

## RIGHT TO FREEDOM OF RELIGION: A BOON

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*“So long as you do not achieve social liberty whatever freedom is provided by the law is of no avail to you.”*

-By Dr B. R Ambedkar

### WHAT IS RELIGION?

Religion is the set of beliefs, feelings, dogmas and practices that define the relations between human being and sacred or divinity. A given religion is defined by specific elements of a community of believers: dogmas, sacred books, rites, worship, sacrament, moral prescription, interdicts, and organization. The majority of religions have developed starting from a revelation based on the exemplary history of a nation, of a prophet or a wise man who taught an ideal of life.<sup>1</sup>

A religion may be defined with its three great characteristics:

- Believes and religious practices
- The religious feeling i.e. faith
- Unity in a community of those who share the same faith: the Church. It is what differentiates religion from magic.

The term religion is not defined in the constitution and indeed it is a term which is hardly susceptible to any rigid definition. The Supreme Court has defined it broadly. A religion may 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 part of religion

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<sup>1</sup> Internet article  
[theisme.free.fr/Religion/What-is-religion-1.htm](http://theisme.free.fr/Religion/What-is-religion-1.htm)  
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and those forms and observances might extend even to matters of food and dress.<sup>2</sup> Religion is thus essentially a matter of personal faith and belief. Every person has right not only to entertain such religious belief and ideas as may be approved by his judgement or conscience but also exhibit his belief and ideas by such overt acts which are sanctioned by his religion.

Hence on the question of religion, India's position is:

- (1) India has no state religion,
- (2) State does not discriminate between religions,
- (3) State cannot impose any tax to promote a religion or to maintain religious institution,
- (4) Religious instructions cannot be imparted in educational institution run by state funds and in educational institutions recognized by the state and receiving aid from the government, religious instructions cannot be compulsorily given to unwilling students.

In educational institutions run by religious establishments, religious instructions can be given only to students willing to receive it. Religious instructions can be given to the minors only with the express consent of their guardians.

## **THE FREEDOM OF RELIGION UNDER THE INDIAN CONSTITUTION**

The Constitution of India guarantees the protection of certain fundamental rights. They are given in articles 12 to 35, which form Part III of the Constitution. Among them articles 25 and 26 are the two central articles guaranteeing religious freedom.

**Article 25** reads:

- (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, practice and propagate religion.

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<sup>2</sup> Commr, H.R.E vs L. T. Swaminar, AIR 1954 SC 282 at p 290; S.P Mittal vs Union of India AIR 1983 SC 1.

(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 character to all classes and sections of Hindus<sup>3</sup>.

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

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

**Article 26** reads: 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 movable and immovable property; and

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

The religious freedom of the individual person guaranteed by the Constitution of India is given in clause (1) of article 25 that reads: 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, practice and propagate religion. In precise terms, the Constitution makes it clear that the rights provided in clause (1) of article 25 are subject to public order, morality and health and to the other provisions of Part III of the Constitution that lays down the fundamental rights.

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<sup>3</sup> P.B. Gajendragadkar, *The Constitution of India*, op.cit.13-14/40-41

Clause (2) of article 25 is a saving clause for the State so that the religious rights guaranteed under clause (1) are further subject to any existing law or a law which the State deems it fit to pass that

- (a) Regulates or lays restriction on any economic, financial, political or other secular activity which may be associated with religious practices, or,
- (b) Provides for social welfare and reform or the throwing open of Hindu religious institutions of a public character to all classes and sections of Hindus.<sup>4</sup>

Similarly Article 26 is the main article that provides the corporate freedom of religion governing the relation between the State and 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 movable and immovable property; and
- (d) To administer such property in accordance with law.

Clause (b) of article 26 guarantees to every religious denomination or any section thereof the right to manage its own affairs in matters of religion and clause (d) gives them the right to administer their property (institutions) in accordance with laws passed by the State. It is obvious from the language of the clauses (b) and (d) of article 26 that there is an essential difference between the right of a denomination to manage its religious affairs and its right to manage its property. This means that a religious denomination's right to manage its religious affairs is a fundamental right protected by the Constitution. No legislation can violate it except for health, morality and public order.

But the right to administer property associated with religion can be exercised only "in accordance with law". In other words, the State can regulate the administration of religious property by way of validly enacted laws. Hence, in the exercise of individual and corporate freedom of religion as guaranteed in articles 25 and 26 of the Constitution of India, it is necessary to understand the judicial definition of 'religion' as given in article 25(1) and

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<sup>4</sup> V.D.Mahajan, Constitutional law of India p.232-241.

‘matters of religion’ as provided in article 26(b). To define religion for judicial purposes has been an onerous job for the judiciary both in the Western countries and in India.

