

**Secularism — The Constitutional Norm of State Exclusion from Religion**

*Dr. B. K. Ravindra,<sup>1</sup>*

**Abstract**

*Whilst the constitutional framers have not explicitly mentioned 'secularism' in preamble part of our constitution, they have brilliantly laid it silently with liberty of thought, belief and faith. However, an explicit reference was required later through 42nd amendment. A reading of the preamble at the gaze of fundamental right to religion, makes it clear that, whilst State has no official religion, it must facilitate the individual right to enjoy this fundamental freedom. Since the constitution itself provides the required restrictions to prevent any harm which may arise out of this freedom State has limited power to intervene in such fundamental right. This paper examines the constitutional and judicial stand on State's intervention to the norm of Secularism, to enhance the constitutional meaning of right to religion.*

**Keywords:** *secularism, preamble, religion, State intervention, role of State, equality, religious conversions.*

**Introduction**

The Constitution Makers realized that secularism is not only integral to a democratic structure but is its very foundation. But in the Indian social context, the role of the State in ensuring conditions conducive for equal religious freedom for all, morality and social welfare Justice was understood by them as requiring a pattern of state-religion relation different from strict neutrality. As viewed by P.B. Gajendragadkar J., "The Indian concept of secularism recognizes not only the relevance and validity of religion in life, but seeks to establish a rational synthesis between the legitimate functions of religion and the legitimate and expanding functions of the State."<sup>2</sup>

**The Constitutional Scheme**

The Preamble to the Constitution not only refers to the goal of ensuring liberty of thought, belief and faith but also constituting a secular state. The policy of secular state is clearer when the equality clauses expressly prohibit discrimination on the ground of religion. The constitutional guarantee of religious freedom is spread over Articles 25 to 28<sup>3</sup>. They focus on two principal concepts, viz. free exercise of religion and non-establishment of religion.

Several aspects of free exercise of religion are pointed out in Articles 25 and 26. Art. 25 (1) guarantees to all persons equal entitlement to freedom of conscience and the right freely to profess, practice and propagate religion. Article 26 confers upon every religions denomination or any section thereof 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 immoveable property and (d) to administer such property in accordance with law. All these rights are subject to public order, morality and health concerning which state has the power of making laws. On the other hand, the policy of non-establishment of religion is reflected in Arts.27 and 28. Article 27 prohibits levying of a tax, the proceeds of which are meant specifically for payment of expenses for the promotion or maintenance of any particular religion or religious denomination. As per Article 28 no religious instruction shall be provided in any educational institution wholly maintained out of states funds.

Article 25(2)(a) recognizes state's power of making laws for regulating or restricting any economic, financial, political or other secular activity which may be associated with religious practice. Moreover, as per

<sup>1</sup>Dean, Alliance School of Law, Alliance University.

<sup>2</sup>Gajendragadkar, Secularism and the constitution of India, University of Bombay 1952.

<sup>3</sup>Article 26 - Freedom to Manage religious affairs, Article 25 - Freedom of conscience Practice and propagate religion, Article 27 - Freedom as to payment of taxes for promotion of any particular religion.

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Article 25(2)(b), State has the power of making laws providing for social welfare and reform or the throwing open of Hindu religious institutions of public character to all classes and sections of Hindus. Because of these reformist roles of the state, the relation between religion and state has obtained a distinct character instead of confining to mere non establishment approach.

There are also Directive Principles of State Policy<sup>4</sup> which obligate upon the State to bring uniform civil code and protect monuments. The Fundamental Duties<sup>5</sup> imposed upon every citizen of India to cherish and follow the noble ideals which inspired freedom struggle (which no doubt include religious tolerance), to promote harmony and the spirit of common brotherhood amongst all people of India transcending religious, linguistic and regional or sectional diversities, to renounce practices derogatory to the dignity of women and to value and preserve the rich heritage of our composite culture contemplate building the attitude of religious tolerance in the very conduct of people. Thus relations between religion and state are moulded by several constitutional provisions which reflect the typical socio-cultural patterns and approaches of Indian secularism.

### **State and Religion: It's Relationship**

Fifty years of constitutional development in India relating to this important sphere has unfolded a number of key issues that posed tall challenges about fair relation between State and Religion. They can be listed for detailed discussion as follows:

(i) Permissibility and extent of state's (including judiciary) power to determine the essential aspects of religion as distinct from the inessential ones; (ii) Extent of state's power of intervention to ensure equality of opportunity in the matter of religious freedom; (iii) State's role in protecting public order, morality and health and its implication for religious freedom; (iv) State's role in protecting the freedom of conscience vis-a-vis freedom of propagating religion in the con-

text of conversion; (v) Permissibility of State's intervention in the matter of excommunication by religious bodies; (vi) State's role in expanding access to places of worship through temple entry legislations and in bringing other social reforms; (vii) Desirability of State's control over secular activities connected with religion; (viii) Extent of state control on administration of institutions established by religious denominations for charitable and religious purposes and over their property; (ix) Permissibility of raising or spending public revenue for religious purpose.

### **Distinguishing the Essential Aspects of Religion from the Non-Essential Ones:**

#### **The State's Role**

Determining the true scope of a religion is a threshold issue in claiming religious freedom in constitutional litigations on the subject. Since a tradition bound society witnesses intermeshing of religious activity with various other activities, this task is a complicated one. To allow the religions an absolute autonomy to decide the boundaries of their religion is to allow any act to be included by them irrespective of its relevance or irrelevance for their religion. In the context of religious conflicts, such an approach is problematic too. On the other hand, if the state bodies like judiciary were to decide such issue, a question would arise whether a religion is what the judiciary lays down. The propriety and competence of judiciary to decide religious community's intimate choices is questionable in multi-religious society. A via media approach carved out by the Indian judiciary has established a principled distancing between the state and religion. The three approaches adopted by the judiciary were: i) tenet approach, which suggests determination of essential parts of religion with reference to tenets of the concerned religion; ii) community belief approach, which relies upon the religious community's belief for the purpose; and iii) integrated approach which not only combined these two approaches but also scrutinized from the viewpoint of constitutional spirit of secularism.

<sup>4</sup>Article 44 - State shall endeavour to secure a uniform civil code throughout the territory of India.

