

# ● SECULARISM & DEMOCRATIC GOVERNANCE: AN APPRAISAL



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## **Abstract**

*Practicing a secular Constitution after independence, wherein the fanatic and radical forces have always been aggressive to attack the secularism in India was not a plaything. The great 'Ganga Jamuni Tehjib' and idea of religious tolerance and 'Sarva Dharm Sambhav' which was conceived on Gandhian Model has always been firmly established by State. Indian Judiciary has been a qui vive of the sentinel of democracy and it has always kept the faith unflinching which has been reposed by a plural democracy like India. Freedom of thought, expression and belief are important elements of liberty and fraternity of the trinity (liberty, equality and fraternity) maintains the Constitutional tandem and creates harmony in society. India is a country, the cultural ethos of which is a symbol of unity in diversity. Practice of religions has two basic parts: the basic one which connects one to his supreme power and the second which is about worldly affairs and is contained in rituals. The second part which is worldly in nature must be regulated for establishment of a secular and egalitarian State. In this paper the author attempts to examine the various aspects of secularism and democratic governance in a descriptive and analytical manner.*

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## **Key words**

*Religion, Secularism, Democarcy, Profess, Propagate and Restrictions.*

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## **I INTRODUCTION**

India is a country which is very diversified in its religious orientation. India being a country has been a country of migrants as it openhandedly welcomed different religious and ethnic group from across the globe. The composite culture is an outcome of assimilation of different cultures which speaks very loudly about cultural heritage of India. Religion is a tool for the spiritual elevation of human being. The other fundamentalist aspect of religion has always been misused by pontiffs and demogouges of the civic society. The communal harmony is an asset for any country as it creates an amicable ambience of growth which is multifacted and optimum. The secular India is the need of the hour as it suits the best to cultural and religious disparity in India and it creates communal harmony by establishing an India which is religiously hamonized. In the initial years of working a democratic constitution India was firmly establishing secularism. In the seventies the preamble was amended to include the term 'secular' to make it more indelible in the constitutional governance of India. The freedom of religion and secularism was adopted by India with full vigour and colour. In practicing India has

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shown up that how multi-cultural and multi-religious communities can peacefully co-exist.

## II. COMPARATIVE OVERVIEW OF SECULARISM

### United States of America

The first amendment to the Constitution says "Congress shall make no law respecting or establishment of religion or...and prohibiting the free exercise thereof"<sup>1</sup>. In *Aversion v. Board of Education*<sup>2</sup> the United States Supreme Court held that, "The prohibition against establishment of religion has been interpreted to mean "neither a state nor the federal Government can setup a church. Neither can pass laws which aid one religion, aid all religious or prefer one religion over other. Neither can force nor influence a person to go to or remain away from church against his will or force him to profess a belief or disbelief in any religion. No person can be punished for entertaining professing religious beliefs or disbeliefs for church attendance or attendance. No Tax in any amount, large or small can be levied to support any religious activity...Neither a state nor the federal Government can openly or secretly participate in the affairs of any religious organizations or groups of vice-versa."

In *Davies v. Beason*<sup>3</sup> the USA Supreme Court held that, "The guarantee of free exercise of religion means that there are no restrains upon the free exercise of religion according to dictates of conscience or upon the free expression of religious opinions, some those imposed under the police power against acts inimical to the peace, good order and morals of society." In *Mccollium v. Board of Education*,<sup>4</sup> the US Supreme Court held that, "No religious instruments can be imported in state aided school premises even by non governmental bodies and beyond the school hour." In *Cantwell v. Connecticut*<sup>5</sup> the US Supreme Court held that, "The freedom of religion, propaganda or solicitism may be regulated by the State in the interests of public safety, peace, comfort or convenience or prevention of fraud provided the restriction is not arbitrary or excessive."

### Australia

Section 116 of Australian Constitution provides, "the commonwealth shall not make any law for establishing 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 common wealth"<sup>6</sup>.

