret the constitution and that secular practices must be excluded from the purview of article 26(b), of the Constitution of India. There is no problem if a given practice is clearly secular but the real difficulty arises in case of doubtful and borderline cases. The line of argument of the Supreme Court in Tilkayt\(^91\) case is not accepted in some quarters. B. Parameswara Rao maintains\(^92\) that in doubtful and borderline cases, if a religious  

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\(^{90}\) Supra n. 81, p. 184.  
\(^{91}\) Supra n. 70.  
denomination or a section thereof is found to consider a particular matter as a matter of religion, it stands to reason, religion being a matter of faith with individuals or communities,\(^93\) to accept the claim of the community as conclusive and extend the protection of article 26(b) to such a practice. On the other hand, if, in spite of the claim of the community concerned that a particular practice is an essential and an integral part of the religion, the court treats it as a fit subject for close scrutiny, the protection given by Article 26(b) would be weakened. He further maintains that the view of the court "that practices which have sprung from superstitious beliefs, though religious are unnecessary accretions to religion itself and, therefore, are not matters of religion within the meaning of Article 26(b)"\(^94\) seems to strike hard at the very foundations of the freedom of religion, because "what is religion to one is superstition to another,"\(^95\) Mr. Rao says:

"The scissors of 'superstition' may not be a safe and a reliable instrument to cut short the difficulty in deciding what are matters of religion. In cases where a religious denomination speaks with two or more voices as

\(^95\) 67 C.L.R. 116 at 123.
regards a particular practice, it is necessary first of all to see whether the different voices represent different sections of the community or the denomination, each capable of exercising the rights given in Article 26. If there are two or more such recognised sections of a denomination each following its own set of practices distinct from the others, then, in view of the language of Article 26, every one of those sections would be entitled to the right given in Article 26(b). Where there are no such recognised sections of a particular denomination and yet different voices speak about a particular matter, then it becomes a question of fact to be ascertained on the basis of evidence and not an issue to be decided on the basis of subjective notions like superstition.96

Prof. Harry E. Groves comments more or less on similar lines when he says:

"This language (used in the Tilak case) appears to go somewhat further than that of the earlier cases which announced that what is essential in a particular religion was to be determined by reference to that religion itself. The use of the phrase 'merely superstitious beliefs' in the above quoted passage would seem to introduce an additional element of hostility to religious freedom; for there are many persons who conceive of all

96 Supra n. 92, p. 513."
religion as mere superstitious belief and there are far more who apply this classification to all religions but the one they espouse. But the Supreme Court, by interpreting Article 25(2)(a) as if it referred to two types of religious practices, the essential and the non-essential, and by holding that the former is relatively free from interference, has infused into the constitution a principle for the protection of religious practice not apparent on a mere reading of the Article 25.\(^7\)

It has been considered, so far, how the autogenesis doctrine was restricted by the Supreme Court by making the question of determination of matter of religion a justiciable issue and how this departure has been received in some quarters. The problem boils down to this: Can one make a distinction between essential and non-essential practices and if one could make such a distinction what should be the basis of such a distinction and who should be empowered to sit in judgement over this question?

One can safely proceed on the basis of the assumption regarding the definition of religion accepted by the Supreme Court of India in Swami case namely that "religion is certainly a matter of faith with individuals or communities and it is not necessarily theistic. A religion undoubtedly has its basis in a system of beliefs

\(^7\) Supra n. 16, p. 200.
or doctrines which are regarded by those who profess that
religion as conducive to their spiritual well-being."

This is a sufficiently comprehensive definition and has
been accepted by the Supreme Court of India so far;
the Supreme Court has also accepted, as has been seen before,
that freedom of religion not only implies a code of
ethical rules only but that it also implies religious
observances, ceremonies or practices as understood in the
religion. It necessarily follows, therefore, that protection
to religious practices as well. The doctrine
of autogenesis of denominational power granted full
autonomy to the religious community to decide what were
the practices which formed the essential and integral
part of the religion. This doctrine helps certainly in
preserving freedom of religion from interference from
the police power or the state power and also ensures the
protection of freedom of religion of one religious
community against the other especially when there is no
conflict the autogenesis doctrine is of no help. In a
multireligious community like that of India, where
there are not only various religions living side by side
but where some of these religions are based on different
religions or denominations, it is of utmost importance to
consider the observances, ceremonies or practices as
understood in the religion. It necessarily follows, therefore, that protection
to religious practices as well. The doctrine
of autogenesis of denominational power granted full
autonomy to the religious community to decide what were
the practices which formed the essential and integral
part of the religion. This doctrine helps certainly in
preserving freedom of religion from interference from
the police power or the state power and also ensures the
protection of freedom of religion of one religious
community against the other especially when there is no
conflict the autogenesis doctrine is of no help. In a
multireligious community like that of India, where
there are not only various religions living side by side
but where some of these religions are based on different
foundations and do adopt conflicting practices, the autogenesis doctrine will not help in solving the conflicts.