<sup>5</sup>Article 51 A - Fundamental duties of 51(a) to 51(e).

<sup>6</sup>AIR 1956, SC 282.

The Supreme Court in *Laxmindra Thirtha Swamier*<sup>6</sup> propounding the tenet approach observed, “In the first place, 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 should be daily recital of sacred texts or oblations to the sacred five, 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). What article 25(2)(a) contemplates is not regulation by the State of religious practices as such, the freedom of which is guaranteed by the constitution except when they run counter to public order, morality or health, but regulation of activities which are economic, commercial or political in their character though they are associated with religious practices”.

In *Ratilal's Case*<sup>7</sup> the Supreme Court observed, “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, 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 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 to matters of food and dress”.<sup>8</sup>

It was reiterated in *Durgah Committee Vs. Hussain Ali*<sup>9</sup>, “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”.

In the course of applying the tenet approach, since judiciary acted by concentrating on the religious text of the concerned religion theoretically there was no antagonism between state and religion. It could solve simple problems about observation of textually prescribed ceremonies like offering of worship or gift. But, dichotomy arose when religious belief of people was different from the text. When religious practice is not based on religious text but is firmly based on community's faith and belief tenet approach could not provide appropriate solution. Judiciary's insistence on textual support would in such situation interfere with the religious freedom. The Court developed this alternative, reasoning from the perception of the followers. For example, in *Jagadeeshwarananda*,<sup>10</sup> while rejecting tandava dance as an essential part of Anandamarga religion the Supreme court was influenced by the absence of adequate textual support for the ritual and overlooked the widely prevalent practice amidst the followers of Anandamarga religion. On the other hand, undue emphasis on the text would approve or glorify certain practices, which may be antithetical to human rights. But subordination of Art. 25 to other provisions of Part III do not permit such a result. In *Saifuddin Saheb*<sup>11</sup>, although the tenet approach was followed in determining the right of the denomination to excommunicate any member of the religion, it was not tempered by an approach of looking to the religious freedom of individual member.

<sup>7</sup>AIR 1954, SC 388.

<sup>8</sup>*Ibid.*

<sup>9</sup>AIR 1961, SC 1402.

<sup>10</sup>AIR 1952, SC 522.

<sup>11</sup>AIR 1962, SC 853.

<sup>12</sup>AIR 1958, SC 255.

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The second approach relies on communitarian conscience. As viewed by Venkatarama Aiyer J for the Supreme Court in *Venkatramana Devaru*<sup>12</sup> (Temple Entry Case) case, “the matters of religion in Art. 26(b) include even practices which are regarded by the community as part of its religion”. While applying this test in *Govindlalji*<sup>13</sup>, Gajendragadkar, J. struck a note of caution that the test may breakdown when conflicting views and evidences are prevalent about religious practice. Hence, he regarded that courts will have to “depend upon the evidence adduced before it as to the conscience of the community and the tenets of religion”.

As held in *Durgah Committee*<sup>14</sup>, this was necessary to exclude those practices which, “though religious may have sprung from merely superstitious beliefs and may in that sense may be extraneous and unessential accretions to religion itself.” While in the above cases along with the conscience of the community religious tenets were also taken into account. In *S.P. Mittal*<sup>15</sup> the minority view of Justice Chinappa Reddy relied solely on community conscience in respect of religious tenets for holding the Aurbindos followers constituted a separate religious denomination. The majority agreed to decline on this. In *Bijoe Emmanuel*<sup>16</sup> Justice Chinappa Reddy for the Supreme Court, although dealt the issue through the community conscience approach, made elaborate reference to religious tenets of Jehovah Witnesses to uphold their right to remain silent. Similarly in identifying thandava dance as an essential part of Ananda marga religion the Calcutta High Court in *jagadishwarananda*<sup>17</sup> applied the community conscience approach along with reference to religious tenets.

In *S. Mahenderan*<sup>18</sup>, the Kerala High Court drew support solely from community conscience as reflected in

oral evidences adduced by various devotees for the religious practice of not permitting women in the age group of 12 to 50 from entering the Sabramali temple during the festival season. In *Ismail Farqui*<sup>19</sup> the Majority of the Supreme Court.

While holding that, “A mosque is not an essential part of the practice of the religion of Islam and Namaz by muslims can be offered anywhere, even in open”. It appears that the court was looking to the conscience of the community when it observed, “while offer of prayer or worship is a religious practice, its offering at every location where such prayers can be offered would not be an essential or integral part of religion or religious practice unless the place has a particular significance for that religion so as to form an essential or integral part thereof”. It is submitted in the background of sensitive issues challenging communal harmony and peace; sole reliance on community conscience will not be conducive for a secular atmosphere.

The third approach regards that not only the religious tenets and communitarian conscience, but also considerations to exclude superstitious beliefs, narrow mindedness and sectarianism should be employed in identifying essential part of religion. Gajendragadkar J. in *Durgah Committee*<sup>20</sup> case cautioned that the courts should rationally examine the beliefs and exclude superstitious ones from becoming essential part of religion. This assumed the role of the court and it is subject to criticisms by H.M. Seervai as violating the secular principle. In some of the cases relating to temple entry, defilement of place of worship and service of Archaka, the third approach is applied.

In *A.S. Narayana*<sup>21</sup> while the leading judgement of Ramaswamy J. made reference to religious tenets and the community conscience to hold that hereditary Ar-

<sup>13</sup> *Ibid.*

<sup>14</sup> AIR 1961, SC 1402.

<sup>15</sup> AIR 1983, SC 1.

<sup>16</sup> (1984) 5 scc 615.

<sup>17</sup> (1984) 4 Scc, 522.

<sup>18</sup> AIR 1976, P. No. 51.

<sup>19</sup> 1994, 6 Scc, 522.

<sup>20</sup> AIR 1961, SC 282.

<sup>21</sup> AIR 1996, SC 1765.

chakavatam is not an essential part of religion, the concurring but separate judgement of Hansaria J equated religious freedom under Article 25 to a broader concept of Dharma where there would be no place for blind beliefs, narrow mindedness, sectarianisms and dogmas. It is submitted such a role of a Judge to exclude blind faiths, etc. compels introduction of conscience of the judge in disregard of the conscience of the founder or followers. Since there are adequate grounds of restraint under Article 25 like public order, morality, health and social welfare they can be resorted to in excluding the undesirable blind faiths. What may appear to be religious for one set of people may be blind faith for another set of people.