### Eire

Article 44(2) of the Constitution of 1937 says that the freedom of conscience and free profession and practice of religion are subject to public order and morality, guaranteed to every citizen; the state guarantees not to endow any religion; and the state shall not impose any discrimination on the ground of religious profession, belief status. But the

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<sup>1</sup>Harry E. Grooves, Religious Freedom, 4 *JIL* 191 (1962)

<sup>2</sup>330 US 1 (1947)

<sup>3</sup>133 US 333 (1890)

<sup>4</sup>333 U.S. 203 (1948)

<sup>5</sup>310 U.S. 296 (1940)

<sup>6</sup>See also *Adelaide co. v. Commonwealth* (1943) *C.L.R.*116



Constitution does in fact recognise the special position of a particular religion namely the Roman Catholic religion. This is evident from its preamble.

### **USSR**

Article 124 of Soviet Constitution 1936 says "Freedom of religious worship and freedom of anti religious propaganda is recognised for all citizens".

### **France**

The Constitution of France 1946 and 1958 says "None ought to be disturbed on account of his opinion, even religious ,provided their manifestation does not derange the public established by law".

### **Japan**

Article 20 of the Constitution of 1946 says "Freedom of religion to all. . . No person shall be compelled to take part in any religious act, celebration rite or practice".

### **England**

There is no separation of church and state in England. The church of England (i.e. protestant church) is a established church and the patron of all its clergy with in the United Kingdom. The protestant church has been by the Act of Supremacy and uniformity by law established i.e. its entire oraginsation is sanctioned by law which establishes it and recogniges its property and other rights to the exclusion of any other system. The Official Church is entitled to public financial support e.g. from a financial levy on land owners called title legalised by statute Teith Act 1936. Only the bishop of the Church of England have seats in House of Lords. Ordinary law makes a distinction between Christian religion and other religion in the matter of blashmemy. Offence of blasphemy of Christian religion is punishable but an attack on other religion is not similarly punished. Anglican is official church and it is an established custom that king or queen must be a follower of catholic faith. Despite of this provisions Britain is considered a secular state because no absolute separation between religion and state church and state's both units are connected with human life.

## **III. INDIAN CONSTITUTIONAL FRAMEWORK**

Concept of secularism has been borrowed Europe we have expanded the concept according to special experiences. Unlike the west the purpose of secularism in India is to develop the feelings of friendliness and fraternity among the followers of different sects/religions. In India term secularism is not added in the Constitution. By 42nd amendment 1976 term secular was added in the preamble. In Hindu the equivelent term is 'Panthanirpantha' nor 'Dharmanirpheksha'. Panth and dharma are distinct. Panth means road while dharma denotes quality of certain thing as quality of fire is to burn.

A secular state has two aspects *i.e.* positive or negative. Negative aspects means that secular state conducts opposite to the state protecting special official religion as Pakistan protects only Islam religion. Positive aspect is that it provides all men (citizen or foreiner) an equal opportunity. In India the positive aspect of secularism has been emphasised. Before introducing the right to freedom of religion a committee was constituted and questions before committee were: Indian Constitution includes right to freedom religion?; should Indians be given freedom of conversion?; and will conversion destroy the democratic from of government?

After the debate of four month committee concluded that there is no danger by conversion in India. The prohibition of right to practice and propogate will affect adversely the Christian Community which will be ultimately violative right to equality. Purshotaam Das Tandon, K.T.Shah, Shayma Prasad Mukherjee, Sardar Vallabh Bhai Patel opposed the practice of conversion but their demand was denied as it was affecting the secular form of the Constitution. Articles 25 to 28 incorporate the right to freedom of religion.

Articles 25 to 28 guarantee fundamental right to freedom of religion to all the persons. Secularism is basic feature of the Indian Constitution. Secularism is derived from Latin term *Secularism* i.e. connected with religious matters. According to D.D.Basu secular state means "a state having no own religion and which treats with all religion equally". In this respect Mahatma Gandhi advocated for religious tolerance. It means that to give importance to own religion equally and simultaneously to give respect to other's religion. In India religious tolerance becomes of utmost importance/ pivotal because religion directs every affair of human life. There are so many religions in India in this contest religious tolerance also become important. But Pt. Nehru advocated for secularism in the form of political tendency. Indian Constitution adopts the concept of Pt. Nehru in respect of secular state. Secular state means that the state will remain in affairs of religion. It is neither pro God nor anti God. Before dealing secularism let us deal with freedom of religion guaranteed as fundamental right in Indian Constitution in Arts. 25 to 28.