All religions help a man to realise himself and to practise the good life. All religions 96 basically preach love and universal brotherhood. There are no inherent conflicts between religions but in the historical past, the followers of different religions have adopted or developed practices which have occasionally created tensions, express or otherwise, and have consequently disturbed social relations between the followers of these religions or religious denominations. "The historical conflicts between followers

96 Hinduism is characterised by tolerance and absorption. Buddhism is an offshoot of Hinduism. It does not believe in God or any intelligence first cause and teaches the noble values of sympathy, love, kindness and detachment. Jainism is also an important sect of dissenters from Hinduism. It also does not believe in God or intelligence first cause. It advocates extreme mental as well as physical discipline in life, it believes in love and compassion toward all sentient beings and it aims to reach the objective of liberation from the transmigration of soul. Sikhism, founded by Guru Nanak is also an offshoot from Hinduism and tries to blend together good features of various religions. Sikhism believes in humanism and brotherhood. Zoroastrianism believes in God and future existence. It emphasises purity of thought, word and deed and is tolerant about the other faiths. Islam was the religion of the invaders who in the zeal of political aggrandisement did not do justice to the basic tenet of the religion which implied that 'there is one and only one god who is infinite and Absolute and who hath neither beginning nor end and who is not conditioned or limited by anything whatever'. Christianity was also the religion of European invaders. It basically believes in love and sacrifice but like many other religions it had many internal sects and has experienced many internal conflicts. All this shows that basically no religion has taught intolerance, violence or strife which are witnessed in the practices of these religions or religious denominations.
of the different religions and between the followers of
the different sects of the same religion, have their
origin in human weakness and its propensity for factiona-
listism. In India, particularly in villages, people belong-
ing to various religions were living together amicably.
Most of the ancestors of various religions were at one time
Hindus. But there were social and economic differences
not only between different religious groups but between
the members inter se of the same religious group. The
disparity in economic, social and educational fields
between the said subcastes was so enormous that it had
become the main source of conversion to other religions
and a fertile field for thorny dissensions for political
objectives. It was but natural, under the circumstances,
that the basic scriptures and the teachings of founders
or prophets of the religion were either unconsciously
forgotten or deliberately neglected and religion came
mostly to be associated with the rituals, ceremonies and
observances and the cobwebs built around it by supersti-
tion and avarice.

Most of the religions followed in India have built
around themselves practices which are hundreds of years
old and it is not an easy task to dissociate the original
and essential practices from the ones which have come into

99 K. Subba Rao, "Caste and Creed under the Constitu-
prominence in later years and, perhaps, some of which deviate from the basic tenets of the religion. Even though no religion can be thought of in isolation from the practices adopted, a rational approach demands that essential practices which form the essence or an integral part of that religion should be safeguarded or protected and those which are non-essential or the non-observance of which does not amount to the very negation of that religion and which are coming in conflict with essential practices of some other religion should not enjoy the protection under Articles 25 and 26 of the constitution. This necessarily means that the courts should take upon themselves the task of deciding whether a particular practice forms an essential and an integral part of that religion, and which they have to decide with reference to the basic scriptures of that religion. This certainly is not an easy task and it being a justiciable issue, assertion of the one or the other in this regard is not final, and this is precisely what the Supreme Court has said in the Tilkayat case.

Let us see how this approach of considering 'Matters of Religion' as a justiciable issue has helped the courts in deciding cases involving acute conflicts between

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100 Ibid., p. 5.
101 Supra n. 70.
practices of different religions or conflicts between the practices of different sects or denominations of the same religion.