However, the advantage of justice Hansaria approach is that promoting of scientific spirit and upholding the values of humanism would be possible by gathering support from various provisions of the constitution.

In *A.S. Naryana* right to appointment of Archaka on hereditary basis was not regarded as an essential aspect of religious freedom. Going a step ahead in a judgement dated 5th October 2002 the supreme court<sup>22</sup> said that a non-brahmin who is properly trained and well versed in the rituals, could be appointed as Santikaran- Pujari. The bench comprised of Justice Rajendra Babu and Justice Dorai Swamy upheld the appointment of a non-brahminas pujari in Kongoopily Nerikode Shiva Temple at Alangad village in Ernakulam, Kerala. The court said that required qualifications to become a priest are to perform the rituals and conduct pujas with mantras as necessary to be recited for the particular diety. If a non-brahmin possesses the necessary qualification nothing should prevent him from becoming a priest. It is submitted that this Judgement is consistent with concept of Social Justice.

It cannot be inferred from the above that in none of the above approaches judiciary or state tried to arrogate to itself the power of dictating terms to the religions nor did the extent of religious freedom depend on mercy of the state. It is only in cases of conflicts that judiciary acted as an umpire and that too with an attitude of tolerance, reason and justice.

### **Ensuring Equality in Religious Freedom: State's Role**

In *M. Ismail Faruqui Vs. Union of Indi*<sup>23</sup>, it was observed that, "The concept of secularism is one facet of the right to equality woven as the central golden thread in the fabric depicting the pattern of the scheme in our constitution".

The constitutional scheme regarding equality starts with Article 14 of the Indian Constitution which guarantees equality before law and equal protection before them<sup>24</sup>. The guarantee is further elaborated by providing that the "State shall not discriminate any citizen on the ground of religion, race, caste, sex or place of birth" or any of them", nor shall any citizen only on the above grounds or any of them<sup>25</sup> be subjected to any disability, liability, restriction or condition with regard to access and use of various places of public resort<sup>26</sup>. It is further provided that "there shall be equality of opportunity for all citizens in matters relating to employment or appointment to any office under the state,<sup>27</sup> and that, discrimination shall not be made in these respects on the ground of religion race or caste<sup>28</sup>. Again religion, race or caste cannot be used for denying admission to any citizen to an educational institution which is either maintained by the state or receives aid out of state funds<sup>29</sup>. For purposes to election to parliament and state legislatures the constitution provides for one general electoral roll and religion, race,

<sup>22</sup>The Hindu, Sunday, October 6, 2002.

<sup>23</sup>(1994) 6 SCC 360.

<sup>24</sup>Equality before law and equal practice before law.

<sup>25</sup>Article 15 of Indian Constitution.

<sup>26</sup>Article 15(2) of Indian Constitution.

<sup>27</sup>Article 16(1) equality of opportunity in the field of public employment.

<sup>28</sup>Article 16(2) of Indian Constitution.

<sup>29</sup>Article 28(2) of Indian Constitution.

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caste, sex cannot be the ground for excluding any person from such electoral roll<sup>30</sup>. Though the constitution itself does not deal with the question of election to local and other bodies, it has been held that it would be unconstitutional to hold elections to any such body on the basis of separate electorates for the members of different religious communities.<sup>31</sup>

The Constitution requires that the important offices of the state such as that of the President<sup>32</sup>, Vice President<sup>33</sup>, Judges of the High Court<sup>34</sup> and judges of the Supreme Court<sup>35</sup>, Attorney General<sup>36</sup>, Advocate General<sup>37</sup> shall be filled by the citizens of the country but citizenship itself cannot be denied on the basis of religion race, caste<sup>38</sup> and the fundamental duties are applicable to all citizens<sup>39</sup>.

However, this constitutional scheme of equality would become meaningless without abolition of untouchability<sup>40</sup>, which has been the bane of Indian Society since ancient times. Accordingly, the constitution prohibits untouchability and its practice in any form punishable under law.

To conclude with the words of Justice Jeevan Reddy in *S.R. Bommai Vs. Union of India*<sup>41</sup>. While the citizens of this country are free to profess, practice, and propagate any religion, faith or belief for the state the

religion, faith or belief is immaterial, to it all are equal and are entitled to be treated equally. This equal treatment is possible only when the state does not encourage one religion at the cost of the other. The constitution promises Social Justice, liberty of belief and faith, equality of opportunity and this can be attained if the state upholds the hall mark of equality.

In *Ismail Faruqui case*<sup>42</sup> two principal challenges upon the constitutionality of the Ayodhya Act were based on right to equality. Firstly, it was argued that section 7(4)<sup>43</sup> of the Act which provided for management of the acquired area by the central Government to “ensure that the position existing before the commencement of the Act in the area in which the structure stood is maintained” had created a slant in favour of Hindus and negated the rights of Muslims, and hence violated the right of equality. The majority of the Supreme Court first referred to the comparative uses of the disputed area by the two communities and the facts leading towards the position on 7th January 1993. The court found that the muslims had ceased to worship in the disputed structure ever since 1949 and that the rights of the Hindus to worship idols in the disputed site became a reduced right of worshipping the idol by one pujari alone after the demolition. The demolition had adverse impact upon both the re-

<sup>30</sup> Article 3(23) of R. P. Act.

<sup>31</sup> Nair SukhDas Vs. State of U.P. AIR 1952, SC 384.

<sup>32</sup> Article 58(1) of Indian Constitution.

<sup>33</sup> Article 63(1) of Indian Constitution.

<sup>34</sup> Article 217(2) of Indian Constitution.

<sup>35</sup> Article 124(3) of Indian Constitution.

<sup>36</sup> Article 76(1) read with Article 124(3).

<sup>37</sup> Article 165(1) read with Article 217(2).

<sup>38</sup> Izhar Ahmed Vs. Union of India AIR 1962 SC 1052.

<sup>39</sup> Supra note No. 9, Art 51-A.