### What is Religion?

In *Commissioner H.R.E v. L.T.Swamiar*,<sup>7</sup> the Indian Supreme Court held that, "Religion is a matter of faith. A religion is undoubtedly has its basis in a system of believes and doctrines which are regarded by those who profess that religion as conducive to their spiritual well being, but it is something more than merely doctrine or belief. A religion may not only lay down ethical rules for its followers to accept but may also prescribes rituals and observance, ceremonies and modes of worship which are regarded as integral part of that religion. These forms and observances might extend even to matters food and dress."

Right to freedom of religion as guaranteed under article has two parts: inner Part as Freedom of conscience, and outer Part as Right freely to profess, practice and propogate. Freedom of conscience connotes a persons right to entertain beliefs and doctrines concerning matters which are regarded by him to be conducive to his spiritual well being. In this connection, to profess means a religion means right to declare freely and openly one's faith. Whereas, practice should be treated as a part of religion, it is necessary that it be regarded by the said religion as its essential and integral part.

Certain practices even though regarded as religious may have sprung from superstitious beliefs and may in that sense be only extraneous to a religion. It is upon the Court to decide which practice is essential and integral and which is not. In *E.R.J. Swami v. State of T.N.*<sup>8</sup> Supreme Court held that the mode of appointment of Acharya in Temple was a

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<sup>7</sup>AIR 1954 SC 282

<sup>8</sup>AIR1972 SC 1586



secular and not a religious practice. In *Mohd. Hanif Ourashi v. State of Bihar*<sup>9</sup> the Supreme Court held that "Slaughter of cows is not an integral part of Islam Religion. A second marriage by a Hindu in presence of his first wife does not include an integral part of Hindu religion." In *Jagdishwara v. Police Commissioner, Calcutta*<sup>10</sup> the Supreme Court after going in to religious books and practices of Anand margis held that tandav dance in public is not an essential part of Anand Marga.

A person may propogate freely his religious views for the edification of others. 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. Religion is a matter of faith with individuals of communities and it is not necessarily theistic. In *PM.A.Metropolitan v. Mohan M. Marthoma*<sup>11</sup> Supreme Court Observed "Religion is a which binds spiritual nature of men to super natural being. It includes worship, belief, faith devotion etc. and extends to rituals.

A religion undoubtedly has its basis in a system become life and doctrine which are regarded by those who profess religion to be conducive to their spiritual well being. A religion is not merely an opinion, doctrine or belief. It has outward expression is acts as well. "Every religion must believe in a conscience and ethical and moral precepts. Therefore whatever binds a man to his own conscience and whatever moral and ethical principle regulate the lives of men believing in that theistic, conscience or religious beliefs that alone can constitute religion as understood in the constitution which fosters the feeling of brotherhood, amenity, fraternity and equality of all persons which find their foothold in secular aspect of the Constitution. Apex Court said that right to religion guaranteed under Article 25 &26 is not absolute and unfettered but subject to legislation by state limiting any activity-economic,financial,political and secular.

Science does not means scientific explanation of problems and scientific solutions. American, French and Russian revolutions have created new chapters in the human history. These revolutions have removed class discrimination and established liberty, equality, fraternity and freedom of religion. These ideas are not mere declarations. All countries adopted it and gave right to enforce it. These revolutions did not eliminate the religion. Court should encourage scientific thinking and supposes in scientific and traditional trend" Court will have to take initiative to protect religious liberty. Politics is based on religion. If a Law is undemocratic, inscientific and backward it should declared unconstitutional on the ground of reasonableness propounded in Maneka's Case.<sup>12</sup>

### **Concept of Secularism**

The concept of secularism is implicit in the preamble of the Constitution which declares the resolution of people to secure to all its citizens liberty of thought, belief, faith and worship. The 42<sup>nd</sup> Amendment Act 1976 has inserted the word secular in the Preamble. There is no mysticism in the secular character of state. A secular state was never considered as an irreligious or atheist state.

<sup>9</sup>AIR 1958 SC 731

<sup>10</sup>AIR 1984 SC 51

<sup>11</sup>AIR 1995 SC 2001

<sup>12</sup>M.Katju, Law, Religion, Politics in Society, 1994 AIRJ (133-137).