## **FREEDOM TO PRACTICE OF RELIGION**

To 'practice' religion is to perform the prescribed religious duties, rights and rituals, and to exhibit his religious belief and ideas by such acts as prescribed by religious order in which he believes. The freedom to practice religion is protected under article 25 (1) of the Indian Constitution. In the year 1952, the first case of this sort seeking protection under this constitutional right as guaranteed in clause (1) of article 25 appeared before the High Court of Bombay.<sup>5</sup> The case arose out of the Bombay Prevention of Hindu Bigamous Marriage Act,<sup>6</sup> passed by the State of Bombay. The Act prevented bigamy among Hindus alone who resided in that State while the Muslim community that practiced polygamy was left out of the operation of the said Act.

Therefore, Shri Narasu Appa Mali appealed before the High Court of Bombay, because the Act infringed the plaintiff's religious freedom. The aggrieved plaintiff alleged that by enacting the Bombay Prevention of Hindu Bigamous Marriage Act of 1946, the State of Bombay discriminated between Hindus and Muslims residing in that State on the basis of religious practice and, therefore, pleaded that the enactment was void. The Court upheld the impugned Act constitutionally valid. Mr. M.C. Chagla, the Chief Justice of the Bombay High Court, who gave the judgment of the Court in this case, indicated that the freedom to practice religion as provided under article 25(1) was not absolute, in the sense that if religious practices contravened to public order or to a policy of social welfare, then they said practices could not claim State protection. He also opined, “a sharp distinction must be drawn between religious faith and belief and religious practices. What the State protects is religious faith and belief.”<sup>7</sup>

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<sup>5</sup> State of Bombay Vs Narasu Appa Mali, AIR 1952 Bom. 84.

<sup>6</sup> Bombay Prevention of Hindu Bigamous Marriage Act, 1946 (Bombay Act 25 of 1946) (as amended by Bombay Act 38 of 1948).

<sup>7</sup> The State of Bombay Vs Narasu Appa Mali, AIR 1952 Bom 84, at 86

Subsequent to **the Narasu Appa Mali case**,<sup>8</sup> many cases came before the Supreme Court of India for constitutional protection to “religion” and “matters of religion” as guaranteed in articles 25 (1) and 26 (b) respectively against certain state statutes. In these cases, the Supreme Court had the occasion to deal with the question of “freedom of practice of religion” protected under article 25(1).

Thus, subject to the restrictions which this Article imposes, every person has a fundamental right under our Constitution not merely to entertain such religious belief as may be approved of by his judgment or conscience but to exhibit his belief and ideas in such overt acts as are enjoined or sanctioned by his religion and further to propagate his religious views for the edification of others.

## CASES

### **Commissioner, Hindu Religious Endowments, Madras v. Shri Lakshmindra Tirtha Swamiar of Shri Shirur Matt**

The Shri Shirur matt case<sup>9</sup> arose out of the Madras Hindu Religious and Charitable Endowments Act 1951<sup>10</sup> passed by the Madras legislature in 1951. The object of the Act, as stated in its preamble, was to amend and consolidate the law relating to the administration and governance of Hindu religious and charitable institutions and endowments in the State of Madras. The Act contained sections dealing with the powers of the State with regard to the general administration of the Hindu religious institutions, their finances and certain other miscellaneous subjects. Section 20 of the Act dealt with matters pertaining to the administration of Hindu religious endowments that were to be placed under the general superintendence and control of the Commissioner.

The Commissioner was authorized to pass orders, which he deemed necessary, for the proper administration of these religious endowments. He was to ensure that the income from these endowments was spent for the purposes for which they were founded. Section 21 of the Act

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<sup>8</sup> *Ibid*

<sup>9</sup> Commissioner, Hindu Religious Endowments, Madras v. Shri Lakshmindra Tirtha Swamiar of Shri Shirur Matt, AIR 1954 SC 282

<sup>10</sup> Madras Hindu Religious and Charitable Endowment Act, 1951 (Madras Act 19 of 1951).

gave the Commissioner, the Deputy and Assistant Commissioners, and such other officials as might be authorized, the power to enter the premises of any religious institution or any other place of worship for the purpose of exercising any power conferred, or discharging any duty imposed by or under the Act, provided that the concerned officer exercising such power was a Hindu.

Section 23 of the Madras Hindu Religious and Charitable Endowments Act of 1951 provided that the trustee of a religious institution was to obey all lawful order issued under the Act by the Government, the Commissioner and other such officials. Section 56 stated that the Commissioner was empowered to ask the trustee to appoint a manager for the administration of the secular affairs of the institution and in default of such an appointment he could make the appointment himself. The rest of the sections dealt with the financial aspects of the religious bodies.