<sup>40</sup> Article 17 abolition of untouchability.

<sup>41</sup> 1994 6 SCC 362.

<sup>42</sup> Supra Cit No. 18.

<sup>43</sup> 7(2) In managing the property vested in the Central Government under Section 3, the Central Government or the authorised person shall ensure that the position existing before the commencement of this Act in the area on which the structure (including the premises of the inner and outer courtyards of such structure), commonly known as Ram Janma Bhumi-Babri Masjid, stood in Village Kot Ramchandra in Ayodhya, in Pargana Haveli Avadh, in Teshil Faizabad Sadar, in the district of Faizabad of the State of Uttar Pradesh is maintained.

<sup>44</sup> Section 6, (1) Notwithstanding anything contained in Sections 3,4, 5 and 7, the Central Government may, if it is satisfied that any authority or other body, or trustees of any trust, set up on or after the commencement of this Act is or are willing to comply with such terms and conditions as that Government may think fit to impose, direct by notification in the Official Gazette, that the right, title and interest or any of them in relation to the area or any part thereof, instead of continuing to vest in the Central Government, vest in that authority or body or trustees of that trust either on the date of the notification or on such later date as may be specified in the notification.

<sup>45</sup> Supra Cit No 41.

ligions. The Court read sections 6,<sup>44</sup> and 7 ((2))<sup>45</sup> together and gathered the legislative intention that the vesting of disputed area upon the Central Government was not absolute, but that the Central Government was a statutory receiver of the area with an obligation of smooth handling over the area with the right of way to the party successful in litigation. Hence the majority concluded that the freeze created by the Act," does not create a new situation more favourable to the Hindu Community amounting to conferment on them, of a larger right of worship in the disputed site than that practiced till 6th December 1992".<sup>46</sup> And accordingly upheld sec. 7(2)<sup>47</sup>. Ahmedi and Barucha JJ in dissent regarded that the investment of the area in the Central Government was for indefinite period as there was no clear indication about the duty to transfer the area to any party and hence the statutory freeze resulted in a slant in favour of Hindus. It is submitted that the majority was right in looking to the spirit of the legislation and preferring a larger purpose to a strict literal interpretation tending to promote factionalism and discord. If the Act had been invalidated as a whole, it would have revived the larger rights of Hindus, obstructing the efforts of restoring communal harmony.

Secondly it was contended that the section 4(3)<sup>48</sup> of the Act, which abated all the suits, appeals or other proceedings in respect of right, title and interest in the acquired area in any courts or tribunals or authorities is violative of rule of law in the absence of alternative dispute resolving mechanism. The court unanimously upheld this contention and quashed section 4(3) after noting that Advisory Jurisdiction of the Supreme Court cannot be construed as an effective alternative dispute resolution mechanism. The court reliance on *Indira Gandhi Case*<sup>49</sup> points out the significance of rule of law norm in deciding the issue, It is very significant point in *Ismail Faruqui* that the court treated the sanctity of the temple and mosque on the footing

of equality, allowing the matter of legal entitlement to be decided according to law.

### Protection of Public Order, Morality and Health: State's Role

Since religion thrives in an atmosphere of peace and tranquility, ensuring such condition is regarded as a pre-requisite for religious freedom. State has considerable role in this regard especially in circumstances of inter-religious conflicts. In *Gulam Abbas Vs. State of UP*.<sup>50</sup> for resolving a long-standing dispute between the Shias and Sunnis regarding the performance of religious rites by members of Shia sect on certain plots and properties the Supreme Court appointed a committee of 7 persons consisting of three nominees of Shias and three nominees of Sunnis and the Divisional commissioner as the chairman. The committee recommended for the shifting of two graves of Sunnis. The challenge that the Court's order implementing the committee's recommendations was violative of the rights of the petitioners under Article 25 and 26 was rejected because the rights were subject to the maintenance of public order, which reflected larger interests of the society. It can be commented that the judicial approach and method employed in the case were ideally suited for resolving the tension-some religious conflicts. The judiciary in a series of cases on Ayodhya emphasized the responsibility of State for the maintenance of public order as a pre-requisite for religious freedom.

In *Tejraj Chnogalal Gandhi Vs. State of Madhya Bharath*<sup>51</sup> the action of the respondents installing a Shivaling in a Jain Temple, which was an extraordinary step to please Hindus who were enraged over the alleged theft of an idol from the temple, was argued as justified for protection of public order. It was held that the Jains were entitled to preserve the nature and character of their temple as such, and therefore the re-

<sup>46</sup>Supra Cit No 18.

<sup>47</sup>Section 4(3) Act, on the commencement of this Act, any section, appeal or other proceeding in respect of the rights or interest relating to any property which has vested in the Central Government under Section 3, is pending before city court, tribunal or other authority, the same shall be abate.

<sup>48</sup>(1975) Supp. SCC 1.

<sup>49</sup>(1975) Supp SCC 1.

<sup>50</sup>1984 Sec 81.

<sup>51</sup>1958 AIR : MP 115.

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spondent's action violated the fundamental rights of the former guaranteed under Article 25(1) and 26(b). It is submitted, the executive's approach was partisan and reflected hegemonistic tendency of the majority. It is accumulation of such faulty approaches that threatens secularism. The judicial intervention restored secular value. Protection of morality is another permissible ground for state's interference.

Accordingly, prohibition of Tandava dance in procession or at public places by Anand Margis carrying lethal weapons and human skulls was in the interest of 'public order' and 'morality' and was not violative of Article 25 and 26 as held in *Acharya Jagdishwarananda Avadhuta Vs. Commissioner of police*<sup>52</sup>. Similarly, prohibition of cow slaughter was justified even though it denied opportunity for Muslims to practice cow slaughter during Bakrid. In fact, sacrifice of cow has not been an essential aspect of Muslim religion. The prohibition of bigamy, sati, nude worship, human sacrifice and temple prostitution has added to the moral standards of society even though it irritated the conservative section of the society.