*St. Xavier College v. State of Gujarat*<sup>13</sup> it was held that there is mysticism in the secular character of the State. Secularism is neither Anti-god, nor Pro-god, it treats alike the devout the antagonistic the athiest. It eliminates God from the matters of the matters of the state and ensures that none shall be discriminated against on the ground of religion.

In *S.R. Bommai v. Union of India*<sup>14</sup> it was held that secularism is a basic feature of the constitution. The States treats equally all religious denominations. Religion is a matter of individual faith and cannot be secular activities. Secular activities can be regulated by the state by enacting a law. Ramaswami J. Observed that secularism is not anti-God. In the Indian context secularism has a positive content. The concept secularism separates spiritualism with individual faith. The State is neither anti-religion nor pro-religion. In the matter of religion, the State is neutral and treats every religion equally.

In *Santosh Kumar v. Secy. Ministry of Human Resources Development*<sup>15</sup> the Court said that state to ensure religion, does not make it either a religious or a theocratic State. Secularism represents faith born out of the rational faculties and it enables to see the imperative requirements for human progress in all aspects. Secularism neither anti-god nor pro-god, as it treats alike the devote, agnostic and the atheist.

In *Aruna Rai v. UOI*<sup>16</sup> it was held that secularism is susceptible to the meaning that is developing, understanding and respect towards different religions. Secularism can be practiced by adapting a complete neutral approach towards religions or positive approach by making one section of religions people to understand and respect religion and faith of another section of people. His Lordship quoted Gandhiji who said the real meaning of secularism is Sarva Dharma Sambhava meaning equal treatment and respect all religions. But we have misunderstood the meaning of secularism as Sarva Dharma Abhav meaning negation of all religions. In *State of Karnatka v. Praveen Bhai Thogadia*<sup>17</sup> it was held where speeches or actions are likely to trigger communal antagonism and hatred, prohibiting orders may be passed irrespective of position. Secularism means that state should have no religion of its own and each person whatever his religion must get on assurance from the state that he has the protection of law to freely profess, practice and propagate his religion and freedom of conscience.

*Bal Patil and others v. UOI*<sup>18</sup> it was held Hindu includes Jain. Our concept to put it in a nutshell is that the state will have no religion. The states will treat all religions and religious groups equally and equal respect without in any matter interfering with their individual rights of religion, faith worship. The constitutional goal is to develop citizenship in which everyone enjoys ful fundamental freedoms of religion, faith and worship and none is apprehensive of encroachment of his right by others in minority or majority.

## **Freedom Of Conscience And Free Profession, Practice And Propagation Of**

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<sup>13</sup> AIR 1974 SC 1389

<sup>14</sup> (1994) 3 SCC 1

<sup>15</sup> AIR 1995 SC 293

<sup>16</sup> AIR 2002 SC 3176

<sup>17</sup> (2004) 4 SCC 68

<sup>18</sup> (2005) 5 SCC 690



## Religion under Article 25 (1)

Subject to public order morality and health and to other provisions of this part all persons are equally per entitled to freedom of conscience and the right freely to profess, practice and propagate religion. These constitutional provisions guarantee religious freedom not only to individuals but also to religious groups. Secularism in India does not mean being irreligious. It means respect for all faiths.

## Restrictions under Article 25

It is noted that right to freedom of religion is not absolute. Art. 25 itself put restriction on this right. It can be explored as follows:

### **Public Order, Morality, Health of Public**

In the name of religion no act can be done against public order, morality and health of public. Sec 34 of Police Act prohibits the slaughter of cattle or indecent exposure one's person in public place. Prohibition on devdasis system can not be justified on the name of practice of religious rites. Right to propagate one's religious does not give right to any one forcibly convert any person to one's own religion. Focibly conversion of any person to one's own religion right disturb the public order hence could be prohibited by law. In *Rev Stainislaus v. State of M.P.*<sup>19</sup> The Supreme Court held that Acts prohibiting forcible conversion were meant to avoid disturbances to the public order by prohibiting conversion from one's religion to another in a manner reprehensible to the conscience of community.<sup>20</sup> In *Gulam Abbas v. state of U.P.*<sup>21</sup> It has been held that the direction given by the SC for shifting a property connected with religion to avoid clashes between two religious communities or he sects does not affect religious rights being in the intersect of public order.

