

**INTRUSION OF STATE INTO RELIGIOUS RIGHTS WITH  
SPECIAL REFERENCE TO DISSENTING OPINION OF  
COURTS: A CRITICAL APPRAISAL**

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**in**

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## DECLARATION

I, hereby declared that the presented work in the thesis entitled “**Intrusion of State into Religious Rights with Special Reference to Dissenting Opinion of Courts: A Critical Appraisal**” submitted in fulfilment of the requirement for the award of the degree of “**Doctor of Philosophy (Ph.D.)**” is an outcome of research work carried out by me under the supervision of **Dr. Meenu Chopra (Professor, School of Law)**. In keeping with the general practice of reporting scientific observations, due acknowledgements have been made whenever the work described here has been based on the findings of another investigator. This work has not been submitted in part or full to any other University or Institute for the award of any degree.

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**CERTIFICATE**

This is to certify that the work reported in the Ph.D. thesis entitled “**Intrusion of State into Religious Rights with Special Reference to Dissenting Opinions of Courts: A Critical Appraisal**” submitted in fulfilment of the requirement for the reward of the degree of **Doctor of Philosophy (Ph.D.)** in the School of Law, is a research work carried out by **Dimple Jindal, Registration No. – 41900158**, is a bonafide record of his/her original work carried out under my supervision and that no part of the thesis has been submitted for any other degree, diploma or equivalent course.

  
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## **Abstract**

*“Religion is a system of belief that includes the idea of the existence of an eternal principle... that has created this world, that governs it, that controls its destinies, or that intervenes in the natural course of its history.”<sup>1</sup>*

### **Nelkin, an American Philosopher**

Religion is an organized collection of various customs, cultural systems, beliefs & faith in the existence of God and particular views that correlate the whole of humanity with nature. "Religion is that belief which binds men's very spiritual nature to a supernatural being. It includes belief, worship, devotion, faith, etc. It also extends to the rituals. The right to profess Religion is the right of a person believing in a particular faith to practice it, preach it and profess it. It is also civil in nature."<sup>2</sup> Morality, until recently, has been taken as a brainchild of Religion; thus, it is an essential part of all Religions from which it cannot be separated. However, the problem that exists in society is the lack of cooperation between Religion and Morality. Jurisprudence means theory or philosophy of law. Over time, different philosophers gave their different political and legal theories concerning social issues and covered the vast topic of religious freedom in their theories. Natural law is the first and foremost school that supports religious rights. It is based upon the law of nature and is famously known as God's law. Philosophers supporting natural law school have described that all laws are a logical progression from morals.

Being the secular nature of the Indian State, the Indian Constitution provides religious freedom to every people via Articles 25 & 26. Although Articles 25 & 26 specifically provide religious freedom for every people and for all religious denominations to propagate their customs and rituals, many other articles also support the secular nature of the Indian Constitution. As per Articles 14 & 15, discrimination based on 'Religion' is unconstitutional. In the same part, Article 21 provides for the right to life, which has been considered the most important fundamental right and over the period, the judiciary

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<sup>1</sup> Rose, H and Rose, S (eds.), *Alas, Poor Darwin: Arguments Against Evolutionary Psychology*, pp 14 (Random House, New York, 1967).

<sup>2</sup> *Most Rev. P.M.A. Metropolitan v. M. M. Marthoma*, AIR 1995 SC 2001 (2026).

has included all basic amenities in it that are required to live a decent life. Sec. 116 of The Constitution of Australia, the United States Bill of Rights, The Canadian Charter of Rights & freedom, Article 13 of the Portuguese Constitution, The Human Rights Act, 1998 of U. K. etc., also provides ample provisions for religious freedom with some reasonable restrictions. In India, these restrictions fall under the category of "Public order, health, morality, laws regulating secular activities associated with religion and other constitutional rights" and find their place in the Constitution but nowhere are these terms defined.

Due to unclear demarcation between all these fundamental rights, it has been observed that there is a need for a clear demarcation between the sphere for the freedom of religion & religious activities which are essential or integral for the existence of any religion and the power of restriction that the State may impose for the welfare of whole society.

Several practices like sati, triple talaq, animal sacrifice for religious purposes, Ex-communication, Sunnat, Santhara, Polygamy & Nikah-Halala, burning of firecrackers, use of loudspeakers in holy places, the performance of tandava dance in a public place and entry of women in temples and mosques were challenged in the courts from time to time. Some of these practices have been declared an essential and integral part of that Religion, while others are either under consideration of Courts or declared not essential for the existence of that Religion. Consequently, the non-essential practices that were found violative of the Constitutional scheme, were declared unconstitutional.

It has been observed that some religious rituals and customs prevailing in society seem unconstitutional on their face. Still, due to some limiting factors, the State remained unable to ban these activities. People celebrate these rituals and follow their religions under the shadow of religious freedom, but they violate the utmost important fundamental right given under Article 21, i.e., the right to life. Judiciary also remains failed to find some concrete solution to these matters related to religious issues.

In a landmark case<sup>3</sup>, the Supreme Court observed that "only those practices could be prohibited, which is not an integral part of Religion and covers under the shadow of public order, health and morality. Now, what are the boundaries of public order, health

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<sup>3</sup> *Sardar Syedna Taher Saifuddin Saheb v. St. of Bombay*, AIR 1962 SC 853.

and morality? It is also under consideration in the latest landmark case of Sabrimala temple, which prohibits the entry of women into 'shrine temple' having specific age between ten to fifty years (referred to nine Judges Bench)."<sup>4</sup>. The dissenting opinion of Justice Sinha, delivered in the case of 'Sardar Syedna Taher Saifuddin Saheb V. The State of Bombay', seems accurate and fit to apply in all these cases to resolve all these critical issues lying pending in several courts for some decades. Justice Sinha held in this case that "the Court had to draw a line of separation between practices comprising of rites and ceremonies connected with the specific kind of worship, which is the basic tenet of the religious community and practices in other matters which may attach with the religious institutions at various points, but which are not intimately connected with rites and ceremonies the performance of which is an essential and integral part of the religion." Only the former would be protected by Article 26(b).

***Undoubtedly, religious rights are private rights and every person carries their personal rights along with him, but while entering into the public sphere, he or she must adhere to the principles of secular society and those principles must be clearly defined in the public domain to remove all type of confusions.***

In this darkness, a ray of hope may be seen through the mirror of various concurrence and dissenting judgments of constitutional benches. This sensitive and complex issue may be scanned by the sieve of constitutional provisions and multiple acts, especially with the comparative analysis of concurrence and dissenting Supreme Court Judgments.

Analyzing the Supreme Court Judgments and legislative provisions deeply, it has been observed that there is a need to change the theological concept to deal with religious freedom. Considering the significance of fundamental rights and sphere of religious freedom and matters of personal choice, the '***Theory of Religious Secularism***' is deduced as an outcome of the study. This theory will help to shape the secular State in a true sense and strengthen the spirit of brotherhood and fraternity. It will also give direction to the State authorities to resolve the pending issues for a long time.

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<sup>4</sup> *K. Rajeevaru v. Indian Young Lawyer Association Thro. It's General Sec. Ms. Bhakti Pasrija & Ors.*, MANU/SC/0158/2020.

***To set up a peaceful society, people don't need to remove the veil from their faces; rather, they need to remove the veil of religion from their minds.***

The essential practice test shall be replaced with the '**Two-Tail Test**'. In this test, the religious practice, custom, usage or ritual should be tested on the wires of Articles 14, 15 and 21 in the first step. If the first test fails, these religious practices, customs, usages or rituals should be held illegal and unconstitutional. If the first test passes, these religious practices, customs, usages or rituals must go through the second step, i.e., the essential practice test, in an unmodified form as conducted earlier. Applying the doctrine of the two-tail test and specifically talking to the issues in conflict with Articles 14, 15 and 21, it is suggested that State should ban these practices immediately without any question of religious freedom. ***The practice of Polygamy, all illegal practices of Divorce, Nikah-Halala, Female Genital Mutilation, Santhara, Self-Flagellation, Animal Sacrifice for Religious purposes etc., are in direct conflict with Articles 14, 15 and 21 and these practices must be banned as it is concluded in the study that the protection of religious freedom is provided to personal belief & faith and not to the unconstitutional practices.***

To make all codified and uncodified personal laws and legislations similar, it is need of time to apply the Uniform Civil Code like the Criminal Code. To enact and enforce Uniform Civil Code and to bring social reform, there is a need for State intrusion into religious customs, usage, rituals and practices. Evil practices violating Constitutional norms must be banned. People think it is challenging to implement a uniform civil code in India, having too many diverse religions and their followers, but it is not. It seems complicated due to a lack of clear separation of religious matters concerning personal beliefs and faith of people from official and political matters of government that are needed to make policies and to run the nation in a secular theme.

## ACKNOWLEDGEMENT

*Religion and morality establish the law of humanity, one of the most complicated, critical and debatable issues on this planet. The purpose of religion is to set up peace and harmony in society, whereas the bitter truth is that religion is mostly used for creating a disturbance in society.*

*That's why I chose this topic for the present study. In this research, I have included matters relating to religious customs and practices violating fundamental rights.*

*This work itself was a challenging task for me to complete which could not have been possible without the guidance and support of Dr. Meenu Chopra who has shown me directions from time to time to proceed with the work. Her vast wisdom and wealth of experience have inspired me throughout my studies.*

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**Dimple Jindal**

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**INTRUSION OF STATE INTO RELIGIOUS RIGHTS WITH SPECIAL  
REFERENCE TO DISSENTING OPINION OF COURTS: A CRITICAL  
APPRAISAL**

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**CHAPTER - 1  
INTRODUCTION**

*“Religion is a social construct including beliefs, faiths and traditional practices that enable individuals and collective group of people, to make some sense of the Great Questions of life and death”<sup>1</sup>.*

**David V. Barrett, a British Philosopher**

**1.1 Introduction**

India is the epitome of rich cultural and religious diversity. "It is archetypal for religious synchronization and has a great heritage where people of different religions live quietly and peacefully"<sup>2</sup>. Many rulers came here and tried to extort the Indians for the compulsive change in their Religion. They ruled for hundreds of years but remained unsuccessful in changing the culture of Indian society and their Religion in an absolute way. Different religions have diverse customs, practices & traditional ceremonies. With time, many customs get challenged in several Courts as these seem against the public order, morality & health. It is averred that these customary practices should be prohibited. However, the followers of these religions seek constitutional protection for these practices given under Art – 25 of the Indian Constitution. They argued that they celebrate these ceremonies for a long time and that these customs and customary rituals are integral to their religions. These customs, traditional ceremonies and rituals were challenged in several judicial Courts. Different judges in many cases opined that if the religious practice/ customary ritual is an indispensable part of the Religion, they should be protected under freedom of religion enshrined in Art-25 of the Constitution and not otherwise. A. N. Ray, C.J. held in a landmark case that "it

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<sup>1</sup> David V. Barrett, *The New Believers: Sects, 'Cults' and Alternative Religions* ISBN 1-84403-040-7 (Cassell & Co., U.K., 2001).