On constitutional grounds, the validity of the Act was challenged by Shri Lakshmindra Tirtha Swamiar, the mathadhipati of Sirur math<sup>11</sup> who assumed also the office of mathadhipati of Udipi math at a time when it was under financial crisis. The Hindu Religious Endowment Board stepped in at this point to assist the Udipi math in getting out of its financial problems. Apparently the Mathadhipati, Shri Lakshmindra Tirtha Swamiar, consented to the intervention as he signed over power of attorney to the manager appointed by the Board. But it seemed that the manager wanted his own way in all affairs of the math. This caused the mathadhipati to retract his power of attorney and to ignore the efforts of the Board, which filed a case against the mathadhipati. The mathadhipati appealed to the Supreme Court on the ground that the Board, whose powers were alleged to be unconstitutional, had violated his constitutional guarantees under articles 25 and 26 of the Constitution.

The Supreme Court found the case in favour of the math. While giving the judgment, it seems that the Court has taken a thoughtful approach to the meaning of “religion.” Besides the Supreme Court seemed to have given an indigenous meaning to what includes into the category of “secular activities” associated with religion. This ruling of the Supreme Court has

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<sup>11</sup> V.P. Luthera, op.cit. p.129.

been considered as one of the most important decisions in Indian jurisprudence with regard to the definite on of religion.<sup>12</sup>

Mr. Justice Mukerjea who spoke for the unanimous decision of the Court pointed out that the resolution of the dispute hinged on the clarification of what 'matters of religion' are. He said: The word "religion" has not been defined in the Constitution and it is a term which is hardly susceptible of any rigid definition. In an American case (vide *Davis v. Benson*, 133 U.S. 333 at 342), it has been said "that the term 'religion' has reference to one's views of his relation to his Creator and to the obligations they impose of reverence for His Being and character and of obedience to His will.

It is often confounded with cult us of form or worship of a particular sect, but is distinguishable from the latter." We do not think that the above definition can be regarded as either precise or adequate. Articles 25 and 26 of our Constitution are based for the most part upon article 44(2) 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. Religion is certainly a matter of faith with individuals or communities and it is not necessarily theistic.

There are well known religions in India like Buddhism and Jainism, which do not believe in God or in any Intelligent First Cause. A religion undoubtedly has its basis in a system of beliefs or doctrines that 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.<sup>13</sup> This passage, which has been frequently quoted by judges and jurists, broadened the protection guaranteed in the Constitution 'to practice religion' as given in article 25 (1).

Commenting on clauses (b) and (d) of article 26, the Supreme Court held in the instant case: Under Article. 26 (b), therefore, a religious denomination or organization enjoys complete

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<sup>12</sup> Richard W. Lariviere, "The Indian Supreme Court and The Freedom of Religion", in *Journal of Constitutional and Parliamentary Studies*, vol. IX, no.2 (1975), p. 176

<sup>13</sup> *Commissioner, Hindu Religious Endowments, Madras v. Shri Lakshmindra Tirtha Swamiar of Shri Shirur Matt*, AIR 1954 SC 282, at 290.



autonomy in the matter of deciding as to what rites and ceremonies are essential according to the tenets of the religion they hold and no outside authority has any jurisdiction to interfere with their decision in such matters. Of course, the scale of expenses to be incurred in connection with these religious observances would be a matter of administration of property belonging to the religious denomination and can be controlled by secular authorities in accordance with any law laid down by a competent Legislature; for it could not be the injunction of any religion to destroy the institution and its endowments by incurring wasteful expenditure on rites and ceremonies.

It should be noticed, however, that under Art.26 (d), it is the fundamental right of a religious denomination or its representative to administer its properties in accordance with law; and the law, therefore, must leave the right of administration to the religious denomination itself, subject to such restrictions and regulations as it might choose to impose. A law which takes away the right of administration from the hands of a religious denomination altogether and vests it in any other authority would amount to a violation of the right guaranteed under cl. (d) of Art.26.<sup>14</sup>

### **Ratilal Panachand Gandhi v. State of Bombay**

The Ratilal case,<sup>15</sup> the Supreme Court was once again appealed to decide on the judicial application of 'religion' and 'matters of religion' as implied in the right to exercise of religion protected under articles 25 and 26 of the Constitution.

The case arose out of the Bombay Public Trust Act, 1950,<sup>16</sup> passed by the Bombay State Legislature. Similar to the Madras Act of 1951,<sup>17</sup> the object of the Bombay Act as stated in its preamble was to regulate and to make better provision for the administration of public religious and charitable trusts in the State of Bombay. Section 18 of the Bombay Public Trust Act, 1950, declared that it was obligatory upon the trustee of every public trust to which the Act applied, to make an application for the registration of the trust. Like section 21 of the Madras Act of 1951, section 37 of the Bombay Act also authorized the Charity Commissioner and his subordinate officers to enter and inspect any property belonging to a public trust. Section 44 of the Act provided that the Charity Commissioner might be

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<sup>14</sup> *Ibid.*, at 292.