In *Acharaya Jagdisawara Nand Avadhuta v. Commr. of Police Calcutta*<sup>22</sup> held that Tandav Dance in Procession or at public places by Anand Margis carrying Lethal weapons Human skulls was not an essentials religious rites of followers of Anand Marga and hence the order under Sec. 144 Cr.PC. prohibiting such procession does not violate right freedom of religion are in the interest of public order and morality.

### **Health**

*Church of God in India v. K.K.R.M.C. welfare Association*<sup>23</sup> the Supreme Court held that "Exercising the right to freedom of religion Under section 25 and 26 does not give anyone right to spread noise pollution and to disorder the public tranquility. In a civilised society no right is absolute. Right to freedom of religion is subject to public health, morality and public order." In *Javed v. State of Haryana*<sup>24</sup> the Supreme Court held that "Haryana Panchayati Raj Act does not violate Art. 25 and is constitutional. This Act disqualifies the persons, for Panchayat elections, who had more than two children."

<sup>19</sup>AIR 1977 SC 906

<sup>20</sup>See also *Satya Ranjan Manjhis v St of Orissa* (2003) 7 SCC 439

<sup>21</sup>(1984) 1 SCC 81

<sup>22</sup>AIR1984 SC512

<sup>23</sup>AIR 2000 SC 2773

<sup>24</sup>AIR 2003 SC 3057

### **National Anthem**

In *Bijoe Emanuel v. State of Kerala*<sup>25</sup> Supreme Court held that, "If saying National anthem is opposite to any religion then only standing in attention position will be enough."

### **Public Safety**

In *Md.H.Qurashi v. State of Bihar*<sup>26</sup> it was held by the Supreme Court that Sacrifice of cow on Bakrid day was not an essential part of Muslim religion and hence could be prohibited.

### **Social Evils**

In *State of Bombay v. Appa Mali*<sup>27</sup> Bombay High Court held an act prohibiting Bigamy was constitutional.

### **Regulation of Earthly Affairs of Religion**

Art 25(2)- Nothing in this Article shall effect 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 practices. (b) providing for social welfare or reform or the throwing open of Hindu religious institutions of a public character to all classes and sections of Hindus.

The question that matter is what is secular and what is religious because state is empowered under this article to secular activities. This again raises the question whether this activities. This again raises the question whether the activity sought to be regulated is regarded as an essential and integral part of the religion in question or not. Art 25(2)(a) contemplates state regulation of economical, commercial or political in character through these may be associated with religious practices.

Slaughtering of animals is connected with economic activity and law can regulate the same.<sup>28</sup> The mere fact that essential activities of religion involves expenditure or employment of priests and servants or use of marketable commodities would not make them secular activity.<sup>29</sup> In *Ismail farukhi v. Union of India*<sup>30</sup> it was held that "A mosque is not an essential part of the practice of religion Islam and Namaz by Muslim can be offered anywhere. State Government can acquire a Mosque in exercise of its sovereign power for public safety."

Explanation 1 says that working and carrying of Kripans shall be deemed to be included in the profession of sikh religion .

Explanation 2 In subclause (b) of clause (2) says that the reference of 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.

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<sup>25</sup>AIR 1987 SC 748

<sup>26</sup>AIR 1958 SC 731

<sup>27</sup>AIR 1952 Bom 84

<sup>28</sup>*Md.H.Quarashi v. State of Bihar* AIR 1958 SC 731.

<sup>29</sup>*Ratilal v. State of Bombay* AIR 1954 SC 388

<sup>30</sup>AIR 1995 SC 605





Venket challiah Commission<sup>31</sup> has recommended that in Article 25(2)(b) "providing for social welfare and reform are throwing open of Hindu, Sikh, Jain or Buddhist religious institutions of public character to all classes and sections of these religions" should be provided. This recommendation shows that these are not different sects of Hindu religion rather it has a distinct basis. Professor Tahir Mahmood. says this communities are minorities. But this view is not good and would lead to disintegration of the Country.