<sup>2</sup> Dale Cannon, *Six Ways of Being Religious: A Framework for Comparative Studies of Religion* (Bay view publishing services, U.S.A, 1996).

should not forget that that Article 25(1) on the Indian Constitution ensures "freedom of conscience" to all persons and not to any specific religion."<sup>3</sup>

People have been celebrating religious practices for a very long time. These practices belong to ancient times, even though some practices started 5000 years ago with the evolution of the Vedic era. Our Vedas were written 5000 years ago, which results in various customary and religious practices of the Hindu Religion and Arya Samaj. After that, people started splitting into small groups, forming new "religious endowments."<sup>4</sup> Some invaders came from outside India and tried to propagate their Religion in our country by compelling Indians to convert to it. The term "Religious Endowments" is defined by Justice M. H. Beg, who said, "In a law dealing with religious endowments, this term, even though not explained, the conjecture stands for people of this nation with certain religious beliefs held or forms of religious worship practiced by common people of this country originally."<sup>5</sup>

Religious practices took their authenticity from the Religion itself. They did not need recognition from any other authority except the constitutional limitation given in Art-25 & 26 of the Indian Constitution under the head of "Public order, health and morality". During ancient times, Religion had supremacy over society. People used to run the society by dividing the whole into different religions. Nevertheless, after the enforcement of the Constitution, things start changing slowly. Now our Constitution is supreme and the religious practices that conflict with our Constitution are declared void, which means that practices will not attract the protection of "Art -25 & 26."<sup>6</sup> P. N. Bhagwati, J. says, "The Constitution is Supreme Lex, the paramount law of the land and neither there is an exception, nor anything is above or beyond its scope."<sup>7</sup> Some practices were estopped by the social reforms under the movement of women empowerment and others under the "Removal of Gender Discrimination" & "Right to Equality and Abolishing of Untouchability". Still, various sects perform many practices upon which either there is no law or clear demarcation between the

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<sup>3</sup> *Rev. Stanislaus v. State of M. P.*, (1977) 1 SCC 677, para 20.

<sup>4</sup> "Endowment is a dedication of property for purposes of religions or charity having both the subject and object certain and capable of ascertainment." ... *A. P. Sen, J. in Pratapsinhji N. Desai v. Dy. Charity Commr.* 1987 Supp SCC 714, para 8.

<sup>5</sup> *Commr. for Hindu Religious & Charitable End. v. Ratnavarma Heggade* (1977)1 SCC 525, para 43.

<sup>6</sup> The Constitution of India 1949, available at: <https://legislative.gov.in/sites/default/files/COI.pdf> (Visited on July 31, 2022).

<sup>7</sup> *State of Rajasthan v. Union of India*, (1977) 3 SCC 592, para 149.

"freedom of religion" and "state intrusion into religious matters". The purpose of this study is to re-examine the historical evolution of religions, religious freedom and customary practices, validation of religious customs in democratic country India, Constitutional aspect of religious freedom in India, analysis of legal theories touches to the issues of religious freedom and other Constitutional rights and critical analysis of landmark judgments delivered by the top courts on the issues of religious freedom.

## **1.2 Religion and the emergence of Religion in society**

*“Religion is a system of belief & faith that encompasses the idea of the existence of a perpetual principle... that has shaped this wonderful world, governs it, wheels its destinies, or intercedes in the natural process of its history”.*<sup>8</sup>

**Nelkin, an American Philosopher**

### **1.2.1 Religion**

Religion is an organized collection of various customs, cultural systems, beliefs & faith in the existence of God and particular views that correlate the whole of humanity with nature. Mostly, each Religion has its separate existence, symbols, narratives and historical scriptures based upon different stories, methods & beliefs to explain the meaning of life, death and recycling of life in this universe. These reasoned beliefs about nature, humanity and the essentials of living life led to the development of ethics, morality, customs and various social & religious laws in our society. There are more than 4000 religions worldwide, with different customs, festivals, scriptures and beliefs. There is a massive difference in the prayer of various Gods and Goddesses, following their rituals and ceremonies, traditions & lifestyle, interaction with each other and other social aspects.

“Religion is the conviction that links a supernatural being with the very spiritual nature of men. It encompasses faith, devotion, worship and so on. It includes rituals as well. freedom to profess Religion is a civic matter and everyone who professes, practices, or preaches a particular faith has a fundamental right to do so.”<sup>9</sup> Emile

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<sup>8</sup> Rose, H and Rose, S (eds.), *Alas, Poor Darwin: Arguments Against Evolutionary Psychology*, pp 14 (Random House, New York, 1967).

<sup>9</sup> *Most Rev. P.M.A. Metropolitan v. M. M. Marthoma*, AIR 1995 SC 2001 (2026).

Durkheim explains Religion and its importance in society very well. He wrote, "If religion has produced everything necessary in society, it is because the idea of society is the soul of religion."<sup>10</sup>

Earlier, in his book, "The Division of Labour in Society", he defines Religion as "the set of beliefs, faiths, feelings and thoughts of each kind related to men's links with a being or beings whose nature he regards as greater to his own". Later, he recognizes this definition as inadequate concerning systems of morality, conduct and laws in society. In his last writing, "The Elementary Forms of Religious Life", Durkheim analyses Religion in the simplest form.

However, Emile Durkheim explains that Religion differs from private beliefs as it is "something eminently social", still the word "Religion" is often interchanged with personal belief, faith and several social bondages & duties. Religions may contain some mythology in them. Some persons follow single Religion, but some follow multiple religions or religious practices.

Mythology & Religion differ in scope but may overlap. Ideologically, both terms are concerned with the conceptual theory of high importance related to a particular community. Mythology refers just to one or another aspect of Religion. However, the religion is broader enough to include mythology in it. Both terms discuss sacred or supernatural things and have morality, humanity, theology and mystical experience.

Hinduism relates to the Vedic era, but basically, Hinduism is not a religion; it is the lifestyle of the people of the Indus valley. People used to worship different gods, wear different clothes, eat different food, speak different languages and have much other cultural diversity. There was considerable diversity at every step. However, slowly, Hinduism took the name of Religion and people started using this word as a substitute for Religion. Due to this diversified culture, our constitution-makers have provided religious freedom under part – III of the Indian Constitution as a fundamental right. They knew very well that it was almost impossible to weave a story of all religions with the same thread. O. Chinnappa Reddy, J said, "Article 25 of the Indian Constitution is a statement of confidence and belief in the Indian Constitution. It acknowledges the idea that the fundamental test of a democracy is whether or not

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<sup>10</sup> Bellah, R. N. (ed.), *Emile Durkheim on Morality and Society* (University of Chicago Press, Chicago, 1973).

even an unpopular minority can find a place in the Indian Constitution".<sup>11</sup> Gyan S. Misra & M. Katju, JJ. said, "Our country has great religious diversity and if we want to keep our country integrated, then it is necessary to be tolerant and give equivalent admiration to all groups, people and religious sections. Our nation's adoption of a secular constitution that takes into account the vast diversity in our country is a result of the deep vision of our founding fathers".<sup>12</sup> V. N. Khare, C.J. Said, "The beauty of the Indian Constitution is that the whole structure of the nation is founded thereupon and it is the very pillar upon which the democracy of Indian country stands".<sup>13</sup>

*"The hypothesis I covet to foreword is that in the real world we inhabit, the etymology of morality is in a parallel state of serious disorder as the philological meaning of natural science is in the imaginary world, I explained. What we achieve and enjoy, are the snippets of a fundamental and conceptual scheme ... we possess indeed simulacra of morality ... but we have lost our theoretical and practical comprehension of morality".<sup>14</sup>*

Up until recently, morality was believed to be a creation of religion; as a result, it is an essential component of all religions and cannot be separated from them. However, the problem that exists in society is the non-existence of cooperation between Morality & Religion.

According to Green, "Morality & Religion, however, twisted with each other, are at least fundamentally and theoretically discrete phenomena. Religion is the collection of attitudes, convictions, rituals and practices that link people to sacred realms and supernatural occurrences. On the other hand, morality has always been a technique of controlling how people behave in groups."<sup>15</sup>

According to many scholars, religions and ethics are very much interrelated. Ethics are the base form of society. To successfully operate in society, a certain set of rules must be followed because it is difficult to accommodate everyone's wishes while also

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<sup>11</sup> *Bijoe Emmanuel v. State of Kerala*, (1986) 3 SCC 615, para 18.

<sup>12</sup> *Kailas v. the State of Maharashtra*, (2011) 1 SCC 793, para 25.

<sup>13</sup> *Uniform of India v. Naveen Jindal*, (2004) 2 SCC 510 para 27.

<sup>14</sup> Alasdair MacIntyre, *After Virtue* (London: Duckworth, 1985).

<sup>15</sup> Green, Ronald M., *Religion and Moral Reason: A New Method for Comparative Study. Religious Studies* (26 (3):427-428, (Oxford University Press, U.K.,1990).

meeting everyone's requirements. Therefore, a standardized set of rules is required to operate society in an orderly manner.

Ethics are guided by reason and religion develops in society to support the emotional aspect. Because if everything has mechanically guided, then the fundamental spirit behind the formation of the society is lost. Earlier all persons lived separately and they all are doing well to support and fulfil their needs. Society needs to make them civilized persons and take care of their emotional aspects so that they feel interconnected and do collectively for the general good by keeping care for each other in their minds. Therefore, coexistence of ethics and religion is necessary for the total development of man since religion serves the emotional side of man while ethics satisfies the volitional side.

According to Matthew Arnold, religion is nothing more than morals coupled with emotion. Religion and ethics are completely interchangeable. Even Kant supports that "every Religion is founded upon morality and the existence of God deeply related to religion." God conjugates pleasure with goodness because virtues rest upon our volitions and pleasure relies upon external conditions' cohesiveness. God is a postulate of ethics. God is the origin of moral responsibility and when man/ individual realizes that true soul, man becomes ethical.

The basis of morality is religion. These together contribute to the flourishing of humanity. Ethics relies upon volition and Religion upon psychic emotions. Ethics makes Religion uncontaminated and refined. Religion reacts to ethics and stimulates it. Thus, both compensate each other and are inseparable for the advancement of the human being and the enhancement of humanity. The primary aim of ethics has been viewed in different ways as some people take it as a rational judgment of right from wrong actions and others take ethics as a dividing line between morally good and what is morally wrong. In a nutshell, ethics purports to frame the principles of living worthwhile life.

People living in different social groups make different communities and develop their customs and rituals by believing in one another. Over the period, these communities converted into particular religious groups having different ideologies. Later, these communities converted to religious organizations propagated their rituals, tenets, customs and emotions and used ethics and morality in daily social life. Through this,

Religion came into our society and took an important place in everyday life. Now Religion has become an inseparable part of society and politics. In 1947, Britishers divided the British India into two new dominion countries i.e., India and Pakistan. At that time, Pakistan opt out for covering their country by the clothes of Islamic State, but our leaders of country India opt out for making India a secular State. They didn't recognize any official State religion. They enact the provisions for religious freedom in our Constitution and now India is a big democratic country.

### **1.3 Constitutional aspect**

Articles 25 and 26 of the Indian Constitution guarantees everyone's freedom of religion because India is a secular nation. Even while Articles 25 and 26 provide religious freedom to everyone and allow all religious denominations to spread their rituals and ceremonies, several other sections uphold the Indian Constitution's secular orientation. Discrimination based on "Religion" is forbidden by Articles 14 and 15.