In M. H. Quereshi V. State of Bihar, petitioner challenged the validity of Acts passed by the States of Bihar, Uttar Pradesh and Central Provinces which prevented the slaughter of cows. They claimed that the said Acts violated their fundamental rights guaranteed under article 25 of the constitution inasmuch as on the occasion of the Bakri Id day, it has been the religious practice of the petitioner's community to sacrifice a cow on the said occasion. As a result of the total ban imposed by the respective sections of the Acts, the petitioners would not even be allowed to make the said sacrifice which is a practice and custom in their religion, enjoined upon them by the Holy Quran and practised by all Muslims from time immemorial and recognised as such in India. The Supreme Court analysed the evidence presented before itself especially the two basic documents of the Muslim Religion namely the Quran and the Hedaya and maintained that they found noted that, it is the duty of every free Musalman, arrived at the age of maturity to offer a sacrifice on the Yd Kirban, or Festival of the sacrifice, provided he be


103 Hamilton's Translation of Hedaya Book XLIII, p. 592, quoted in ibid., p. 984.
then Possessed of Nisab and be not a traveller. "The sacrifice established for one person is a goat and that for seven a COW OR CAMEL." It is therefore optional for a Muslim to sacrifice a goat for one person or a cow or camel for seven persons. It does not appear to be obligatory that a person must sacrifice a cow. The very fact of option seems to run counter to the notion of an obligatory duty." As regards the claim of the petitioners about the historical practice of sacrifice of cows the Court pointed out, on the basis of evidence available, that Mughal emperors Babar, Humayun, Akbar, Jehangir, Ahmed Shah and many other Muslim rulers in south had prohibited the slaughter of cows. The court also pointed out on the basis of the evidence presented by the respondent states that though cows were slaughtered in Vedic times, the cow was gradually raised to the status of Divinity in later years. "There can be no gainsaying of the fact that the Hindus in general hold the cow in great reverence and the idea of the slaughter of cows ... is repugnant to their notions." The court came to the conclusion that the sacrifice of a cow on Bakri Id day was not an obligatory overt act for a Muslim to exhibit his religious belief.
and idea and in view of the fact, the slaughter of cows was not only not permitted in Hindu religion but that the cow was and is valued as a divine entity, the claim of the petitioners could not be upheld. This shows that the Supreme Court was, at the time of deciding this case, gradually evolving an approach different than the autogenesis doctrine adopted in previous cases and the first suggestion of this departure is found in the Durga Committee case,\(^{107}\) where the Supreme Court struck a note of caution 'that the protection must be confined to such religious practices as are an essential and integral part of it and no other.' The distinction made by the court in essential and non-essential practices has enabled itself to resolve a conflict arising out of a sensitive and delicate issue of cow-slaughter, an issue which has provoked bloody communal riots in the pre-independence as well as the post-independence period. This distinction between essential and non-essential practices helped the Allahabad High Court in Ramprasad V. State of Uttar Pradesh\(^{108}\) where monogamy legislation of the State of the U.P. was challenged alleging that it contravened the fundamental right under Article 25. The court held that in view of the existence of an alternative mode of obtaining a son by adoption; a second marriage


\(^{108}\) A.I.R. 1957 ALL. 411.
was not an obligatory religious practice within the protection of Article 25(1).

Conclusion

The judiciary in India has adopted a comprehensive and liberal definition of the term 'religion' so as to suit the heterogeneous, multi-religious community in India and to give enough latitude to various faiths and their denominations reasonable opportunity to exercise basic freedom granted in Articles 25 and 26 of the Constitution of India. The interpretation of 'Matters of Religion' has, however, undergone changes as analysed in this chapter. The present position of the judiciary about the interpretation of matter of religion can be summarised as follows:

1. Matters of religion must be distinguished from secular practices.

2. A practice under consideration shall not be regarded as a matter of religion unless that practice is considered by the religious community concerned as an essential and an integral part of it.

3. Even if a religion regards a particular practice as an essential and an integral part of it, it would not be automatically deemed as a matter of religion if it is found that the said practice has sprung from superstitious beliefs.
4. As the matter is justiciable, and likely to be controversial due to a variety of conflicting practices, the court, in any event will carefully scrutinise the claims of the parties to the dispute claiming protection for their practices under Articles 25(1) and 26(b) of the Constitution of India.

This position has its own limitations. By making 'matters of religion' a justiciable issue, the judiciary has limited considerably, the autonomy of religious institutional life. This approach, has, nevertheless, helped the judiciary to decide controversial issues of religious practices and has enabled the state to impose reasonable limitations with a view to maintaining public order, morality and health as well as attempting to introduce necessary social reforms. How this has been done is the province of the detailed analyses of the forthcoming chapters.