<sup>15</sup> Ratilal Panachand Gandhi v. State of Bombay, AIR 1954 SC 388

<sup>16</sup> Bombay Public trust Act, 1950 (Bombay Act 29 of 1950)

<sup>17</sup> Madras Hindu Religious and Charitable Endowments Act, 1951 (Madras Act 19 of 1951)

appointed by a Court of competent jurisdiction or by the author of the trust to act as a sole trustee of a public trust. Section 74 gave powers to the Court to appoint a new trustee or trustees and the Court, after making inquiries, could appoint the Charity Commissioner or any other person as a trustee to fill up vacancies.

The Manager of a Jain public temple and Trustees of Parsi Panchayat Funds and Properties in Bombay challenged before the Bombay High Court<sup>18</sup> the constitutional validity of the Bombay Public Trust Act of 1950. It was done on the ground that the provisions of the Bombay Act of 1950 contravened freedom to practice religion as guaranteed in article 25 (1) and freedom to manage matters of religion as protected by article 26 (b) of the Constitution. The Bombay High Court denied the petition in the light of sub- clause (c) and (d) of article 26 of the Constitution, which provides the State with authority to enact the legislation as given in the Bombay Act<sup>19</sup>. Therefore, the Bombay High Court resolved the case in favour of the State on the basis of the definition that the Court gave to religion in the instant case. This definition reduced religion to spiritual and moral aspects only and eliminated secular activities, like the property ownership and expenditure associated with religious practices, from the protection guaranteed in the Constitution.

The Chief Justice, Mr. M.C. Chagla who delivered the judgment of the Bombay High Court said: “Religion” as used in arts. 25 and 26 must be construed in its strict and etymological sense. Religion is that which binds a man with his Creator, but Mr. Sommaya on behalf of his client (Panachand) says that as far as Janise are concerned they do not believe in a Creator and that distinction would not apply to the Jains. But even where you have a religion which does not believe in a Creator, every religion must believe in a conscience and it must believe in ethical and moral precepts. Therefore whatever binds a man to his own conscience and whatever moral and ethical principles regulate the lives of men that alone can constitute religion as understood by the Constitution?

A religion may have many secular activities, it may have secular aspects, but these secular activities and aspects do not constitute religion as understood by the Constitution. There are religions which bring under their own cloak every human activity. There is nothing which a man can do, whether in the way of clothes or food or drink, which is not considered a

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<sup>18</sup> Ratilal Panachand Gandhi v. State of Bombay, 1953 ILR, Bombay 1187

<sup>19</sup> Bombay Public trust Act 1950 (Bombay Act 29 of 1950).

religious activity. But it would be absurd to suggest that a Constitution for a secular State ever intended that every human and mundane activity was to be protected under the guise of religion, and it is therefore in interpreting religion in that strict sense that we must approach arts. 25 and 26<sup>20</sup> of the constitution of India.

In the *Shri Lakshmindra and the Ratilal* cases, the Supreme Court of India has given a liberal approach to the meaning of religion which includes not only faith, belief, doctrines, code of ethical rules but also rituals, ceremonies and observances done in pursuance of religious belief, which are regarded conducive to spiritual well being. It is surprising, however, that in two subsequent cases, *Quareshi* and *Durgah Committee*, the Supreme Court had given a guarded interpretation when it had to decide on 'matters of religion' as referred to in article 26 (b).

### **Mohammad Hanif Quareshi v. State of Bihar**

The *Quareshi* case<sup>21</sup> is about prohibiting the slaughter of cows. It has got long constitutional history. The Constitution of India has certain Directives to the States that they expect to keep in view in the conduct of their policies. These Directives are listed in Part IV of the Constitution under the heading 'Directive Principles of State Policy'. The Directive Principles are different from the rest of the articles of the Constitution in the sense that they are non-justifiable because they don't have a legal force to bind them. That is, if the State acts in a way contrary to the Directives laid down in Part IV of the Constitution; its action cannot be challenged in the Court.<sup>22</sup>

It is held that the Directive principles are, nevertheless, important. Their importance consists, as commented by M.C. Setalvad, a former Attorney-General of India, that "they appear to be like an instrument of instructions, or general recommendations addressed to all the authorities in the Union reminding them of the basic principles of the new social and economic order, which the Constitution aims at building."<sup>23</sup> Hence, article 48 of the Constitution of India is one of the Directive Principles. The objectives of this article are for the development of agriculture and animal husbandry on modern and scientific lines as well as for the

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<sup>20</sup> *Ratilal Panachand Gandhi v. State of Bombay*, 1953 ILR, Bombay, 1187, at 1193

<sup>21</sup> *Mohammad Hanif Quareshi V. State of Bihar*, AIR1958 SC.731

<sup>22</sup> V. D. Mahajan, *Constitutional Law of India*, op.cit. pp. 298-309

<sup>23</sup> *Ibid.*, p. 301

preservation and improvement of the breeds of cattle, and prohibition of the slaughter of .cows and calves and other milch and draught cattle.