#### **1.3.1 Fundamental right to religious freedom**

All people are granted the freedom of conscience and the right to freely profess, practise, and propagate their religion under the conditions of public order, health, and morality, according to Article 25 of the Indian Constitution. According to Article 26 of the Indian Constitution, any religious group or subset thereof is free to practice its traditions and engage in religious activities as long as they comply with laws governing public morality, health and order. Religious groups and their adherents have long celebrated their customs and rituals. These customs are recognised as legitimate by Article 13 of the Indian Constitution as long as they comply with it. Clause 1 of Article 13 states that "All laws existing in Indian territory immediately prior to the commencement of this Constitution which are contradictory with the provisions of this chapter shall be void to the extent of such discordant provisions". Clause 3 of the same Article 13 states that "any ordinance, order, by-law, rule, regulation, notification, custom, or usage having the force of law throughout the territory of India or any portion thereof" is included in the definition of "law".



### **1.3.2 Right to life**

In the same part, Article 21 guarantees the right to life, regarded as the most significant fundamental right and to which the judiciary has added all the necessities for a good life through time.

Due to unclear demarcation between all these fundamental rights, it has been observed that there is a need for a clear demarcation between the sphere for the freedom of religion & religious activities which are essential or integral for the existence of any religion and the authority of restriction that the State may enforce for the welfare of the whole society. Article 21, or the "Right to life", supersedes all other fundamental rights in situations where a person's life or means of subsistence are at stake. The issue of religious freedom should be less significant than the right to life, which implies that Article 21 should take precedence when the right to life begins since we cannot compromise this right under any circumstances. Under the guise of religious freedom, practising communalism, exploiting any segment of society, or engaging in immoral or inhumane behaviour is unacceptable. It is also unacceptable to allow the State to meddle in religious matters in any way. Now the point is, who will make this interpretation possible? For this, there is a need to draw clear boundaries for the state powers (both legislative & judiciary) to remove all ambiguities, there is a need to define what the essential practices for any religion are and there is a need to search that at which point state powers of making laws and applying restrictions converts into intrusion. It can be done perfectly by proper interpretation and analysis of landmark judgments penned by the constitutional benches of the Apex Court. A reference may be taken from foreign judgments, foreign Acts and Jurists to define generic issues and consider other democracies upon the same matters.

Delving into the analysis of Supreme Court judgments may prove helpful in analyzing judges individually. There are five or more judges in a Constitutional bench and only the majority decision is upheld in the law books. Nevertheless, sometimes, dissenting judgments compel us to think something out of the box.

### 1.3.3 Concept of the secular State

India is a secular nation and there is no official state religion in our country. Being secular does not mean that one cannot practice their religion; rather, it means that one has complete freedom to practice or not practice their faith. The government cannot force citizens to practice any religion in a secular nation. "The Indian Constitution's preamble has only ever been altered once, in 1975, with the 42nd amendment."<sup>16</sup> This revision included the phrase "Secular" in the preamble. Pakistan proclaimed itself to be an "Islamic Country" during the partition, whereas India did not. India has always welcomed all religions with open arms since respect for all religions is an inherent part of Indian culture as a whole. The Apex Court is honoured to define secularism in the real sense in the historic case of "S. R. Bommai." In this case, the nine-judge Apex court bench examines the idea of secularism within the context of Indian sociology. Justice Sawant said that "the secularism contained in Part III of the Indian Constitution includes tolerance of all religions, equal treatment of all religious groups and protection of their holy sites and personal property".<sup>17</sup> What is "secularism" is well defined by many judges in different cases. D.M. Dharmadhikari, J. describes that "Secularism is a fundamental element of the Indian Constitution".<sup>18</sup> Santander Kumar, J. said, "Secularism is the essence of our democratic system. Secularism and brotherhood are intertwined in a golden thread that runs through the whole Constitutional scheme incorporated by the framers of the Constitution".<sup>19</sup>

Nevertheless, under the shadow of Secularism, followers of some religions still profess unwanted practices, even though these practices are unconstitutional and the State is not moderately exercising its duties to save fundamental rights. Sometimes, the State overrides its powers to restrict the freedom of religion under Art – 25 & 26. There is a need to define clear-cut boundaries for both to avoid unnecessary conflict in society, which is not suitable for the development of any nation. If we try to justify religious practices in the light of our Constitution, we find that some of these practices conflict with the soul of the Constitution and hence not in the same tune as our

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<sup>16</sup> The Constitution (Forty-second Amendment) Act 1976 (91 of 1976), available at: <https://legislative.gov.in/sites/default/files/COI.pdf> (Visited on July 31, 2022).

<sup>17</sup> *S. R. Bommai v. Union of India* 1994 AIR 1918, 1994 SCC (3) 1.

<sup>18</sup> *Aruna Roy v. Union of India*, (2002) 7 SCC 368, para 56.

<sup>19</sup> *Sindhi Education Society v. Govt. (N.C.T. of Delhi)*, (2010) 8 SCC 49, para 108.

Constitution makers wish for our new independent India. Some practices go derogatory by violating fundamental rights, supporting gender discrimination, affecting minor rights and acting ethically wrong. To check the Constitutional validity of religious customs and to re-define the limits of religious freedom, one should need to scan these provisions of religious freedom through the lenses of legal theories.

#### **1.4 Jurisprudential aspect**

Jurisprudence means theory or philosophy of law. Over time, different philosophers gave their different political and legal theories concerning social issues and covered the vast topic of religious freedom in their theories. Natural law is the first and foremost school that supports religious rights. It is based upon the law of nature and is famously known as God's law. Philosophers supporting natural law school have described that all laws are a logical progression from morals. They stress the importance of having a moral foundation for law. John Locke, who founded the natural law school, claimed that no state could abrogate some unalienable rights that he deemed to be either natural or gifts from God. These rights are now termed fundamental rights and are included in the constitutions of various countries. The proponents of the historical school hold that laws are established, not created. The historical School of Law's principal founders and backers were Friedrich Karl and Von Savigny. The analytical school takes a very constructive stance and emphasises that law should be regarded as a command coming from the State.

In contrast, the unique arrangement of social and democratic states develops the system of social contracts and interconnections among all people. It brings people nearer to them and makes their connections more robust. The Sociological school transforms society from a monarchy to a democratic government. People surrender themselves to the sovereign governments in consideration of surveillance and the surety of caring for their fundamental rights. The most modern law school is a realistic school of law and it supports judge-made laws. The realist approach to law is a blend of contemporary and sociological approaches. Due to this, it is sometimes called a left-wing sociological school. ***Based on the realist approach, judicial activism has proved most beneficial in resolving long-lasting issues pending for decades in the courtrooms.***

## **1.5 Religious customs and the role of State organs**

Several customs prevail in our society and these have indulged in our life so deeply that we cannot leave them behind. These customs have developed our usual lifestyle and directed us on how to manage our life. These customs play a significant role in events like birth, marriage, death ceremonies, etc. No such event is possible without these customs and as these customs are prevailing for a very long time in our society, these customs have implied sanction of the society. Nevertheless, things will change as time passes and our society is also regulating laws. After the enactment of the Constitution, only those customs are valid and enforceable, which are not contrary to public policy and prevailing for a long time. Following the adoption of the Indian Constitution, a deluge of petitions was filed in Indian courts to examine the constitutionality of these customs as they concerned public policy and the Apex Court repeatedly declared that such customs must be fair, sincere and not in violation of the Constitution's tenets. The Apex Court puts a more comprehensive check upon these customs, affecting the fundamental rights of the whole society.

### **1.5.1 Conflicting religious practices**

The Constitution of India is a live document that must be reviewed regularly. D. K. Jain, J. had beautifully written, “The United States Constitution is an organic, living document. It must develop together with the country and cannot remain static. Regarding the altered circumstances, the demands of time and the requirements of politics, the constitutional articles should be interpreted broadly and freely”.<sup>20</sup> It has been observed that many practices followed by society go invalid after a specific time. Society has authenticated some customary practices prevailing in our society, but these practices seem unconstitutional or morally wrong. Society and sovereign authority try to get supremacy over the other for rule in society and end the confrontation between these two. Whosoever receives the supremacy is not a matter, but one should remember that it is the society & the people's lifestyle which leads to making laws. Sometimes law follows society, but sometimes society follows the law. In the first case, society's approval is not needed, but in the latter case, it took hundreds of years to get approval from society. C. K. Prasad J. described that “the

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<sup>20</sup> *State of W.B. v. Committee for Protection of Democratic Rights*, (2010) 3 SCC 571, para 45.

power to adjudicate must come from a valid law”.<sup>21</sup> Many customs, including Sati, Triple Talaq, Animal Sacrifice for Religious Purposes, Excommunication, Sunnat, Santhara, Polygamy & Nikah-Halala, Burning of Firecrackers, Use of Loudspeakers in Holy Places, Tandava Dance Performance on Streets and Entry of Women into Temples and Mosques, have been occasionally challenged in the courts. While some of these activities have been deemed fundamental to that religion, others are either being considered by the courts or have been deemed unnecessary for that religion to survive.

Consequently, the non-essential practices found to be violative of the Constitutional scheme were declared unconstitutional. In a landmark case<sup>22</sup>, it was noted by the Supreme Court that “Only those actions that do not directly relate to religion and are under the purview of public order, health and morals could be outlawed. What currently constitutes the limits of public order, health and morality? It is also being considered in the most recent landmark case of Sabrimala Temple, which forbids women with a specific age between 10 to 50 years old from going inside the holy shrine temple (referred to nine Judges Bench)”.<sup>23</sup> The Supreme Court is debating a comparable issue in the Haji Ali Dargah case, which concerns women's access to the mosque. These faiths' adherents consider the presence of women in holy locations to be sinful and a degradation of their religion's moral principles. The Supreme Court is attempting to establish a connection between the freedom of religion and a uniform civil code while debating several issues that are still up for debate in separate instances. The universal civil code was correctly positioned under Article 44 of our Constitution, which is now part -IV and is not binding like part -III, i.e., “Fundamental Rights”, by our Constitution's highly intelligent authors. They know very well that it is almost impossible to integrate so many religions and tie their followers by a rope of uniform rules. In the last seven decades, SC has also played an essential role via various concurrence and dissenting judgments of constitutional benches, which paved both ways. This study's principal purpose is to determine whether the "judgments of the SC" which save the freedom of Religion and the "acts

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<sup>21</sup> *Vishwa Lochan Madan v. Union of India*, (2014) 7 SCC 707, para 13.

<sup>22</sup> *Sardar Syedna Taher Saifuddin Saheb v. St. of Bombay*, AIR 1962 SC 853.

<sup>23</sup> *K. Rajeevaru v. Indian Young Lawyer Association Thro. It's General Sec. Ms. Bhakti Pasrija & Ors.*, MANU/SC/0158/2020.

of legislation" which impose restrictions upon religious freedom align with each other. Supreme Court is trying to construct the boundary line of "public order, morality and health" by which the fundamental right of religious freedom may not be violated. In a secular country like India, having rich, diverse cultures and different religions, is it better to go with a harmonious interpretation of "Morality" or be stuck upon rigidity for the sake of any particular religion? On the one side of the coin, the State must keep an eye on unconstitutional activities and on the other side, it must respect the belief of all religions also. State ought not to forget that people live in a social welfare state as V. R. Krishna Iyer, J. said that " the rule of law does not operate in a one-way fashion and the state's authority does not favour the police over the general public."<sup>24</sup>. Keeping the balance between all the communities should be our primary function. If any such custom or belief of any religion is hurting the other, then it is a matter of discussion whether this practice should be prohibited or the State should keep its mouth shut by not interfering in integral matters of any religion. Going deep into this matter is a must to know what is an essential part of any religion.