That the State's role in protection of health stands superior to religious freedom is reiterated in a number of cases on noise pollution. Uses of loud speakers for religious prayers, festivals and other religious celebrations have been considered as amenable effective state control. Citing from *Narasu Appa Mali*<sup>53</sup> judgment to the effect that if a religious practice runs counter to interests of health, it must give way before the good of the people of the State as a whole, the Bombay High court in *Yashwant Trimbak* and also *Maulana Mufti Sayeed Mohd. Norrur Rehman Barkariq Vs. State of West Bengal*<sup>54</sup> ruled that freedom of religion could not be invoked for use of loudspeaker for conducting religious festival in a manner causing nuisance to the public. In *Church of God(Full Gospel) in India* the Supreme Court upheld the directions given by the Kerala High Court to the Church to keep the voice amplifiers at low level and observed, "Undisputedly no re-

ligion prescribes that prayers should not be performed by disturbing the peace of others nor does it preach that they should be through voice-amplifiers and beating of drums. In our view, in a civilized society in the name of religion, activities which disturb old or infirm persons, students or children having their sleep in the early hours or during day time or other persons carrying on other activities cannot be permitted."<sup>55</sup>

On the whole, the constitutional development in this sphere contemplates a vigilant state with an aptitude for welfare and disregard for partisan approach.

### Control Over Religious Conversions

The extent to which the right to convert or otherwise propagate religion can be validly regulated by legislature or executive actions is one of the contentious and sensitive issues.

In *Yulitha Hyde Vs. State*,<sup>56</sup> the petitioners challenged before the Orissa High Court the Orissa Freedom of Religion Act 1968, as it made it an offence to convert or attempt to convert, either directly or otherwise, any person from one religion to another by use of force or by inducement or by any fraudulent means. The Act also made it an offence to abet any such conversion.

The petitioners, who were Christians, impugned the Act on the plea that it violated their freedom of propagation of religion under Article 25(1). They argued that the wide definition of the word "force" "fraud", and "inducement" overreached the limitations permitted under clause (1) of Article 25. The definition of the word "force" was assailed on the ground that in the Indian Penal Code this term was defined to refer to physical force. While under the Act it included 'threat of divine displeasure' or 'social excommunication' as well. Regarding the definition of the word "inducement", it was contended that it was so widely stated that even invoking the blessings of the Lord or to say that 'by his, grace your soul shall be elevated', could come within the mischief of the term. The Court held

<sup>52</sup> 1984, 4, Sec 522.

<sup>53</sup> AIR 1953, Bombay 84.

<sup>54</sup> AIR 1999, Calcutta 15.

<sup>55</sup> *Ibid.*

<sup>56</sup> AIR 1976, Orissa 116.

that the statutory restrictions by way of prohibition of conversion by the use of “force” and “fraud” could not be objected to. But the prohibition upon conversion by inducement was not covered by the limitations of clause (1) of Article 25. Mishra, J. Who spoke for the unanimous court, observed;

“People from the downtrodden sections of society ordinarily take to Christianity as an escape. It is in this background that the legitimacy of the purpose - the extension of the definition falls to be determined. Threat of divine displeasure numbs the mental faculty; more so of an undeveloped mind and the actions of such person thereafter are not free and according to conscience. Social excommunication is a serious malady and forces the excommunicated to lead a hazardous life. The extended meaning given to the word “force” does not seek to import anything any foreign into the word inasmuch as the two acts which are now included in the definition do fit into the essential concept of the word, merely because the penal code confines the meaning of the word to bodily force, in our opinion, cannot justify the acceptance of the contention advanced before us. Similar is our view with regard to the term “fraud”, the contention that there is a vagueness in the term misrepresentation does not also impress us. As we have already said these are not the normal methods adopted for bringing about conversion ‘Y’.<sup>57</sup>

Against the decisions of *Yulitha Hyde*<sup>58</sup> and *Rev. Stainisalus*” appeals were lodged before the Supreme Court and they were disposed of by the court in a single judgement in *Rev. Stainsalus Vs. State of M.P.*<sup>59</sup> In this case the Orissa and M.P. Acts were inter alia challenged on the ground that they infringed right to propagation of religion under article 25(1) of the Constitution. The Supreme Court rejected this contention. A. N. Ray, C. J., speaking for the Court, observed:

“That the Article 25 does not have the right to convert another to one’s own religion, but to transmit or spread

one’s religion by an exposition of its tenets. It has to be remembered that Article 25(1) guarantees “freedom of conscience” to every citizen and not merely to followers of one particular religion, and that, in turn postulates that there is no fundamental right to convert another person to one’s own religion because a person purposely undertakes the conversion of another, to his religion as distinguished from his religion, that would impugn on the “freedom of conscience” guaranteed to all the citizens of the country alike.<sup>60</sup>

The Supreme Court also held that the state legislatures had competence to pass the impugned acts. It is submitted; the constitutional development on this aspect of religious freedom is on right lines as it allows conversion by convincing and disallows conversion by force, fraud and allurement. State’s role in protection of freedom of conscience against arbitrary methods of proselytizing contributes to the cause of equal freedom of conscience of all. In the Indian social context where poverty, illiteracy and meekness are exploited for spread of religion, state cannot afford to be silent spectator. However, many states have not enacted legislations on this matter and a Private Member’s Bill in the Parliament in 1978-9 on lines of *Stainislaus* was not successful. The fear of losing political support of the religious minority like Christianity desisted the lawmakers from enacting the law. The unabated practice of conversion by undesirable methods angered some section of the majority religion resulting in sporadic attacks on religious minority. This shows how governmental action in the required dimension is essential for peaceful enjoyment of freedom of conscience.<sup>61</sup>

The latest controversy on conversion is the ordinance passed by the Tamil Nadu Govt. on October 5, 2002<sup>62</sup> banning forcible conversion by allurement or fraud. The immediate reason that must have compelled the Govt. to enact this ordinance could be the mass conversion in Madurai where 250 dalits adopted Chris-

<sup>57</sup> *Ibid.*

<sup>58</sup> AIR 1973 Orissa 116,92.

<sup>59</sup> *Ibid.*

<sup>60</sup> *Ibid.*

<sup>61</sup> *Ibid.*

<sup>62</sup> The Hindu, Sunday, October 18, 2002.