Article 48 reads: The state shall endeavor to organize agriculture and animal husbandry on modern and scientific lines and shall, in particular, take steps for preserving and improving the breeds, and prohibiting the slaughter of cows and calves and other milk and draught cattle.

It may be appropriate here to point out that the directive for the prohibition of cow-slaughter as referred to in article 48, was made mainly out of respect for the religious sentiments of the majority community, the Hindus. As it is well known in India, cow has great religious significance for them. This article did not find a place in the Draft Constitution but was incorporated during the debates in the Constituent Assembly. Most of the members of the minority communities, the non-Hindus, who were in the Constituent Assembly, seemed to have consented to the Hindu religious sentiments associated with the provision against cow-slaughter<sup>24</sup> However; some held that the Hindu sentiments predominated in the Constitution.<sup>25</sup>

As follow-up to these Directives, some State Governments<sup>26</sup> have enacted legislation banning the slaughter of cows. Shortly after these enactments, three cases were petitioned before the Supreme Court challenging their constitutional validity.<sup>27</sup> The petitioners were Muslims, mostly of the Quareshi community, who were traditionally engaged in the butcher's trade. The first among the three was the Quareshi case that challenged the legislations of the all three States, namely Bihar, Uttar Pradesh and Madhya Pradesh on the ground that they violated the constitutional right of the petitioners to carry out their trade.<sup>28</sup>

The petitioners also contended that these legislations infringed on their right to practice religion because Islam enjoined on every Muslim to sacrifice one goat on the Bakr-Id day (the festival of sacrifice) or seven persons together may even sacrifice one cow. They claimed that cow sacrifice was customary among Indian Muslims on Bakr-Id day and the practice was

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<sup>24</sup> CAD, vol. 7, pp. 577-578.

<sup>25</sup> Austin Granville, *The Indian Constitution: Cornerstone of a Nation* (Oxford, Clarendon Press, 1966) p..

<sup>26</sup> The Bihar Preservation and Improvement of Animal Act, 1956 (Bihar Act 2 of 1956); Uttar Pradesh Prevention of Cow Slaughter Act, 1955 (U.P. Act 1 of 1956); Central Province and Bihar Animal Preservation Act, 1949 (C.P & Bihar Act 52 of 1949) as amended by Madhya Pradesh Acts 32 of 1951 and 10 of 1956. etc.

<sup>27</sup> *Mohammad Hanif Quareshi v. State of Bihar*, AIR 1958 SC 731;

<sup>28</sup> Clauses (1) g and (6) of article 19, The Constitution of India

“certainly sanctioned by their religion.”<sup>29</sup> Therefore, cow sacrifice was part of their practice and profession of religion protected by article 25 of the Constitution.<sup>30</sup>

The Bihar Act placed a total ban on slaughter of all types of animals of the species of bovine cattle while the Uttar Pradesh Act did not protect the slaughter of buffaloes and the Madhya Pradesh Act allowed such slaughter under a certificate issued by certain authorities as mentioned in the Act. In dealing with this case, the Supreme Court traced the history of cow slaughter in India and indicated that in the past many Muslim kings prohibited cow slaughter even on the Bakr-Id day.<sup>31</sup> Chief Justice Mr. Das who delivered the judgment of the Court stressed that the Islamic law gives option to sacrifice a camel instead of a cow or even permits to give gifts of charity as a substitute for animal sacrifice on the Bakr-Id day. Chief Justice Mr. Das argued further, as claimed by the State, that many Muslims do not sacrifice a cow on the Bakr-Id day. He, moreover, pointed out that three members of the Gosamvardhan (cow protection) Enquiry Committee appointed by the Government of Uttar Pradesh were Muslims. All the three concurred with the unanimous recommendation of the Committee for total ban on cow slaughter<sup>32</sup>.

Mr. Das, C.J., who issued the judgment of the Court in the Quareshi case, stated that the Islamic law sanctioned cow sacrifice on the Bakr-Id day but did not enjoin it as an obligatory overt act in the practice and profession of Islamic faith and therefore, cow sacrifice was not essential. He said: We have, however, no material on the record before us which will enable us to say, in the face of the foregoing facts, that the sacrifice of a cow on that day is an obligatory overt act for a Mussalman to exhibit his religious belief and idea.