### **1.5.2 State intrusion for the purpose of social reformation**

Some social reforms make it possible to remove the evils of society like 'Sati Pratha' & 'Child marriage practices' etc. A social activist named "Raja Ram Mohan Roy" was born in 1772 and he played a pivotal role in eradicating social evils like Sati and Child marriage prevailing at that time in society. He founded the "Brahmo Sabha", which was a social reform & religious movement in Indian history. However, it takes hundreds of years to get people's sympathy and authenticity from society. It is tyranny that our society has been performing many practices that need to be tested through a scanner of the Constitution. The followers of that Religion, or the other part of the society, assert that these practices are essential & protected by constitutional freedom provided by Art. 25 and 26. This is because one part of society wants to abolish all such practices that are derogatory to some communities or inhumane. The question before society is who will resolve these sensitive issues and how? Especially when both the state organs, i.e., legislation and judiciary remained, fail to tackle and resolve these critical issues. There is a need to delve inside, to resolve these issues with the

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<sup>24</sup> *Niranjan Singh v. Prabhakar Rajaram Kharote*, (1980) 2 SCC 559, para 12.

concurrence of society as it is the main hindrance in the development of any nation. Without resolving our social issues, our legislation cannot make smooth and uniform laws, which is society's demand now. P. B. Sawant, J. has written in golden words, “the core of our society is religious freedom. The social fabric is shaken by even small changes. However, certain rituals that violate basic rights and human dignity and sacramentally restrict fundamental civil and material liberties do not represent autonomy; rather, they oppress. A common code is therefore essential to safeguard the oppressed and advance solidarity and national unity. To promote religious and cultural harmony, the first step should be to rationalise the personal laws of the minorities”.<sup>25</sup>

The State wants to impose restrictions on those practices that are inhumane in nature or appear to be unconstitutional when seen without the religious mask and spectacles. On the other hand, religious endowments want complete freedom to carry out all such practices, which they are running under the religious faith of their Religion & for the satisfaction of their inner soul. There is a direct clash between these two for the continuity of religious practices and to save people's fundamental rights and there is a need to understand various legal theories that help in the evolution of laws in society. Different law schools and legal theories help us understand these concepts better. "Aristotle, Socrates, Plato & Henry Drummond"<sup>26</sup> favours the natural law theory, whereas "Roscoe Pound" works for the “Sociological School.”<sup>27</sup> Furthermore, there is a vast difference between these theories for cycling our sociological structure.

### **1.5.3 Role of the Supreme Court**

In the case of “Lakshmindra”<sup>28</sup>, The SC has outlined what constitutes a practice as essential to religion. According to this interpretation, a specific activity is a necessary component of a religion “if the prohibition of that particular conduct diminishes the

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<sup>25</sup> *In re: Sanjiv Datta, Dy. Secy., Ministry of Information & Broadcasting*, (1995) 3 SCC 619, para 20.

<sup>26</sup> Henry Drummond, *Natural Law in the Spiritual World* (Wildside Press, United States, 2012).

<sup>27</sup> Roscoe Pound, *Interpretations of Legal History* (Harvard University Press, Cambridge, 1946).

<sup>28</sup> *The Comm. Hindu religious endowments Madras v. Sh. Lakshmindra Thirtha Swamiar of Sri Shirur Math* 1954 SCR 1005; *Sardar Syedna Taher Saifuddin Sahib v. St. of Bombay* AIR 1962 SC 853; *Sheshammal V. State of Tamil Nadu* 1972 2 SCC 11.

existence of that very much religion”.<sup>29</sup> Supreme Court favours these practices through many concurrence Judgments vis-à-vis dissenting ones. Reading Justices individually, by separating them from the bench and comparing them with each other on common issues, a strong base may be found for the belief and faith of the followers in their Religion. The nation's attention was recently drawn to the historic case of the temple of Sabrimala concerning the admittance of women of having specific ages between ten and fifty years. In this case, Justice I. Malhotra was the only lady Justice out of five judges on that bench. She chose to remain on dissenting side, penned her dissenting opinion and held that “according to Articles 25 and 26, religious practices are protected under the constitution (b). In the absence of any victims belonging to that particular religious religion or sect, courts typically avoid discussing the subject of religious activities”. Later on, this case was referred to a review bench and then after, that review bench referred the same to a higher bench of nine Judges. Now that numerous other petitions on related topics have been combined to form seven questions, the Supreme Court is debating the petitions. By eliminating the overlap of freedoms and constraints in the "Sabrimala Review petition referred to nine Judges Bench, the Court is attempting to create a nexus through a larger Bench and to put an end to all conflicts”.<sup>30</sup> Combining three other notable incidents with these raises other similar issues regarding Muslim women visiting the Hazrat Ali Dargah and a women related to Parsi religion getting married to non-Parsi men in front of an Agri's sacred hearth. The third instance included female genital mutilation, which is a practice carried out by the Dawoodi Bohra sect and the court took notice of it.

The seven most important and contentious issues, in this case, will be addressed by the larger S.C. bench, including the definition of “sections of Hindus”, the scope and ambit of the “right to freedom of religion”, the rights of religious denominations, the scope and extent of morality under Articles 25 and 26 and the scope of judicial review in religious matters.

Now, the Court will consider the extent of freedom of Religion and explain the constitutional morality in the light of Art – 25 & 26, by which the claim of other

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<sup>29</sup>*The Comm. Hindu religious endowments Madras v. Sh. Lakshmindra Thirtha Swamiar of Sri Shirur Math* 1954 SCR 1005

<sup>30</sup> *Kantara Rajeevaru v. Indian Young Lawyer Association Thro. It's General Sec. Ms. Bhakti Pasrija & Ors.*, MANU/SC/0158/2020.



fundamental rights, i.e., Art – 14, 15 and 21, will not clash with religious rights in future and the Court will try to put an end to all the controversies. However, as the matter is susceptible and related to the belief & faith of all religions, it will be challenging for the Court to find the middle way.

Another landmark case related to Dawoodi Bohra's community, a small sect of Islam religion, is merged with this Sabrimala case. In this case, the practice of the FGM case, i.e., female genital mutilation, is under challenge. FGM is a procedure in which the child is taken to a dark room, pinned to a bed, their pants are taken off and a small portion of them is cut, making the experience one of the greatest delights of being a woman. They chopped off their clitoris using blades, knives, or anything else that was even somewhat lengthy and sharp. All of their young females, who are either seven, eight, or nine years old, are subjected to this. To safeguard children's fundamental rights, our country has not yet approved any laws to abolish FGM and other similar practices known as "Khatna" or "Khafz" within the Muslim Bohra community. FGM is still a practice in some places in India. Female genital mutilation has been deemed a human rights violation by the UN, although India has not yet outlawed the practice.

In another landmark case, "Shayara Bano V. State", Khehar, J. S., C.J. & Nazeer, Abdul, J. among the five Judge bench gave dissenting judgment and held that Art – 25 protects religious rights and courts cannot interfere in religious matters except the expressed exceptions provided in Art -26 itself, i.e., public order, health and morality. Additionally, they maintained that triple talaq is a fundamental tenet of Islam and has been practiced for centuries. As a result, they ruled that it was permissible, but the other justices who made up the majority declared the triple talaq to be invalid. In conclusion, the triple talaq was declared invalid by 3:2 Judges.

#### **1.5.4 Locus Standi**

The State, being a sovereign power, is the ultimate caretaker of the fundamental rights. According to Article 32 of the Constitution of India, anyone may file a lawsuit in the public interest, regardless of whether or not his fundamental right is violated. For the sake of significant public interest, any person may file writ petitions in the Apex Court and the issue of 'locus standi' is not a limitation. In contrast, when discussing personal rights, no other person can file the petition except the affected

person and no court entertains any such petition filed by anyone other than the victim or his heir. Regarding religious rights, religious denominations get exemption from 'freedom of Religion' under Articles 25 & 26 of the Indian Constitution. It is a topic of discussion whether the non-followers of any religion can file a petition to challenge any custom or tradition of that Religion.

From the deep study of religious practices & their sanctity in society concerning the Constitution, it came to know that many practices violate several fundamental rights and still, these practices are ongoing in society. These practices have social conformity; hence there is no need for further approval for the validity of these customs from any other authority. Child marriages, gender-biased customs, anti-environment religious rituals, khatna or FGM, or child genital mutilation performed by a religious sect of the Bohra community, an Islam-related sect, etc. are some examples of actions carried out by the society and held in high regard by some members of that community. These behaviours, however, do not occupy the Constitution's intra-vires pedestal in a constitutional sense. The issue is that adherents of all faiths assert that no one from another faith has "locus standi"<sup>31</sup> to challenge the practices of their Religion sounds good also, but is it good to leave these customs to keep violating fundamental rights that obstruct the development of the progressive State? Keeping silent and being a mock spectator will leave people "stateless".<sup>32</sup>

Furthermore, it will make a hurdle on the path of development for any democratic nation.

Who will save for these fundamental rights and maintain balance with religious rights? Especially when both states, i.e., legislation and judiciary themselves, have kept closed their eyes on this issue and, in consequence, promoted these unconstitutional practices. Religious endowments and their adherents seek unrestricted exercise of their faith in accordance with the Constitution, but state interference is the state's supreme power to limit such freedom in a secular democracy. These religious denominations do not want to leave the customs of

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<sup>31</sup> 'Locus Standi' is defined as "a right to appear in a court or before anybody to file a petition on any cause of action, in short, a right to be heard", available at: <https://www.merriamwebster.com/dictionary/locus%20standi> as (Visited on July 31, 2022).

<sup>32</sup> "Stateless" is defined by Oxford Dictionary as "(of a person) not officially a citizen of any country", available at: <https://www.oxfordlearnersdictionaries.com/definition/english/stateless?q=stateless> (Visited on July 31, 2022).

orthodox schools making hurdles in the nation's development and the judiciary does not allow the other part of society to stand for saving fundamental rights of people on the ground of "locus standi".

### **1.5.5 Contribution of legislation and judiciary**

The question before us is whether these practices should continue or whether some corrective measures must be needed to stop these practices. In the last seven decades, it has been noticed that both states, i.e., legislation and judiciary, are confronting each other for the crown of supremacy. "Tug of war" is going on between them. Sometimes the legislature passes a law, the judiciary declares it unconstitutional using its extraordinary and self-evident "Judicial Review" powers and other times the judiciary issues guiding principles that become the nation's governing law and then the legislature passes a law to override the effect of the Supreme Court's ruling. K.S.P. Radhakrishnan, J. has said, "The people, in their solemn capacity as sovereigns, formally grant the Constitution the supreme dominion and declare that it may only be amended in ways that are consistent with the Constitution. It is not because of any judicial supremacy that courts deem legislative Acts to conflict with constitutional provisions; rather, they do so to give effect to the will of the people".<sup>33</sup> According to D. K. Jain, J., "The Apex Court and all State High Courts are required to actively and attentively uphold the fundamental rights that are broadly protected by Article 21 and part III of the Indian Constitution".<sup>34</sup> There is a need to resume this controversy and resolve the social issues amicably by considering the constitutional stream.