Article 25(2)(b) enables the state to take steps to remove the scourge of untouchability from amongst Hindu. The right is not unlimited. Thus no Hindu can claim that a temple must be kept open for worship at all hours of day and night or he should personally performs those religious services in a temple which the pujari alone is entitled to perform.

The Court by restricting the time of bursting the firecrackers has not in any way violated the religious rights of any person as enshrined under Article 25 of the Constitution. The festival of Diwali is mainly associated with pooja performed on the auspicious day and not with firecrackers. In no religious textbook is it written that Diwali has to be celebrated by bursting crackers. Diwali is considered as a festival of lights, not of noises.<sup>32</sup>

### **Freedom To Manage Religious Affairs under Article 26**

Subject to public order, morality and health, every religious denomination or any section thereof shall have the right- to establish and maintain institutions for religious and charitable purposes; to own and acquire and immovable property; and to administer such property in accordance with law.

#### ***Religious Denominations***

In Webster's Dictionary the word denomination has been defined as "collection of individuals classed together under the same name" Generally a religious sect or body having a common faith and organisation and designated by a distinctive value and name.

To form a religious denomination three conditions must be fulfilled: it is a collection of individuals who have a system of beliefs which they regard as conducive to their spiritual well being; they have a common organisation; and they have a common notice

#### ***Establish and Maintain***

Where an institution has been established by a religious denomination then it can claim the right to maintain the same as well. It includes the right to administer as well. In *Azeez Basha v. Union of India*<sup>33</sup> it was held that "A denomination has no right to maintain an institution which has not been established by it. Aligarh Muslim University has been established by statute and not by Muslims and they can not right to maintain."

#### ***Matters of Religion***

The term matters of religion used in Art. 26(b) is synonymous with their term religion in

<sup>31</sup>The National Commission to Review the Working of the Constitution, 2000.

<sup>32</sup>*In re Noise Pollution (V)* (2005) 5 SCC 733.

<sup>33</sup>AIR 1968 SC 662

article 25(1). The religious institutions of public character in Art.25(2)(b) includes an institution belonging to a religious denomination and such an institutions can thus be thrown open to all sections of Hindus under Art.25(2)(b). On the other hand the term religions in the Art.26(b) embraces religious practices which signifies that such questions as who are the persons entitled to enter in to temple for worship are matters of religion coming with the Article 26(b).

### **Right to Acquire and Manage Property**

Under Art.26(d) it can administer such property according to law. Reading Art.26(d) together it becomes obvious that a distinction has been drawn between the right to manage its religious denomination and right to manage its property. The former is a guaranteed right which can not be taken in accordance with law. State can not administration and manage of properties of such religious denominations but can not manage the affairs of religion. In *State of Rajasthan v. Sajjan Lal*<sup>34</sup> it was held that if however the right to administer the properties never vested in denominations concerned or had been validly surrendered by it then Article 26(d) could not be invoked by it. Article 26(c)(d) merely safeguard the continuance of the rights which the denomination already had. In *State of Orissa v. Chintamani Khuntia*<sup>35</sup> it was held that collecting fruits and flowers and money by worker of temple and distributing those among themselves is not a religious matter nor it is their religious right.

*Adi SaivaSivachariyargal Nala Sangam v. The Government of Tamil Nadu*<sup>36</sup> Supreme Court addressing the issue of appointment of Archakas discussed about validity of a law providing for appointment of Archakas held that, "That the freedom of religion under Articles 25 and 26 of the Constitution is not only confined to beliefs but extends to religious practices also would hardly require reiteration. Right of belief and practice is guaranteed by Article 25 subject to public order, morality and health and other provisions of Part-III of the Constitution. Sub-Article (2) is an exception and makes the right guaranteed by Sub-article(1) subject to any existing law or to such law as may be enacted to, inter alia, provide for social welfare and reforms or throwing or proposing to throw open Hindu religious institutions of a public character to all classes and sections of Hindus. Article 26(b) on the other hand guarantees to every religious denomination or section full freedom to manage its own affairs insofar as matters of religion are concerned, subject, once again, to public order, morality and health and as held by this Court subject to such laws as may be made under Article 25(2)(b). The rights guaranteed by Articles 25 and 26, therefore, are circumscribed and are to be enjoyed within constitutionally permissible parameters. Often occasions will arise when it may become necessary to determine whether a belief or a practice claimed and asserted is a fundamental part of the religious practice of a group or denomination making such a claim before embarking upon the required adjudication. A decision on such claims becomes the duty of the Constitutional Court. It is neither an easy nor an enviable task that the courts are called to perform. Performance of such tasks is not enjoined in the court by virtue of any ecclesiastical jurisdiction conferred on it but in view of its role as