In examining this case, the Court acknowledged that Islam sanctioned cow sacrifice. Nevertheless, Mr. Chief Justice Das ascertained that it was not “an obligatory overt act for a Mussalman to exhibit his religious belief” because Islamic law provides alternatives. The Supreme Court noted that instead of a cow, Muslims could sacrifice a camel or do acts of charity on the day of Bakr-Id. The petitioners of the instant case pleaded that the impugned laws, if enforced, would affect adversely their trade and, therefore, violated the constitutional protection guaranteed under article 19(1) (g). The Court ruled that the laws only regulated

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<sup>29</sup> Mohammad Hanif Quareshi v. State of Bihar, AIR 1958 SC 731, at 740

<sup>30</sup> Ibid., at 740

<sup>31</sup> Ibid., at 740

<sup>32</sup> Ibid., at 740

and restricted these occupations, but did not deprive the petitioners of their right to practice them because butchers could still slaughter certain classes of bulls, bullocks, buffaloes, as well as sheep and goats.

It seems that the Supreme Court's ruling on this case (Quareshi case) had taken into consideration the Hindu religious sentiments attached to the legislation of banning cow slaughter as one of the reasonable elements. Certainly, the Court was equally concerned with communal riots often arising on account of cow slaughter. The honorable judges of the Quareshi case acknowledged, "While we agree that the constitutional question before us cannot be decided on grounds of mere sentiment, however passionate it may be, we, nevertheless, think that it has to be taken into consideration, though only as one of many elements, in arriving at a judicial decision as to the reasonableness of the restrictions"<sup>33</sup>.

### **Durgah Committee, Ajmer v. Syed Hussain Ali**

In the Durgah Committee case,<sup>34</sup> an appeal was made once again to decide on "the matters of religion" which is protected under clause (b) of article 26. The history of the present case is as follows: In 1955, the Parliament had passed the Durgah Khawaja Saheb Act,<sup>35</sup> to administer the Durgah and the endowment of the Durgah Khawaja Moinuddin Christi at Ajmer. This Durgah, which is a Muslim pilgrim centre built at the tomb of Khawaja Moinuddin Saheb who is a Christi saint, has been visited by both Muslim and Hindu pilgrims.

Sections 4 and 5 of the Durgah Khawaja Saheb Act of 1955, provided for the appointment of a Durgah Committee by the Central Government to administer and manage the Durgah endowment. According to the terms of sections 4 and 5 of the Act, the members of the committee nominated by the Government were to be Hanafi Muslims. Section 15 of the Act laid down the instruction that the Committee should follow the Muslim rules and tenets of the Christi saint in performing and conducting the established rites and ceremonies at the tomb of the Christi saint.

The Khadims (the traditional custodians of the tomb) challenged the constitutionality of the Act on the ground that it infringed upon their rights guaranteed in article 26(b), (c) and (d).

<sup>33</sup> Donald E. Smith, *op.cit.*, pp. 483-489; C.P. Jain, *op.cit.*, pp. 282-294; CAD, vol. 7, pp. 568- 581.

<sup>34</sup> Durgah Committee, Ajmer v. Syed Hussain Ali, AIR 1961 SC 1402.

<sup>35</sup> Durgah Khawaja Saheb Act, 1955 (Act 36 of 1955).

Their challenge succeeded in the High Court of Rajasthan.<sup>36</sup>In issuing the judgment, the Rajasthan High Court observed that the provisions for the appointment of the Committee members were ultra vires to the extent that the appointment of the Committee members avoided members of the Christi order who have the faith in the religious practices and rituals associated with the Christi saint shrine. Other provisions of the Act affecting the privileges and duties of the functionaries of the shrine were also declared violative of articles 19 and 25 of the Constitution. On appeal,<sup>37</sup>the Supreme Court found that the provisions of the said Act were not violative of the Constitutional rights guaranteed to religious communities. The Court observed that the Act regulated only the secular practices associated with religion, which were not essential or integral part of religion.

Mr. Justice P.B. Gajendragadkar who delivered the unanimous judgment of the Court said: 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 apt to be clothed with a religious form and may make a claim for being treated as religious practices within the meaning of article 26. Similarly even practices though religious may have sprung from merely superstitious beliefs and may in that sense is extraneous and unessential accretions to religion itself. Unless such practices found to constitute an essential and integral part of a religion their claim for the protection under Article 26 may have to be carefully scrutinized; 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.<sup>38</sup>

In delivering the judgment of the instant case, Mr. P. B. Gajendragadkar, J., who spoke for the Court, stressed that ‘matters of religion’ protected under article 26 (b) are those acts which are treated as essential and integral part by the religion. He cautioned that otherwise things that are not of religious concern can be brought under its ambit in such a way that religion can be used or manipulated to legitimate superstitious beliefs and practices which may harm instead of enabling human well being. This is the reason for the learned judge to

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<sup>36</sup> Syed Hussain Ali v. The Durgah Committee, AIR 1959 Raj 177.