### **1.5.6 Importance of dissenting opinions of courts**

In this darkness, a ray of hope may be seen through the mirror of various concurrence and dissenting judgments of constitutional benches. This sensitive and complex issue may be scanned by the sieve of constitutional provisions and multiple acts, especially with the comparative analysis of concurrence and dissenting Supreme Court Judgments. Supreme Court is an independent organ and is supposed to be the

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<sup>33</sup> *Society for Unaided Private Schools of Rajasthan v. Union of India*, (2012) 6 SCC 1, para 205.

<sup>34</sup> *State of W. B. v. Committee for Protection of Democratic Rights*, (2010) 3 SCC 571, para 69.

caretaker and saver of the fundamental rights of citizens. People repose their faith in the Supreme Court against the State's intrusion, restricting their religious freedom and violating their fundamental rights. Supreme Court has given many verdicts that stand in front of the State to save citizens' fundamental rights by estopping the intrusion made by the State having the overriding effect of intrusion upon the freedom of Religion. Various concurrence judgments align with legislative acts. Also, some notable dissenting opinions uphold different views. Justice Indu Malhotra in "Women entry in Sabrimala Temple case", Justice J. S. Khehar & Justice Abdul Nazeer in "Tripple Talaq case", Justice Lakshmanan in "Anand Margis case" and many other notable judgments will be discussed here for better understanding of Supreme Court view. The Supreme Court's closed doors and the national level are currently debating how much religious freedom is guaranteed by the constitutional framework and which constraints the State may apply to protect the country from the prospect of a breach of democratic norms. By contrasting the provisions found in statutes, constitutions and Supreme Court rulings with those found in other democratic nations, these problems will be examined. The comparative study of the Statuary and Constitutional provisions of India and other democratic countries like Canada, Australia, the U.S.A., the United Kingdom, Europe and many more will help us conclude some definite conclusion to this issue. There are numerous provisions for religious freedom with some reasonable restrictions, including Sec. 116 of the Australian Constitution, the U.S. Bill of Rights, the Canadian Charter of Rights and Freedoms, Article 13 of the Portuguese Constitution and the Human Rights Act of 1998 of the U.K.

## 1.6 Literature review

**Table 1.1: Literature survey**

| <b>S.No.</b> | <b>Detail of the journal/<br/>Book/Book<br/>chapter/website<br/>link</b> | <b>Publication<br/>Year</b> | <b>Journal indexing<br/>(Scopus, S.C.I. index,<br/>etc.)</b> | <b>Main<br/>conclusion or<br/>findings<br/>pertinent to the<br/>intended study<br/>work</b>   |
|--------------|--|-----------------------------|--|---|
| 1.           | The Universal Declaration of Human Rights, 1948                          | 1948                        |  | As per this declaration, each person has freedom of thought, conscience, belief & religion. It includes to change the religion freely by anybody. |
| 2.           | Art – 25, 26, 27 & 28 of The Constitution of India, 1949.                | 1949                        |  | These are the Constitutional provisions regarding freedom of religion provided in Indian Constitution.  |

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| 3. | Constitutional Law of India by H. M. Seervai (Fourth Edition)  | 2015     |  | This commentary is written by the author in three volumes and describes fundamental rights very profoundly. In this book, the author discusses the origin of fundamental rights and their social development as per changing scenario of society. |
| 4. | Freedom of Religion & The Indian S.C.: The R.D. test & E.R.P. test: A research work submitted by Coleman D. Williams | May 2019 | The thesis work was submitted to the university by the research scholar. | The thesis describes the two self–deduced tests by the Supreme Court in their landmark judgments to test religious freedom and put restrictions upon religious  |

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|    |   |      |  | <p>freedom. These tests qualify the religious groups that have the immunity of religious freedom &amp; the E.R.P. test checks religious practices that should be allowed to continue.</p>  |
| 5. | <p>Law &amp; Religion in the Muslim middle east by Ann Elizabeth Mayer. (The American Journal of Comparative Law, Vol. – 35, Oxford University Press)</p> | 1987 |  | <p>In this paper, the author explained the role of Religion in the law-making system and also described how the Muslim middle east area justifies its forward steps towards the direction of Secularism. The author described how Islamic laws have been</p> |

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|    |  |      |                           | adopted by the governments and made applicable to whole nations (nationalization of Islamic rules).  |
| 6. | “Indian Young Lawyer's association & Ors. V. The State of Kerala & Ors”. | 2018 | (2018) SCC Online SC 1690 | A five-judge Constitutional court, led by Chief Justice Dipak Mishra, has ruled that limiting the women entry inside the Sabrimala temple is discriminatory. The other three judges are A.M. Khanwilkar, D.Y. Chandrachud and R.F. Nariman. <b>Indu Malhotra dissented.</b> This ruling ends the long-standing |



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|    |   |      |                | practice of prohibiting women from entering the Sabrimala shrine upon their arrival.   |
| 7. | Shayara Bano v. Union of India & others | 2017 | (2017) 9 SCC 1 | The golden pens of five Supreme Court justices, including CJ J.S. Khehar, Justice Abdul Nazeer (dissenting), Rohinton Fali Nariman, U. U. Lalit and Justice Kurian Joseph on the majority side, were used to write this decision. This bench ends the long-standing custom of triple talaq & criticizes the way it has severely devalued |

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|  |  |  |  | <p>women in society and treated them unfairly.</p> <p>According to Justice Joseph, who put it brilliantly, no activity can be justified by any other means if it is not permitted by the Quran, which is Islam's holy book and primary source of law.</p> <p>However, applying constitutional law to personal laws is analogous to a bull in a China shop, according to CJ J.S. Khehar &amp; Justice A. Nazeer in a dissenting note.</p> |
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| 8.  | “S. R. Bommai v. Union of India”        | 1994 | AIR 1918, 1994 SCC (3) | In this ruling, the Apex Court defined the word "Secular" in its proper sense. According to J. Sawant, the secularism is defined as religious tolerance & equal treatment of all religions. |
| 9.  | Lemon v. Kurtzman                       | 1971 | 403 U.S. 602 (1971)    | The "Lemon Test" was applied by the US Court, in this case, to determine whether the State had violated the First Amendment of the United States Constitution.                              |
| 10. | “Ramji Singh V. State of Uttar Pradesh” | 2020 |                        | The Allahabad H.C. stated that the word   |

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|     |  |      |  | "person" as defined in Article 21 of the Indian Constitution includes a dead person within its restricted extent. |
| 11. | Alas Poor Darwin: Arguments Against Evolutionary Psychology by Hilary Rose and Steven Rose | 2001 |  | In this book, a famous American Sociologist, Nelkin, defines 'Religion'.  |
| 12. | “The New Believers: Sects, Cults and Alternative Religions by David V. Barrett”            | 2001 |  | In this book, the definition of “Religion” is given by famous British Sociologist David V. Barrett.               |
| 13. | The Elementary Forms of the Religious Life By Emile Durkheim                               | 1912 |  | Emile Durkheim describes the elementary forms of religious life and religion in this book.                        |

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| 14. | <p>Republic of<br/>Religion: The rise<br/>&amp; fall of colonial<br/>Secularism in<br/>India<br/>By: Abhinav<br/>Chandrachud</p> | 2020 | <p>ISBN:9789353057534,<br/>9353057531<br/>Penguin Random<br/>House India Private<br/>Limited</p> | <p>How did India go about achieving secularism? Due to our history as a colony, we have adopted many English laws and institutions. Our democracy is founded on the parliamentary system and uses the Westminster system of government. Nevertheless, England was not a "secular" nation when it ruled over India. The Republic of Religion makes the persuasive case that a colonial power forced the secular government of India's colonial</p> |
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|     |   |      |  | state upon a conquered people. Given the dubious history of colonial Secularism, it was an unnatural foreign imposition that may have been destined to disintegrate in some way once colonialism was over. |
| 15. | Buddha or Karl Marx<br>By: Bhimrao Ramji Ambedkar | 2015 | ISBN:9781517205218, 1517205212<br>Create Space Independent Publishing Platform | It's possible to take the comparison between Buddha and Karl Marx as humour. This shouldn't be shocking. Marx and Buddha are separated by 2381 years. Karl Marx was born in 1818 AD, while Buddha          |

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|     |   |      |  | was born in 563 BC. The Buddha is considered to have solely contributed to the development of a religion with little influence on either politics or the economy, but Karl Marx is credited with inventing a new economic system based on a new ideology. |
| 16. | Dr B. R. Ambedkar's political philosophy:<br>By Chandrakant Devappa Shivakeri | 2004 | ISBN:9788126120000, 8126120002<br>Anmol Publications Pvt. Ltd. | Like Aristotle and Plato, Dr. Ambedkar was not an entirely idealistic and theoretical political philosopher. However, he also developed his own social and political ideals that were   |

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|  |  |  |  | <p>firmly based on fundamental human problems, difficulties, and worries. His political philosophy attempted to bring materialism and spiritualism, as well as application and theory, into harmony.</p> <p>Ambedkar's political ideology evolved as a result of his displeasure with the cruel treatment that the caste Hindus had meted out to his community, his desire to completely free the servile classes from the</p> |
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|     |   |      |   | control of the privileged caste Hindus, and his intense involvement with the problems facing Indian society.  |
| 17. | Religion, Morality and Law:<br>Southern Methodist University, Studies in Jurisprudence<br>By Robert Elliot Fitch and Wilber G. Katz | 2013 | ISBN:9781258704728, 1258704722<br>Literary Licensing, LLC | In his paper "Christian Morality and Criminal Law," Wilber G. Katz explores a topic that is much more important to lawyers. The specific issue is quickly reduced to the Lutheran and Calvinist interpretation of the role of legal punishment in the classical Protestant tradition. Retribution—or the carrying out of justice—for a criminal act |

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|  |  |  |  | <p>freely chosen—<br/> is discounted as<br/> a basis for<br/> punishment<br/> insofar as the<br/> author attributes<br/> to "realistic"<br/> Judeo-Christian<br/> tradition,<br/> supported by<br/> dynamic<br/> psychology, an<br/> insight into<br/> human nature<br/> that recognizes<br/> the relatively<br/> fixed character<br/> of youth that<br/> renders personal<br/> responsibility<br/> inappropriate to<br/> the issue.<br/> Insofar as illegal<br/> behaviour is<br/> conditional, the<br/> offender has no<br/> direct blame;<br/> rather, those<br/> who determined<br/> his behaviour<br/> bear vicarious</p> |
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|     |   |      |                   | <p>culpability. The primary goal of punishment is revealed to be rehabilitation, with crime prevention as a necessary byproduct. The reader is indirectly urged to support, or at the very least sympathize with, a prison reform that will implement the concepts discussed here.</p> |
| 18. | Ratilal Panachand Gandhi V. State of Bombay | 1954 | 1954 AIR (SC) 388 | <p>Ratilal Panachand Gandhi v. State of Bombay was decided in 1954 and the court declared that "freedom of conscience is not merely for adherents of one faith but applies</p>   |