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tianity at the instance of the seventh Day Adventist Church. Besides earlier incidents of 1986 when the entire dalit colony of Meenakshipuram Village converted into Islam or the recommendations of Inquiry Commission of 1986 incident to ban conversion could have been few more reasons for the ordinance. The Act targets conversions, attempting to or abetment of or participating in conversions which attracts fines up to Rs. 50,000 and imprisonment upto 3 years.

It is submitted, when forcible conversion leads to sensitive stage, intervention by the state to maintain public order by passing the law banning conversion is justified to in the interest of public order, morality and the health of the society.

Although time has come to leave religion to individual choice but coercing him to adopt religion without the choice of conscientious but by material gains is violation of his human rights.

### Excommunication and State's Intervention

Should the religious community be vested with full autonomy to impose disciplinary action like excommunication upon its members or should the state intervene to prevent arbitrary and vindictive punishment by the religious body as it entails denial of civil and social rights is another contentious issue.

In *Saifuddin*<sup>63</sup> case the petitioner was the head of the Dawoodi Bohra community vested with disciplinary powers including the right to excommunicate any member of the community. A Bombay statute regulated this traditional right, which had been applied by the Privy Council, in order to protect the interests of individual members. The petitioner impugned the Act as violating Articles 25 and 26. The Supreme Court (by 4:1 majority) held the impugned Act as void by reasoning that (i) where excommunication was itself based on religious grounds, it could not but be held to be for the purpose of maintaining the strength of that religion; (ii) although individual member might lose his social rights as a consequence of excommu-

nication, as the Dawoodi Bohra Community had the right of managing its religious affairs and administer its property the latter shall prevail in the background of subordination of individual religious freedom under Art. 25 to that of the denomination; (iii) the objective of social welfare underlying the statute cannot be a justification for interference with religious denomination's rights.

Chief justice Sinha in his dissent pointed out that the position of an excommunicated person became that of an untouchable in his community and if that was so, the Act in declaring such practices to be void had only carried out the strict injunction of Article 17 of the constitution by which untouchability in any form is prohibited. The Act in this sense was its logical corollary and must, therefore, be upheld.

A careful distinction between religious and civil effects of expulsion can be perused in *Chinnamma Vs. Regional Deputy Director of Public Instructions, Guntur*<sup>64</sup>. In this case the petitioner was a nun working as a teacher in Roman Catholic School. She was expelled by the Bishop of the Diocese from sisterhood for her conduct unbecoming of a nun. In defiance of the canon law she persisted in wearing the religious habit of a nun after her expulsion. The School Management removed her from service. She was reinstated on intervention of the civil authorities subject to the condition that the Catholic Mission managing the school could prohibit her from wearing the nun's dress. She pleaded her right to freedom in this regard. The Mission on the other hand claimed its right to manage its own religious affairs, also the right to manage the school under Article 30(1). The High Court upheld both the claims. The Mission could legally expel the petitioner from the community of sisters. The direction to an expelled nun not to wear the religious habit of a nun could not be questioned when indisputably nuns have a distinctive dress known as the religious habit which only nuns could wear.

In *PM. A. Metropolitan Vs. Moran Mar marathom*<sup>65</sup> the Supreme Court's approach about state's interfer-

<sup>63</sup> AIR 1962, SC 853.

<sup>64</sup> AIR 1964, A. P. 287.

<sup>65</sup> AIR 1995, S C 2001.

ence to deal with arbitrary excommunication underwent a desirable change. The Court retained its right to interfere in matters of excommunication to look into the reasonability of the action taken by the head of the community. According to the Court, “The civil courts are competent to decide on the validity of the ex-communication. A church is formed by the voluntary association of individuals and the churches in the commonwealth are voluntary body organised on consensual basis. Their rights apart from statutes will be protected by the courts and their discipline enforced exactly as in the case of any other voluntary body whose existence is legally recognised. Therefore, all religious bodies are regarded by courts of law in the same position given to their respective organisation. It is further settled that discipline of a church cannot affect any person except by express sanction of the civil power or by the voluntary submission of the particular person. But for purposes of enforcing discipline within a church religious body may constitute a tribunal to determine whether its rules have been violated by any other members or not or what will be the consequence of that violation. In such case the tribunals so constituted are not in any sense courts, they derive no authority from the statutes and they have no power of their own to enforce their sentence. Their decisions are given effect to by the courts as decisions of the arbitrators, whose jurisdiction rests entirely on the agreement of the parties. Consequently if any member of such body has been injured as to his right in any matter of mixed spiritual and temporal character the courts of law will, on due complaint being made, inquire into the laws and rules of the tribunal or authority which has inflicted the injury and will ascertain whether any sentence pronounced was regularly pronounced by the competent authority, and will give such redress as justice demands.”<sup>66</sup>

On the whole, excommunication is not a matter purely of indoor management for the religious community. Its effect upon the rights of individual calls for state’s reasonable intervention. That the constitutional development has favored a judicial rather than statutory remedy points out the undesirability of hasty and au-

thoritative policy without effectively consulting the religious community.

### **The Temple Entry and other Social Reforms: State’s Role**

In India the right to worship a temple has long been denied by priests and temple administration to the low caste Hindus, the untouchables. Now, Article 17 abolishes untouchability and its practice in any form is an offence. Further, Article 25(2) (b) provides for social welfare and reform and for throwing open of Hindu religious institutions of public character to all section of Hindus. In the background of such constitutionally contemplated interventionist role of the state in rendering social justice to the religious have-nots, the state-religion relationship is built on a different mould. While the legislative and judicial contributions have assisted the constitutional policy, the social facts of illiteracy, caste prejudices and blind beliefs have obstructed success in this sphere. However, continued efforts of the state with its legal mechanism and propaganda have lessened or sometimes even eliminated orthodoxy’s obstruction. The relevancy of activist role of the state is to be appreciated in this background. That the case law development has not neglected the limited special rights of religious denominations and traditional respect for sanctum sanctorum points out the demarcation of state’s competence to interfere in this matter.