<sup>37</sup> Durgah Committee, Ajmer v. Syed Hussain Ali, AIR 1961 SC 1402, at 1417

<sup>38</sup> Ibid., at 1415

strike a note of caution to differentiate ‘matters of religion,’ whose protection is guaranteed by the Constitution of India, from secular activities attached to religious practices.

#### Restriction on Religious Instruction in Educational Institution

Article 28 of the Constitution is specifically concerned with the question of religious instruction in three categories of educational institutions. It provides:

- (1) No religious instruction shall be provided in any educational institution wholly maintain out of State funds.
- (2) Nothing in clause (1) shall apply to an educational institution which is administered by the State but has been established under any endowment or trust which requires that religious instruction shall be imparted in such institutions.
- (3) No person attending any educational institution recognized by the State or receiving aid out of State funds shall be required to take part in any religious instruction that may be imparted in such institution or to attend any religious worship that may be conducted in such institution or in any premises attached thereto unless such person or, if such person is a minor, his guardian has given his consent thereto.

Clause (1) of the Article 28 refers to the first category of educational institutions, which is wholly owned by the State, where the prohibition to impart religious instruction is absolute. Neither the State nor a private agency may provide religious instruction in such institutions. Clause (2) of Article 28 deals with the second category of educational institutions in which the State does the administration in the place of a trustee. However, under this category the institution itself is established under a trust or an endowment wherein the terms of the trust or endowment require imparting religious instruction, which is protected under this clause. Clause (3) of Article 28 deals with the third category of educational institutions. These are owned and managed by religious denominations, but come under the system of grants-in-aid. These institutions are free to impart religious instruction. The provision under article 28 (3) assures the conscience clause by which the State protects the individual’s right to freedom of conscience by placing them above religion while at the same time the State acknowledges as well as protects religious pluralism.



**D.V.A College, Julandhar V. State of Punjab**<sup>39</sup> saying that the provisioned not imply that religious instruction would be given. A provision for an academic study of, and research in, the life and teaching or the philosophy and culture of any great saint of India in relation to, or their impact on, the Indian and world civilization could not be considered as providing for religious instruction. The court stated that religious instruction is that ; which is imparted for inculcating the tenent, the ritual, the observance, ceremonies and mode of worship of a particular sector denomination'.

## **AN ORIGINATING APPROACH TO RELIGIOUS FREEDOM**

The foregoing case studies regarding the free exercise of religion provide us the reason to conclude that the Constitution of India guarantees religious freedom, which is indigenous to Indian religious ethos and to its socio-cultural context so as to satisfy the multi- religious tradition of the country. Article 25 of the Constitution guarantees freedom of conscience. However, clause (2) of article 23 does not oblige exemption to conscientious objectors on religious scruples from compulsory service of the State when services of this sort are necessary for public welfare and for the security of the country.<sup>40</sup>

As interpreted by the Courts, article 25 (1) protects religious practices that are essential or integral to a religion. Owing to the delicate communal situation, which is endemic in some parts of the country, these practices are, however, subject to overriding regulatory process of the State under sub-clause (a) of clause (2) of article 25 that saves any State statutes to regulate and restrict secular transactions and activities associated with religious practices.<sup>41</sup>

Although religious practices protected under the provision of clause (1) of article 25 are free from State regulation unless detrimental to public order, morality, health and the fundamental rights guaranteed under Part III of the Constitution, nevertheless these practices cannot be

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<sup>39</sup> AIR 1971 SC 1731

<sup>40</sup> Article 23 (2) of the Constitution of India

<sup>41</sup> "Regulating or restricting any economic, financial, political or other secular activity which may be associated with religious practice." Article 25 (2)(a) of the Constitution of India.

protected if they contravene social welfare and reform measures initiated by the State as provided under sub-clause (b) of clause (2) of the same article.<sup>42</sup>

This dialectical process of freedom and regulatory measures amounting to the State's non-intervention and intervention associated with the practice of religion brings out clearly the fundamental dynamics of the philosophy of Indian secularism as enshrined in the secular provisions of the Constitution. It means that the Constitution is committed to protect values that enhance the flourishing of freedom of religion. Therefore, the free exercise of religion cannot supersede these objectives of the nation reposed in the Constitution.