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|     |   |      |                   | to everyone."  |
| 19. | Commr. of Police<br>V.<br>Jagadishwarananda<br>Avadhuta | 2004 | (2004) 12 SCC 770 | The religious freedom is always subject to public order, morality and health. Since the Tandava dance performed by the petitioner's group in the present case was against public order and morality, the Court obstructed their performance in public. However, they were permitted to dance in private. |
| 20. | S. Mahendran V.<br>Secretary,<br>Travancore             | 1993 | AIR 1993 Ker 42   | In this case, the court banned entrance of women having specific age between ten to fifty years inside the   |

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|     |  |      |                      | Sabarimala temple to pray. They claimed that this limitation was in line with long-standing customs.                         |
| 21. | Kutti Chanami v. Moothan Ranapattar  | 1978 | (1978) 19 Cri LJ 960 | All persons should be permitted to profess their religion freely.  |
| 22. | Basir-ul-Huq v. State of West Bengal   | 1953 | AIR 1953 SC 293      | In this case, the court stated that disruption of the performance of the last rites is a violation of the Indian Penal Code. |
| 23. | M. Siddiq (Deceased) Through. Lrs. v. Mahant S. Das & Ors. (Ayodhya – Babri land dispute Judgment) | 2019 | (2019) 4 SCC 641     | By performing long-standing, uninterrupted worship at Ayodhya temple, the followers have amply demonstrated the possessory   |

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|     |  |      |                  | title of Hindus to the exterior courtyard.  |
| 24. | Dr M. Ismail Faruqui v. U.O.I                                  | 1994 | (1994) 6 SCC 360 | "A mosque is not an integral part of the practise of the Islamic religion," the Supreme Court panel of five judges concluded in 1994. The Court also ruled that "Namaz could be offered anywhere and the state's purchase of a mosque is not forbidden by the Indian Constitution." |
| 25. | Dr Subash Kashinath Mahajan V. The State of Maharashtra & Anr. | 2018 | (2018) 6 SCC 454 | In this decision, the Court added several restrictions in response to claims of abuse of the SC/SC  |

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|     |   |  |                                       | Act and the filing of baseless cases. The most important of these was that giving anticipatory bail to someone charged under this statute would not be completely prohibited.  |
| 26. | Comparative legal analysis of indigenous customary institutions among Mizo, Khasi and Paite Tribes of North-East India by Thangzakhup Tombing |  | Contemporary Law Review, Vol. 4, No.1 | Following a protracted battle by the Mizo woman's society and pressure from other parties, the government passed the Mizo Marriage, Divorce and Inheritance of Property Act 2014 into law. The Mizo community moved from a |

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|  |  |  |  | <p>collection of customary laws to passing legislation with the passage of the Act of 2014. This law aims to give Mizo males and females the same standing when it comes to the Mizo institution of marriage.</p> <p>Except for the three Mizoram areas listed in the sixth schedule, it covers the whole state of Mizoram.</p> <p>According to the Act of 2014, the Church and the Government will work together to regulate marriage.</p> |
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| 27. | Sunita Tiwari V. Union of India                        | 2019 | (2019) 18 SCC 719 | The custom of FGM was challenged in this case. On 24 September 2018, the Division Bench forward this issue to a bigger bench.                               |
| 28. | Dargah Committee, Ajmer & Anr. V. S. Hussain Ali & Ors | 1962 | 19621 SCR 3 8 3   | The Dargah Khwaja Saheb Act of 1955, was challenged as being unconstitutional, giving the Court another chance to use the essential religious rituals test. |
| 29. | Sardar Sarup Singh & Ors. V. State of Punjab & Ors     | 1959 | (1959) INSC 31    | The Sikh Gurudwaras Act, 1925's Section 148-B was contested in this matter before the court. The Apex Court maintained                                      |

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|     |  |      |                  | <p>Section 148-B's constitutional validity by using the standard of necessary religious practices. The Court noted that no authoritative text had been presented to it to demonstrate that the Religion itself required the direct election of every member from Sikh religion only to manage the committee.</p> |
| 30. | Common cause (A regd. Society) V. Union of India | 2018 | AIR 2018 SC 1665 | <p>The Court ruled that the right to die with dignity should be deemed essential, (delivered by a five-judge panel in 2018).</p>   |

### **1.7 Research gap/ problem profile**

It has been noticed that tremendous work has been done in defining Religion, Secularism, freedom of religion and state restrictions upon religious rights. There are so many great philosophers and thinkers who gave their most valuable input in this field. Many philosophers also compared these works with different studies of different geo-territorial sovereign & democratic countries. These works also discuss the historical evolution of different religions at great length. How these religions were adopted by society and became the rule of law in society is also explained very well in many works. Although all works are not uniform and support each other, different aspects can be generated from these studies, which may be valuable and helpful in reaching some discrete & definite conclusion. These different studies clearly show how states intrude into religious freedoms for bringing social reforms and sometimes these states also exceed their powers of imposing restrictions upon freedom of Religion. The legislation enacted many laws by undermining minority rights, religious rights and other basic fundamental rights. Several times, Supreme Court also intrudes into religious matters by overlooking Constitutional aspects, extending its powers by the self-deduced rule of judicial review and developing new theories like the essential practices test and religious denomination test. Both states either go in one way or fail to analyze the issue in a definite way. Supreme Court sang different tuning upon this song, as some judgments find their way in one direction but some in another. The limits of State-imposed constitutional restraints must be determined throughout time. These limitations are included in the Constitution under the headings "Public order, health, morality, rules governing secular conduct linked with a religion and another basic right," however these categories are not defined anywhere.

It has been observed that some religious rituals and customs prevailing in society seem unconstitutional on their face. Still, due to some limiting factors, the State remained unable to ban these activities. Under the guise of religious freedom, people participate in these rites and practice their religions, yet they are violating Article 21 of the Indian Constitution. The judiciary has likewise been unable to come up with a workable answer to these religiously related problems.

The major goal of this research study is to identify solutions to contemporary societal problems through a thorough analysis of crucial concerns that occasionally cause the

legal and judicial systems to engage in a tug-of-war. Nobody can tie together all of the essential rights into a single fabric and it is very impossible to assign each one a specific weight. Fundamental rights are subject to waves of to and fro oscillation, much like a pendulum, because of the dynamic character of the legal system and constantly shifting social conditions. In this study, every constitutional and legislative clause pertaining to religious freedom in India and other nations is examined. By running these practices through the Constitution's checks and balances to safeguard everyone's fundamental rights, the most controversial religious practices are given careful attention. The most condemned rituals in India are those that involve FGM, or female genital mutilation, gender inequality, human and animal sacrifice, disruption of societal cohesion through various religious customs and processions, etc.

Article 21 shall not be sacrificed in anyhow case, specifically under the shadow of religious rights. One cannot override to right to life of any person by professing his religious rights. Supreme Court interpret these terms as they wish to describe. However, as everybody knows, in large Constitutional benches, only majority judgments rule and take the shape of law. Dissenting judgments did not find any place in the rule-making process. Judiciary is an independent organ and every judge is entirely independent to give his or her separate judgement even if he or she does not agree with the majority view. The method of issuing distinct and dissenting opinions is evidence in the court's history that it is an autonomous body. In conclusion, it has been discovered that both States violate numerous religious liberties and some fundamental rights that are strongly protected by the Constitution and have been in existence since antiquity.

Now the matter is that "when the protector itself destroys the fence, then who will care for the crops & fields?" In this darkness, a ray of hope may be seen through the mirror of dissenting judgments, which are also authentic. Still, due to minority views, these dissenting judgments are not considered anywhere except for academic purposes. In this study, the judges will be evaluated individually to explore what each Supreme Court judge separately has written about religious matters and Secularism. Each Supreme Court judge is equal and it does not matter that for writing the judgment, who is senior or junior. Every judge has equal powers to deliver their separate judgement and take their different view. This main character of the judiciary

makes it an independent organ. It helps to keep balance in today's pendulum of society having tremendous political pressure and other critical issues on the opponent side. This study will analyze these Supreme Court judgments, evaluate judges individually and compare their views with foreign courts' judgments. It is not certain that some definite solution to this problem will find out. Still, it may allow us to make this study in a discrete & different way, help us spread awareness and help convert the orthodox society into a progressive nation.

### **1.8 Research objectives**

Indian Constitution explicitly describes that India is a secular nation. But, in the last seven decades, it has remained significant confusion in society about the limits of freedom of Religion and the restrictions upon them placed by the State. Despite much honourable work by many legal luminaries, there is still much more to do for us. There are many Supreme Court judgments describing religious freedom about much controversy about religious freedom in society and even the judiciary is not singing the song in a similar tune. Through this study, an analysis of the Supreme Court judgments will be made, specifically about religious freedoms and restrictions upon them. A comparison of these judgments with the foreign Court's standing will also be made. It will help us understand the standing of every judge who wrote these judgments individually, whether he or she had delivered a majority judgment or had dissenting views & this will help us understand all the controversies in a better way & to resolve them the matter with social conformity. It will also help us see the impact of these judgments upon society, which brings a change in society and law. The objective of this study is to attain social conformity upon some unresolved issues, which are the main hindrance to development and their resolution may establish peace and prosperity in society. Constitutional morality should not be infringed and the Article 21 shall not be sacrificed at any cost.

This study will also be fruitful in setting a future task for the nation, which can be seen through these landmark judgments.

- 1) To analyze right to religion.
- 2) To study right to religion in India in comparison with other countries.

- 3) To study the contribution of legislature and judiciary in developing the right to religion as a fundamental right.
- 4) To study the compatibility of religious practices with Constitutional provisions.
- 5) To analyze dissenting opinions of different Courts regarding right to profess religion.
- 6) To study the instances where right to life overpowers right to profess religion.

### **1.9 Research questions**

- 1) Whether right to religion is ensured in true spirit to all persons in “Secular India”?
- 2) How is the right to religion exercised in other countries compared to India?
- 3) Whether the legislation and judiciary are fairly exercising their powers to ensure freedom of religion?
- 4) Whether the judiciary is exercising excessive powers under the preview of judicial review?
- 5) Whether the customary practices are in consonance with the constitutional provisions in India?
- 6) Whether dissenting opinions of courts are important to give shape to right to life and religion?
- 7) Whether the State should interfere in the evil practices prevailing in the society in the name of religion?

### **1.10 Research Hypothesis**

For this study, two hypotheses are formed and given below.

- 1) Religious practices are violating the fundamental rights of the citizens.
- 2) Dissenting opinions of the courts are important in the reformation of laws for curbing social evils.

## **1.11 Research methodology**

This study adopted qualitative, explanatory, descriptive, analytical and comparative research methodology. This study is mainly related to the deep analysis of Supreme Court Constitutional Judgments and significant High Court judgments; hence it will specifically touch on doctrinal studies, i.e., Doctrinal (Non – Empirical research) & case study analysis. The matter is related to the utmost important issue of fundamental rights, i.e., freedom of religion and it touches on several social issues as discussed above. It has been noted that the viewpoint of the general public has no significance to this study because it is focused on the opinions of Supreme Court and High Court judges and an analysis of their judgements. Hence, it needs no data collection from the general public. Qualitative research through proper analysis and observation of Supreme Court and High Court judgments and various statutory and constitutional provisions is sufficient to conclude some definite results.