The Supreme Court in *Venkataramana Devaru Vs. State of Mysore*<sup>67</sup> examined the validity of Madras Temple Entry Authorisation Act. The impugned Act authorized the untouchables to enter and worship in any Hindu Temple. The trustees contended that their temple belonged to the Gowda Sara swath Community of the Hindus and that under Article 26(b) they had a right to manage the affairs of the temple as they pleased in matters of religion. It was argued that exclusion of untouchables from the temple was a matter of religion and the impugned Act authorizing temple entry for them violated the guarantee of Article 26(b). On behalf of the state it was contended that the Act was valid under Article 25(b). It was argued that Ar-

<sup>66</sup>*Ibid.*

<sup>67</sup>1958, SC 255.

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Article 25(2)(b) applied not only to temples which are open to entire Hindu public but also to denominational public temples, that is, temples appertaining to certain groups such as Vaishnavites etc. The Supreme Court held that Article 25(2)(b) applied to denominational public temples also, and so the temple entry legislation was valid as a measure of social reform. The Court also held that the temple authority was entitled to confine the right of access to the temple only to the members of the religious denomination during special occasion connected with them.

However, if there is a dispute as to whether or not a particular temple is a Hindu temple, the matter has to be settled by the court. In *Shastri Yagna Purushdashji Vs. Muldas Bhandardas Vaishya*<sup>68</sup>, the appellant who belonged to Swaminarayanan sect, known as Satsangis, claimed that they were not Hindus. As such they could exclude Harijans and non-satsangis from entry into Satsangi temples, and consequently asserted that the Bombay Hindu Places of Worship (Entry Authorization) Act 1956 did not apply to them. The Supreme Court examined the tenets and the philosophy of Swaminarayanan sect and found that they were not out of the Hindu fold and accordingly held that the Bombay Act applied to satsangi temples<sup>69</sup>.

Although the Constitution provides for opening of Hindu religious Institutions to all classes of Hindus, it is submitted that there could be no such thing as unrestricted right of entry into public temple or other religious institutions for persons who are not connected with the spiritual functions of such institutions. It is a custom observed and Judicially recognised<sup>70</sup> not to allow access to any outsider to sacred parts of the temple, as for example, the place where deity is installed and the sanctum sanctorum. Further, under ceremonial rules, on special occasions, none except the priests are permitted to stay in the temple. In such cases like any other member of the society a Harijan cannot claim a right of entry into the temple<sup>71</sup>.

<sup>68</sup> AIR 1966, SC 1119.

<sup>69</sup> Dr. Dharendra Srivatsava *Religious Freedom in India*, New-Delhi, Deep and Deep Publications, 1982, P. 133.

<sup>70</sup> V. Devaru Vs. State of Mysore, AIR 1958 SC 255.

<sup>71</sup> Supra Cit No 64, P. 146.

<sup>72</sup> AIR 1983 SC 1, P 171.

## Control Over Secular Activities Connected with Religion

Since some of the mundane factors like economic activities are also connected with religion, regulation of such activities is within the state's competence. However, excessive regulation impinging upon religious freedom is to be avoided. In *SP. Mittal vs Union of India*<sup>72</sup> the validity of the Aurobindo (Emergency provisions) Act, 1980, which took over Aurobindo Society was in issue. Sri Aurobindo and his disciples had formed the society under the West Bengal Society's Registration Act, 1961. The society preaches and propagates the ideas and teachings of Sri Aurobindo and the Mother through its numerous centers in India and abroad. After his death the Mother proposed a project of setting up an international cultural township, Auroville in Pondichery. The society received large funds as grants from the central and state governments and different organisations in India and abroad for development of the township. But after the death of the Mother the Government received complaints about the mismanagement of the affairs of the society, and accordingly enacted the Auroville (Emergency provisions) Act, 1980, providing for taking over the management of Auroville for a limited period. The Supreme Court by a majority of four to one held that neither the Society nor Auroville constituted a "religious denomination" and that the Act had only taken away the right of management of property of Auroville, in respect of secular matters, which could be regulated in accordance with law. The case law development shows the inevitability of state's regulative power to deal with secular activities, which are connected with religion.

## State's Regulatory Power Over Property and Management of Religious Institutions

The term "Institution" may include organisations for religious purposes, such as temples, churches,

synagogues, mosques, monasteries and the like. It may also include various types of charitable organisations like hospitals, orphanages, asylums and homes for the aged and persons with disabilities run by religious institutions. While public interest demands effective performance of their functions to comply with their objectives, undue intervention abridges religious freedom. Striking a fair balance in state-religion relationship is the thrust of constitutional development.

In *Vashno Devi Shrine Vs. State*<sup>73</sup> the validity of the Jammu and Kashmir Mata Vashno Devi Shrine Act, 1988, which was enacted to provide for the better management, administration and governance of the temple and its endowment was challenged on the ground that it was violative of the petitioner's fundamental right to freedom of religion guaranteed under Articles 25 and 26 of the Indian Constitution. The Act abolished the hereditary post of priest in the temple and made provision for appointment of priests by the state. The Supreme Court held that the service of priest is a secular activity and that may be regulated by the state under clause 2 of Article 25 of the constitution. In *A.S. Narayana Vs. State of Andhrapradesh*<sup>74</sup>, the petitioner, the Chief Priest in the ancient and renowned Hindu Temple at Tirupathi, challenged the validity of the Andhra Pradesh Charitable and Hindu Religious and Endowment Act abolishing hereditary rights of *archaka* and other office holders on the ground that it violated his right to freedom of religion under Articles 25 and 26 of the constitution. It was contended that abolition of hereditary rights created by the founders in rendering services to the temple by *archaka* (priest) in charitable and religious institutions and endowments interfered with religious practices and customs which were essential part of religion. The court held that the Act is not violative of Articles 25 and 26 and is valid. The hereditary right to appointment of priest is not an essential part of religion or matter of religion or religious practices.

In *Krishnan Vs. Guruvayoor Devasom*,<sup>75</sup> the full bench of the Kerala High Court held the Guruvayoor

Act, 1971 and 1972 as unconstitutional on the ground that it was violative of article 14 and 26 of the constitution. The Act made provision for what purported to be the proper administration of the Guruvayoor Devasom. An indirect effect of the Act was to give the state extraordinary patronage. The court held, "The provision of Section 4(1) of the Act dealing with management committee must be held to be void for the reason that the power of nomination conferred on the Government is naked and arbitrary without any safeguard being provided for ensuring that the committee will be a body representing the denomination. The right to administer the temple being vested in the denomination, any statutory provision which completely ignores, the denomination in the matter of setting up the committee to administer the religious institution belonging to the denomination will necessarily be violative of Article 26 of the Constitution".