## **JUDICIAL PERCEPTION OF THE RIGHT TO FREEDOM OF RELIGION**

The term 'religion' has not been defined in the Constitution and it is hardly susceptible of any rigid definition. The Supreme Court has defined it in number of cases.<sup>43</sup> A religion is certainly a matter of faith and is not necessarily theistic. Religion 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 part of religion and these forms and observances might extend even to matters of food and dress.<sup>44</sup> Subject to certain limitations, Article 25 confers a fundamental right on every person not merely to entertain such religious beliefs as may be approved by his judgment or conscience but also exhibit his beliefs and ideas by such overt acts and practices which are sanctioned by his religion. Now what practices are protected under the Article is to be

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<sup>42</sup> Nothing in this article shall affect the operation of any existing law or prevent the State from making any law – (b) providing for social welfare and reform or the throwing open of Hindu religious institutions of a public character to all castes and sections of Hindus." Article 25 (2) (b) of the Constitution of India.

<sup>43</sup> Commissioner of H.R.E. v. Lakshmindra, A.I.R. 1954 S.C. 282; Ratilal v. State of Bombay, A.I.R. 1954 S.C. 388; Taher Saifuddin Saheb v. State of Bombay, A.I.R. 1968 S.C. 662.

<sup>44</sup> Commissioner of H.R.E. Vs Lakshmindra, A.I.R. 1954 S.C. 282 at 290

decided by the courts with reference to the doctrine of a particular religion and include practices regarded by the community as part of its religion.<sup>45</sup>

In numerous cases the courts have commented upon, explained and interpreted the provisions of the Constitution on equality, non-discrimination and religious freedom. The decisions in most of these cases have been given in the contexts of the rights of particular religious communities or under special laws relating to such communities. A brief on major decisions follows.

In the opinion of Dr. B.R. Ambedkar, what constitutes a 'religion' or 'matters of religion' is to be ascertained by limiting to religious beliefs and ceremonials, which are held as essentially religious in a particular religion, which is under judicial review.

The Indian Constitution has no explicit definition of 'religion' or 'matters of religion'. Under the directive of article 32 of the Constitution, which provides the right to constitutional remedies, it is left to the Supreme Court to decide on the judicial meaning of such terms. In the early 1950s in a number of cases the Courts in India had been faced with the problem of defining 'religion' as given in article 25 (1) and 'matters of religion' as provided in article 26 (b). Researcher shall now proceed to examine some of those specific cases, which were appealed before the Supreme Court of India for judicial classification.

## **THE STATE'S ASSISTANCE TO FREEDOM OF RELIGION**

The activities of a welfare State are to be ordered in a manner conducive to provide proper facilities for the integrated development of its citizens including their religious needs. The secular provisions of the Indian Constitution recognize the importance of religion in people's lives, though they may not be applicable to all.<sup>46</sup>

The peculiar nature of religions in India, moreover, calls for various types of State support to religion. Unlike the ecclesiastical institutions, most of the religions in India require administrative and organizational systems capable of taking care of the enormous amount of wealth and landed property they possess. These are given to them from ancient times onwards

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<sup>45</sup> Seshammal Vs State of Tamil Nadu (1972) 2 S.C.C. 11

<sup>46</sup> Articles 25 and 26 of the Constitution of India

by way of endowment for religious, charitable and educational purposes in perpetuity. Under these circumstances, the State in India has assumed great responsibility for the proper administration of such religious institutions within the constitutional rights to religious freedom guaranteed to them.<sup>47</sup>

It has noted that at the same time, India has neither State religion nor it gives any constitutional recognition to Hinduism as the religion of the majority of the citizens. There is also no Ecclesiastical Department in the Union Government as existed during the British Raj. Hence, we will examine the various kinds of assistance the State in India provides to religion while being secular. This would enable us to see another important dimension of the political philosophy of Indian secularism, which stands committed to integral humanism affirming the dignity of human persons in their individual self-identities and their plural community identities.

## CONCLUSION

The Preamble of the Constitution of India and the various provisions of Part III and IV of the Constitution explicitly enunciate that the positive content of the political freedom consists in establishing an egalitarian social order based on the principles of the welfare State and Democracy. The Constitution of India guarantees religious freedom, which is indigenous to Indian religious ethos and to its socio cultural context so as to satisfy the multi religious tradition of the country. Article 25 of the Constitution guarantees freedom of conscience.

However, clause (2) of article 23 does not oblige exemption to conscientious objectors on religious scruples from compulsory service of the State when services of sort are necessary for public welfare and for the security of the country although religious practices protected under the provision of clause (1) of article 25 are free from State regulation unless detrimental to public order, morality, health and the fundamental rights guaranteed under Part III of the Constitution, nevertheless these practices cannot be protected if they contravene social welfare and reform measures initiated by the State as provided under sub-clause (b) of clause (2) of the same article.

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<sup>47</sup> In particular article 26 of the Constitution of India