### **1.11.1 Qualitative Research**

This study has profoundly observed personal laws, religious practices and state interventions in personal laws. Study of victim women and the effect of unconstitutional rituals upon them, persons affected by triple talaq, Polygamy, Nikah-Halala, ban of a judicial remedy under Parsi religious laws and other such disputed religious practices that are derogatory to the women's dignity or violative of other fundamental rights are considered under this study. The aftermath of the Shayara Bano case & the Sabrimala case, along with various other landmark judgments, has been mainly focused on in this study, covering both the majority and dissenting views of the Supreme Court Bench. For detailed analysis and comparative study, data has been taken from various:

- Supreme Court & High Court Judgments
- Foreign Judgments
- Research papers
- Acts, Statutes & Constitutions of different countries, specifically common law Countries
- Law Commission reports
- Commentaries, Digests & other related law books

### **1.11.2 Case study analysis**

This tool covers all other landmark cases of the SC, various HC's & Foreign Courts touching on the issues related to this study.

So, for this study, the tools of qualitative research and case analysis will be used. Emphasis is on the analysis of legal rules, provisions and judicial pronouncements by the application of reasoning. A critical appraisal of judicial pronouncements and statutory provisions has been done. Data is collected from primary resources like judicial pronouncements, law commission reports, NCRB reports and secondary sources such as articles, newspapers & books. As the purpose of the study is to analyze the right to religious freedom, this study is mainly based upon different interpretations of religious freedom under our Constitution made by individual judges, various statutes enforced by legislation and expert opinion by legal luminaries & academicians will be most helpful to find concrete answers for unresolved issues discussed above.

### **1.12 Chapterization**

This study is classified into the following chapters.

- 1) INTRODUCTION
- 2) HISTORICAL EVOLUTION OF RIGHT TO RELIGION IN INDIA
- 3) RIGHT TO RELIGION: A COMPARATIVE ANALYSIS
- 4) CONSTITUTIONAL ASPECT REGARDING THE RIGHT TO RELIGION IN INDIA
- 5) OTHER LEGISLATIVE PROVISIONS CONCERNING THE RIGHT TO RELIGION IN INDIA
- 6) JUDICIAL PRONOUNCEMENTS WITH SPECIAL REFERENCE TO DISSENTING OPINIONS OF COURTS
- 7) THEORETICAL OUTCOME OF THE STUDY
- 8) ANALYSIS OF THE PUBLIC OPINION ON RELIGIOUS PRACTICES AND STATE INTRUSION
- 9) CONCLUSION AND SUGGESTIONS



### **1.13 Study Limitation**

This study mainly concerns the analysis of Supreme Court judgments, High Court judgments and various statutory and constitutional provisions. It is observed during the research work that there is the least relevance of comments of the general public upon the analytical reports of eminent scholars or analysis of judgments delivered by judges and it is not fair to collect any such data. Qualitative research tools comprising deep analysis of court judgments, detailed analysis of their viewpoints, comparative study of similar judgments, case study analysis and literature review are sufficient for the doctrinal part of this research work and quantitative research is conducted to take public opinion on religious practices and State intrusion into personal laws.

During the empirical study, the main challenge under this study was to collect the personal views of the persons concerning their religion and religious activities. A lot of vigilance has been taken to discuss the critical and sensitive issues related to religion and religious customs or practices. As described, it was very difficult to collect personal views, but still it was a successful attempt to collect such sensitive data and to conclude this research study in a fair way.

## CHAPTER - 2

### HISTORICAL EVOLUTION OF RIGHT TO RELIGION IN INDIA

#### **2.1 Evolution and flourishing of Religion in society**

Religion is as old as society in existence. Many religions are related to ancient times; some were developed later and these religions emerged and developed in society along with the development of society. People's uses in daily life, the relation of people with each other and their social contracts developed as their customs. With time, people started to divide into different groups and followed different ideologies that converted into different religions.

##### **2.1.1 Oldest religions of the world**

1. Hinduism
2. Zoroastrianism
3. Yazdanism
4. Judaism
5. Jainism
6. Confucianism
7. Buddhism
8. Taoism
9. Shintoism

##### **2.1.1.1 Hinduism (15<sup>th</sup> – 5<sup>th</sup> Century B.C.E.)**

Hinduism is a way of life known as the world's oldest religion. Hinduism was not any particular religion; it was just a way of life for people living in the Sindhu region. Nevertheless, slowly, it takes the semblance of Religion and accumulates the strength of the 3<sup>rd</sup> largest religion in whole world. In original, its roots are deeply connected with Sanatan Dharma. It contains the rich culture of historical and ancient India, the diversity and togetherness of people from diverse cultures and the eternal way of life, which alludes to the concept expressed in the scriptures and books of ancient Hinduism. Ancient Vedas greatly influence the ideology of Hinduism. Philosophers of Hindu theology rely on the sources like Shrutis, Smritis, Vedas, Scriptures,

Upanishads, Puranas and other Digests & Commentaries. Hindu Mythology describes duties/ ethics as Dharma, prosperity as Artha, passion/ desires as the Kama, freedom from the life cycle, i.e., salvation as Moksha, actions of human beings as Karma and cycle of birth–rebirth as Samsara. Puja, Japa and Dhyan are some rituals of Hinduism. Some popular denomination groups of Hinduism are Shaivism, Vaishnavism, Smartism and Shaktism. Hinduism is widely spread and professed in India, Nepal & Mauritius and a significant number of persons following Hinduism found well in Africa, Oceania, Europe, North America, the Caribbean and Southeast Asia.

#### **2.1.1.2 Zoroastrianism (10<sup>th</sup> – 5<sup>th</sup> Century B.C.E.)**

One of the oldest religions that is still actively practised today is Zoroastrianism, also known as Mazdayasna. Its foundation is dualistic cosmology. People who practised this religion adhered to Zoroaster's teachings and believed that Ahura Mazda, his Wise Lord (deity of wisdom), was the religion's supreme divinity.

#### **2.1.1.3 Yazdanism**

Yazdanism is pre - Islamic native Religion of the Kurds. "Mehrdad Izady"<sup>35</sup> was a Kurdish Scholar who introduced Yazdanism as the original Religion of the Kurds. Three distinct religious groups, known together as Yazdanism or the Cult of the Angels, included the Yazidis, Ishik Alevis and Gorans. It reconciled the existence of Abrahamic prophets who believed in the theory of rebirth and evolved from a mixture of Hurrian forerunners to the Zoroastrian faith and Islam. They believe that 'Seven angels will defend the world from evil. It is as older as the Zoroastrianism religion.

#### **2.1.1.4 Judaism (9<sup>th</sup> – 5<sup>th</sup> Century B.C.E.)**

Judaism first emerged in the Kingdoms of Judah and Israel during the ninth century BCE. Christianity and Islam, the two most popular religions in the world, have existed since the first and seventh centuries, respectively. Contrarily, Judaism developed into its current form in the sixth century B.C.E.

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<sup>35</sup> Mehrdad R. Izady, *The Kurds: A Concise Handbook* (Taylor & Francis, U.S.A., 1992).

#### **2.1.1.5 Jainism (8<sup>th</sup> – 2<sup>th</sup> Century B.C.E.)**

Jain Dharma is an ancient and one of the oldest religions of India. Its followers believe in Tirthankaras and the last two Tirthankaras are known as Mahavira (599-527 BCE) & Parshvanath (8<sup>th</sup> century B.C.E.). There are approximately 4-5 million followers of Jain Dharma in India and 6-7 million followers worldwide. Jain Dharma is mainly spread in Canada, the United States and Europe outside India. The followers of Jainism believe in ahimsa, anekantavada, aparigraha and asceticism and live a vegetarian lifestyle only. They use Namokara Mantra as their essential prayer.

#### **2.1.1.6 Confucianism (6<sup>th</sup> – 5<sup>th</sup> Century B.C.E.)**

“Confucianism is a way of life initiated by Chinese Scholar Confucius during the 6<sup>th</sup> – 5<sup>th</sup> Century B.C.E. Most Chinese people have followed Confucianism for more than two millennia. Over time, its influence extended to Vietnam, Japan and Korea also. Confucianism is a good mixture of philosophy and Religion that is understood as a social ethic having a different political ideology and way of life”.<sup>36</sup> There are approximately 6 million followers of Confucianism worldwide.

#### **2.1.1.7 Buddhism (6<sup>th</sup> – 5<sup>th</sup> Century B.C.E.)**

Siddhartha Gautama, also known as Gautama Buddha, lived in the northernmost parts of the Indian subcontinent between the sixth and fifth centuries B.C.E. (Nepal). He was the founder of Buddhism. There are several followers of Buddhism worldwide and Buddhism is the fourth-largest religion in the world. Having more than 520 million followers of Buddhism spread worldwide, it counts for more than 7% of the world population. A variety of beliefs, traditions and spiritual practices are followed by its followers and are primarily based on the original teachings of Gautama Buddha. After the death of Buddha, his teachings were codified by their followers.

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<sup>36</sup> Confucianism, *available at*: <https://education.nationalgeographic.org/resource/confucianism/> (Visited on September 12, 2023).

### **2.1.1.8 Taoism (6<sup>th</sup> – 4<sup>th</sup> Century B.C.E.)**

Taoism/ Daoism is a Chinese philosophy, primarily spread in rural areas of China and became the country's official religion during the Tang Dynasty's golden period. Observance of the natural world leads to the development of this philosophy, which later converted into Religion, believing in cosmic balance regulated & maintained by Tao. After some time, “Tang Dynasty”<sup>37</sup> was replaced by Confucianism & Buddhism. However, the followers of Taoism are still present in China and some other countries and these followers are still practising their Religion.

### **2.1.1.9 Shintoism (3<sup>rd</sup> – 8<sup>th</sup> Century C.E.)**

Shinto also goes by the Japanese name kami- no- michi, which has its roots in Japan. Its adherents referred to it as a nature religion, while religious scholars identified it as an East Asian religion. Shintoism practitioners built kamidana households, families and public shrines for worshipping kami (spirits or gods). The festivals & rituals of Shintoism are collectively known as 'masturi'.

### **2.1.2 The emergence of Religion in society**

Ethics and morality lead to the emergence of Religion in society. There are many different religions and the primary aim of every Religion is to regulate the whole society on a just and equitable basis, which directly or indirectly means and is connected with moral principles and ethics. Morality does not depend upon Religion, whereas Religion is so dependent upon moral principles and morality can stand independent of Religion. The question of whether "goodness is liked by the gods because it is excellent or if goodness is good because it is loved by the gods" can be explained by claiming that the gods love goodness because it is good is one that Socrates poses in Plato's Euthyphro. On the other hand, morality might need religion in order to advance its ideals. Religion needs morality to support a just society. Religion and morality consequently go hand in hand and cannot be separated.

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<sup>37</sup> Tang Dynasty (618-907): An Introduction, *available at:* [https://www.khanacademy.org/humanities/art-asia/imperial-china/tang-dynasty/a/tang-dynasty-618907-an-introduction#:~:text=The%20Tang%20dynasty%20\(618%E2%80%93907,four%20hundred%20years%20of%20fragmentation](https://www.khanacademy.org/humanities/art-asia/imperial-china/tang-dynasty/a/tang-dynasty-618907-an-introduction#:~:text=The%20Tang%20dynasty%20(618%E2%80%93907,four%20hundred%20years%20of%20fragmentation) (Visited on September 12, 2023).