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<sup>34</sup>AIR 1975 SC 706

<sup>35</sup>(1997) 8 SCC 22

<sup>36</sup>AIR 2016 SC 209; (2016) 2 SCC 725.



the Constitutional arbiter. Any apprehension that the determination by the court of an essential religious practice itself negatives the freedoms guaranteed by Articles 25 and 26 will have to be dispelled on the touchstone of constitutional necessity. Without such a determination there can be no effective adjudication whether the claimed right it is in conformity with public order, morality and health and in accord with the undisputable and unquestionable notions of social welfare and reforms. A just balance can always be made by holding that the exercise of judicial power to determine essential religious practices, though always available being an inherent power to protect the guarantees under Articles 25 and 26, the exercise thereof must always be restricted and restrained.

The Apex Court did not allow the burial of a Muslim Baba in School premise under right to religion.<sup>37</sup> Haj Pilgrimage was examined in *Union of India v Rafique Shaikh Bhikan*<sup>38</sup> and asked the Government to reduce the subsidy within ten years on Haj. The court held that conducting NEET exam for medical aspirants does not violate Articles 25 & 26.<sup>39</sup>

### **Taxation and Religion**

Article 27 provides that, "No person shall be compelled to pay taxes, the proceeds of which are specifically appointed in payment of expenses for the promotion or maintenance of any particular religion or religious denomination." Article 27 does not prohibit to impose tax for public service though it is related to any religious denomination. In *Ramchandra v. State of West Bengal*<sup>40</sup> it was held that If any tax is imposed for promoting health, morality and public order, on pilgrimages, it will be valid. In *Raja Bir Kishore v. State of Orissa*<sup>41</sup> to maintain water tanks of Lord Jaggannath Temple, tax was imposed by State government which was held valid on ground of public health, clean water for drinking. In *Surksh Chandra Chiman Lal Shah v. Union of India*<sup>42</sup> supporting a cultural function related to Lord Mahaveer was not held a violation of Article 27 and 28. Celebration of the 25000<sup>th</sup> anniversary of the attainment of salvation of the founder of Jain religion, Mahavira.

### **Freedom as to Attendance at Religious Instruction or Religious Worship in Certain Educational Institutions under Article 28**

It reads as follows:

1. No religious instruction shall be provided in any educational institution wholly maintained out of State funds.
2. Nothing in clause (1) shall apply to 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 institution
3. No person attending any educational institution recognised by the State or receiving aid out of state funds shall be take part in religious instruction that may be imparted in

<sup>37</sup>Mohd Hamid v Badi Masjit Trust 2011 (8) SCALE 2

<sup>38</sup>AIR 2012 SC 2453

<sup>39</sup>*Christian MedicalCollege v. Union of India*, (2014)2 SCC 314

<sup>40</sup>AIR 1976 Cal 164

<sup>41</sup>AIR 1964 SC 1501

<sup>42</sup>ILR 1975 Delhi 32

such institution or any religious worship that may be conducted in such institution or in premises attached thereto unless such person or if such person is a minor his guardian has given consent thereto.

With regard to religious instructions Article 28 makes a distinction between educational institutions: wholly maintained out of State funds; established under any endowment or trust but administered by the state; and recognised by state or receiving aid out of state funds.

In respect of educational institutions wholly named by the state funds, clause(1) prohibits all together giving of religious instruction. As regards the institution in category (2)religious instruction can be imparted if the endowment or trust so requires. As to those institution which falls in category (3)there is no prohibition in giving instruction or conducting religious worship, but there can not be any compulsion on attendance.