In *Bira Kishore Dev Vs. State of Orissa*<sup>76</sup>, Shree Jagannatha Temple Act took the management of secular activities of temple from the Raja of Puri and vested it in committee constituted under the Act. The court held the Act valid, as it did not affect the religious aspects.

### Raising and Spending Public Revenue for Religious Purpose

While the general constitutional policy eschews raising and spending of public revenue for religious purposes, at the time of territorial reorganization of states, the States of Kerala and Tamil Nadu have been constitutionally obligated to make annual payment to certain Devaswam Funds. According to Art. 290A, "A sum of forty-six lakhs and fifty thousand rupees shall be charged on, and paid out of, the Consolidated Fund of State of Kerala every year to the Travancore Devaswam Fund; and a sum of thirteen lakhs and fifteen thousand rupees shall be charged on, and paid out of the Consolidated Fund of the State of Tamil Nadu every year to the Devaswam Fund established in that State for the maintenance of Hindu temples and shrines in the territories transferred to that State

<sup>73</sup>Unreported.

<sup>74</sup>AIR 1996, SC 1765.

<sup>75</sup>Reported in Hindustan Times, December 24, 1973.

<sup>76</sup>AIR 1964, SC 150.

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on the 1st day of November, 1956 from the State of Travancore-Cochin.”<sup>77</sup>

Art. 290A is a provision of unusual character and more a product of the concern to avoid untoward act of abandonment arising from territorial delineation between states, which involved political compromises, and reflects a tradition of conserving religious monuments rather than projecting a determined deviation from secular values. However, it should be noted that Art. 290A has caused some difficulty in developing principled distancing between state and religion.

State’s obligation not to tax or spend for favouring any or all religions is subject to an exception in the context of remedial action by the state while restoring places of worship, which were destroyed in communal riots. In *Raghunath Vs. State of Kerala*”<sup>78</sup> the Kerala High Court adopted this approach when the impugned governmental order sanctioned Rs. 25,000 for relief measure. The Court observed, “Houses, schools and places of worship belonging to both the religious groups, Hindus and Muslims, were damaged, and in restoring them to their original condition there is no question of promotion or maintenance of any particular religion or religious denomination that they were damaged in the religious incidents. Even otherwise, we mean, even if places of worship belonging to one religious denomination alone were damaged and they alone are to be reconstructed, even then there is no question of promotion or maintenance of that particular religion or religious denomination”.<sup>79</sup>

It is submitted, the Court’s approach is laudable as it helps in soothing the wounded feelings of the aggrieved religious community and enables confident exercise of religious freedom. A contrary approach would be obstructive to religious freedom since state has the responsibility of providing protection against deprivation.

A distinction between religion and culture has been sometimes employed to justify state’s involvement

in religio-cultural celebration. In *Sureshchandra Vs. Union of India*’,<sup>80</sup> constitutionality of government sponsored programme celebrating 2500th anniversary of Bhagwan Mahaveer’s Nirvana was questioned. The High Court held that the programme was in the nature of cultural activity as distinguished from religious activity. The celebration fell on the domain of culture and was a secular way of remembering Bhagwan Mahaver and did not amount to maintenance of Jain religion.

### A Historical and Comparative Analysis

The long standing Indian ethos of religious tolerance, realization of solutions to the problems of communalism erupted at the juncture of partition and the search for fitting measures to deal with the religion-based social evils moulded the original intention beneath the constitutional scheme on religious freedom. The policy emerged from the crucible of history was a composite one to accommodate the characteristics and demands of multi-religious society. The need to assist the religious have-nots and victims of religion-based social evils or exploitation persuaded for state-sponsored social welfare measures.

Because of these factors Indian model of secularism did not neatly fit into any of the models explained in the previous chapter. Indian constitution neither propounds state religion nor fosters special place for any specific religion. Thus, it is out of the South-Asian model and away from the British system of established religion. Further, it is not in consonance with the communist model because it does not espouse irreligious or anti-religious or approach of antagonistic/callous neutrality. While it has resemblance with the wall of separation model, it deviates from it because state has not only protective, facilitative and regulative role but also the role of integrating social justice with religion. But the common denomination of all models i.e, equal religious liberty of all has been in the center state of Indian constitutional jurispru-

<sup>77</sup> AIR 1996 (8), see 470 also see Ruchi Tyagi *Secularism in Multi-Religious Indian Society*, New Delhi, Deep-Deep Publications, 2001 P. 212-213. Also see Appendix A.

<sup>78</sup> 1974 Kerala 80.

<sup>79</sup> *Ibid.*

<sup>80</sup> AIR 1975, Delhi 178 P 83 - 87.

dence on secularism. It is also in keeping with the aspiration of international human rights instruments towards educating and motivating people for religious tolerance and harmony. References to American, Australian and Canadian cases made in Indian judgements while deciding the extent of collective and individual rights especially about freedom of conscience, practice and propagation of religion have been rewardful. Moreover in distinguishing the essential aspects of religion from in essential ones methods used have some parallel in American and Australian cases. However, in spite of similarity of issues, the culture-specific problems of India require unique solutions suitable to Indian Social Conditions.

### **Conclusion**

The above survey of constitutional development and decisional law points out that in spite of several distracting factors, populist pressures, political twists and

tension some challenges, a reliable corpus of jurisprudence on secular values has been meticulously built by the Indian judiciary. The approach emerged is notably unique as it was influenced by the Indian social and cultural circumstances. The discourse on principled distancing between state and religion in the context of constitutionally contemplated social justice orientation has much to be commended as it provides valuable input for policy makers and public men and antidote against communalism. It is to be noted that religious freedom jurisprudence was not built as a watertight compartment, but was done by getting a great amount of assistance from right to equality and other fundamental rights. The harmonious way in which the conflicts between collective and individual rights are resolved in the matter of excommunication and temple entry shows equal importance of both the rights. State's role in obtaining equilibrium in this matter is inevitable although delicate. Judicial contributions in these spheres have been sound and convincing.