In explaining the reasons for prohibiting religious instruction Dr. Ambedkar discussed three main reasons as Art.27 prohibits the utilisation of public funds raised by taxes for the benefit of any particular community; multiplicity of freedom of religion; all religious so far as there mutual relations are concerned, they are anti social, one religion claiming that its teaching constitutes the only path for salvation, that all other religion are wrong.

In *D.A.V. College Jalendhar v. State of Panjab*<sup>43</sup> it was held that Sec.7 of Guru Nanak University Act which enjoyed the Sate to make the provision to study and research on the life and teachings of gurunakwas questioned on ground at the university was maintained wholly out of State funds. The Court did not accept his argument because what sec 4 enjoyed the university was to encourage an academic study of life and teachings of Gurunanak which need not necessarily amount to religious instructions or promotions of any particular religion. In *PM. Bhargava and others v. UGC And others*<sup>44</sup> It was held that study of astrology in universities does not amount to religious instruction. For it a expert committee was constituted which did not give any report that this violates any Constitutional provision. This is not against doctrine of secularism.

In *Santosh Kumar v. Secretary Ministry of Human Resources Development*<sup>45</sup> held that introduction of Sanskrit language as a subject in CBSC is not against as it is mother of all Aryan languages. The Court directed the CBSC to make necessary amendments in the syllabus within three months to make Sanskrit an elective paper for nurturing our cultural heritage. Without learning Sanskrit language it is not possible to decipher Indian Philosophy, culture and heritage.

In *Aruna Rai v. Union of India*<sup>46</sup> the validity of new National Education Policy 2002 which provided for value based education to school children based on basis of all religions was challenged as violative to Article 28 anti secular. The Court held that study of religions in school education is not against secular philosophy. In *Bramh Samaj Education Society*

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<sup>43</sup>AIR 1971 SC 1737

<sup>44</sup>AIR 2004 SC 3478

<sup>45</sup>AIR 1995 SC 293 SC

<sup>46</sup>AIR 2002 SC 3176



*and others v. State of west Bengal and others*<sup>47</sup> it was held that every religious institution has right to establish educational institution but the right is subject to public order, morality and health. Merely on the ground that petitioner do not receive funds from Government. This autonomy can be prohibited absolutely neither the institution can be regarded as government undertaking.

It was reiterated in *I. Nelson v. Kallayam*<sup>48</sup> Pastorate that rights under Arts. 25 and 26, are not absolute and unfettered. Right to manage does not carry with it a right to mismanage and therefore in cases of mis-management, courts can oversee its function.

### **Conversion**

In *M. Chandra v. M. Thangamuthu*<sup>49</sup> the court held that to prove conversion from one religion to another, two elements must be satisfied: (i) there has to be a conversion and (ii) acceptance into the community to which the person had converted.

In *Lily Thomas v. UOI*<sup>50</sup> it was held that freedom guaranteed under Art. 25 of the Constitution is such freedom which does not encroach upon the similar freedom of other persons. What Article 25 grants is not right to convert another person to one's own religion by exposition of its. This Article postulates that there is no fundamental right to convert another person to own religion because a person purposely convert another person to his own religion it would be an attack on freedom of conscience guaranteed to all citizens of country alike.

## **IV. CONCLUSION**

Practicing a secular Constituion in plural democracy like India was not easy however the organs of state has successfully curtailed the radical and fanatic forces in India and maintained the Constitutional tandem wherein 'we the people of India' have enjoyed the freedom of thought, expression and belief like no one on this planet could dare to enjoy. The right to religion has various tricky tentacles which has been dealt by organs of state like religion and extra-religious affairs, regulation of non-religious affairs, management of deities' wealth and properties, conversion, cultural unity, untouchability etc. The Constitution of India envisages an eagalitarian society which is religiously tolerant and sober. The secular character of India is well founded in the Constitution in its various provisions. The constitutional framework with the help of Apex Court has steered the country in the right direction which is laying the edifice of a shining and sumptous India. The communal harmony created with the help of constitution and Supreme Court is not only vital but sine quo non in the diversified ambience of India.

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<sup>47</sup>AIR 2004 SC 36

<sup>48</sup>2006 (9) SCALE 245

<sup>49</sup>(2010) 9 SCC 712.

<sup>50</sup>(2000) 6 SCC 224