Religion and morality are complementary in the emergence of a peaceful, just and equal society since their goals, preoccupations and constituent aspects differ and there is no explicable connection between them. The issue in today's society is the lack of cooperation between morality and religion, which sometimes obscures the influence of religion on the eradication or reduction of social ills like teen pregnancy, infidelity in marriage, injustice and other social ills like family conflicts, corruption, prostitution, armed robbery and violence. Religious people will most likely become moral people if religious institutions retain strong ethical standards, preach them and require their adherents to do the same. The world will then be a much better place for everyone to live in peace. *However, as long as morality and religion don't work together, as long as religious organisations don't raise moral people but instead focus on preaching prosperity and breakthrough where the end justifies the means, as long as they don't promote justice, equity, moral integrity and selfless love, the diversity of religious denominations won't matter. The idea of a just, tranquil and egalitarian society will always remain a mirage.*

Morality and ethics have always been seen as the product of religion and as an integral, indivisible aspect of religion. Since morality is firmly anchored in religion, some academicians and scholars have even come to believe that morality cannot exist without religion. As a result, it is presumed that someone who practices religion is fundamentally moral and that religion may be necessary for someone to live a decent life. If this premise is correct, the diversity of the world's great religious traditions will be beneficial. The human activity that a man deliberately engages in and for which he can be held accountable is the subject of morality. Morality is concerned with the rightness or wrongness of behaviours, or whether such an act should be undertaken or not, while studying such human behaviour.

Different social groups make different communities and develop their customs and rituals having belief in one or another thought and slowly, these communities take the face of religious groups. Religious organizations propagate their traditions, tenets, customs and emotions and use ethics and morality in daily social life and by this, Religion came into our society and took an important place.

## **2.2 Role of worldwide spiritual and religious leaders in developing religious customs and practices**

The form of Religion in which the world had started preaching was not the same as today. Several religious and spiritual leaders contributed unlimited theories for praying to God and getting salvation.

### **2.2.1 Manu**

According to Indian mythology, Manu was the first man and the fabled creator of a significant Sanskrit legal treatise known as the Manu-Smriti (i.e., Laws of Manu). The Manusmriti is also famous by another name i.e., Manav-Dharma sastras and it is the first Constitution and first ancient legal text among all other Dharma sastras of Hindus. Earlier, the sages often used to write their ideas in manuscripts about how society should be operated and governed. It has been noted that the Laws of Manu's original texts were amended because the copy contains numerous contradicting passages. Sir William Jones, a British philologist, was the first person to translate this Sanskrit text into English in 1776. It was also used to enact the Hindu Law Code for those territories that were administrated by the East India Company.

There are currently more than fifty Manusmriti manuscripts available, but the "Kolkata manuscript with Kulluka Bhatta commentary" has been the most well-known, often translated and thought to be the original since the 18th century. The many versions of the manuscripts unearthed in India are contradictory to one another and themselves, according to modern scholarship, raising questions about their validity and any later insertions or interpolations into the text.

The primary work, which is in Sanskrit and is written during the second and third centuries BCE, portrays itself as a disclosure made by Bhrigu and Manu on dharma-related subjects including obligations, rights, behaviour and virtues, among other things. Long before the colonial era, the text's popularity began to expand beyond India. Manu is also credited with inspiring and transforming earlier Hindu kingdoms in Indonesia and Cambodia. The text also affected and changed the mediaeval Buddhist rules of Myanmar and Thailand.

Manusmriti assigned specific responsibilities to each of the four Varnas—Brahmin, Kshatriya, Vaisya and Sudra—that made up the entire community. Eminent legal

experts and academicians have attacked the Manusmriti due to these Varna classifications and their responsibilities outlined in it.

Manusmriti recommends non-violence toward everyone. Sympathy, patience, tolerance, honesty, non-violence, contemplation, extra-marital sexual intercourse and politeness are the primarily recommended virtues described in it. Manusmriti states that "it is not wrong to eat meat, drink liquor, or have sex; these are natural activities of the universe, but refraining from such activities brings the greatest rewards".

Manusmriti is not consistent and the texts & verses differ on women's rights. For example, the texts written in verses 8.101- 8.102 declare that a marriage is a sacrament union of husband and wife and it can never come to an end by the act of husband or wife. However, the language found in verses 9.72–9.81 either permits them to leave the marriage or grants them a divorce from an illegitimate or abusive partnership, allowing them to remarry. "The Manusmriti explains a legitimate reason for a woman to remarry in the rare circumstance if her husband is misplaced or left alone. It prevents a lady from marrying someone who is not a member of her social class. Manusmriti instructs us that a woman should adore her husband in the same way as she worships God and that she should seek the protection of her father as a girl, her husband as a married woman and her son as a widow".<sup>38</sup> Manusmriti also states in verses 3.55–3.56 that "a woman must be honoured and decorated" and that "when women are honoured with respect, then the deity rejoices; but where it is not so, no sacred rite bears any fruit."

The Law of Manu lists a variety of common and important behaviours, including marriages outside of one's varna, a woman becoming pregnant by a man she is not legally married to, the succession of legal rights and property and the custody and legal rights of illegitimate offspring. The words of verses 9.192–9.200 in Manusmriti grant a woman six types of property rights. These property rights cover all assets she acquired from her biological parents, her husband's family, or after her marriage, as well as any bequest from departed family members. She may have acquired these assets before, during, or after her marriage.

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<sup>38</sup> Manusmriti, *available at*: <https://eweb.furman.edu/~ateipen/ReligionA45/protected/manusmriti.htm> (Visited on September 12, 2023).



In nut-shell, the text, Manusmriti played a vital role in describing Hindu customs, traditions, religious ceremonies, treatment of different varnas in society, the social and legal status of women and children etc.,

### 2.2.2 Moses

Moses was one of the main figures in Judaism. He is credited with authoring the first five books of the Bible, according to tradition. God communicates with the Hebrews through Moses, who also gives them the basic guidelines for how to behave as God's people. Moses liberated the Jewish people from slavery in Egypt and led them into the holy land that God had given them around 1300 BCE. Jews commemorate their exile from Egypt every year during the Passover holiday. God confirmed his covenant with the Jews, a commitment that was comparable to the one he had made with Abraham, in a conversation with Moses on the rocky mountainside of Mount Sinai, which is located in modern-day Egypt. God also gave the Jews a set of instructions on how to live their lives. On behalf of Israel, Moses received the Torah, often known as the "Law". Rather than being a law in the contemporary sense, it is authoritative direction, instruction and teaching. The most well-known of these are the Ten Commandments<sup>39</sup>, but 613 additional commandments cover every aspect of life, such as family, law, personal cleanliness and nutrition. Moses is a well-known figure in several religions besides Christianity and Islam. Moses is known as Musa in Islam. Muslims hold him in high regard as a powerful prophet.

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<sup>39</sup> 1. Thou shalt have no other gods before me.  
2. Thou shalt not make unto thee any graven image.  
3. Thou shalt not take the name of the Lord thy God in vain.  
4. Remember the sabbath day and keep it holy.  
5. Honour thy father and thy mother.  
6. Thou shalt not kill.  
7. Thou shalt not commit adultery.  
8. Thou shalt not steal.  
9. Thou shalt not bear false witness against thy neighbour.  
10. Thou shalt not covet anything that is thy neighbour's., *available at:* [https://grailmessage.com/the-ten-commandments-of-god/?pk\\_campaign=Grants-AdWordsSearch-10-commandments-explained-&pk\\_kwd=the%20ten%20commandments&gclid=CjwKCAiA68ebBhB-EiwALVC-NubDc3jjhNSa5EVostzAnC-zl-OjTU1j95yhB0z03Dt1qko3kH4lhRoCKMkQAvD\\_BwE](https://grailmessage.com/the-ten-commandments-of-god/?pk_campaign=Grants-AdWordsSearch-10-commandments-explained-&pk_kwd=the%20ten%20commandments&gclid=CjwKCAiA68ebBhB-EiwALVC-NubDc3jjhNSa5EVostzAnC-zl-OjTU1j95yhB0z03Dt1qko3kH4lhRoCKMkQAvD_BwE) (Visited on November 14, 2022).

Moses laid the foundation for morality in the Ten Commandments, which have been followed by two-thirds of the world's population for more than 3,000 years. Exodus chapter 20 and Deuteronomy chapter 5 include the Ten Commandments in their most well-known version.

Today, these commandments are embedded in the statutes of every democratic nation and part of its laws.

### 2.2.3 Jesus Christ

The Gospels, the first 4 books of the New Testament, include the most significant biblical stories as well as background information on the person, ministry and teachings of Jesus Christ. The four Gospels—Luke, Matthew, John and Mark—are each written from an original and distinctive viewpoint. But each Gospel's depiction of Jesus' teachings and life adds to and complements the others. It provides us with a thorough portrait of Christ's life and his qualities as a teacher. About three years were spent by Jesus Christ in earthly ministry.

Numerous people also watched, followed and learned from him over those years wherever and whenever he ministered. These lessons address the most important life lessons. Even 2000 years after Christ's death and resurrection, it still has a significant effect on millions of people and their lives.

Jesus Christ's teachings have been around for more than 2000 years and if their influence hasn't changed, then their understanding of them is still the best in human history. It is difficult to pinpoint what Christ's core teachings are given the variety of subjects he covers throughout his sermons and parables. His ministry has taught him many things that are helpful for instructing, rebuking, correcting and training in righteousness.

“The core teachings of Jesus Christ”<sup>40</sup>:

- 1) Love God: The Greatest Commandment (Mark 12: 28-30)
- 2) Love Your Neighbor (Mark 12: 31-33)
- 3) The Parable of Good Samaritan (Luke 10: 25-37)

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<sup>40</sup> The Teachings of Jesus Christ, *available at:* <https://www.churchofjesuschrist.org/comeuntochrist/believe/becoming-like-jesus/teachings-of-jesus-christ> (Visited on September 12, 2023).

- 4) Forgive Seventy-Seven Times (Matthew 18: 21-22)
- 5) The Parable of The Unforgiving Servant (Matthew 18: 23-25)
- 6) Judging Others (Luke 6: 37-42)
- 7) Love Your Enemies (Luke 6: 27-36)
- 8) Lay Up Treasures in Heaven (Matthew 6: 19-24)
- 9) The Parable of The Rich Fool (Luke 12: 13-21)

Jesus Christ's Core Teachings need to motivate us to rely on God's grace rather than our strength to live. He won't let us do anything that He hasn't previously permitted us to do. The central theme of Jesus Christ's teachings is love. It should come as no surprise since it perfectly captures God's nature. Although there is no simple method to follow Jesus Christ's teachings, we as Christians should do so since He set the example. Christ's teachings cannot be followed by one individual alone. He provided us with individuals to assist, reprimand and even chastise us.

Additionally, Jesus Christ promised to provide us with guidance on how to resist temptation when it arises. Just a handful of the powerful sayings, parables and teachings that Jesus Christ made during his three-year earthly career include these basic concepts. The teachings of Jesus Christ are followed by genuine Christians. Although it might not be an easy journey, Jesus Christ said that the gate leading to life is narrow (Matthew 7: 13–14), so we can keep moving forward in the direction of our redemption.

#### **2.2.4 Prophet Muhammad**

The first prophet of Islam, Muhammad, was born in Mecca in AD 570. Muhammad preached a religion that was different from Arabia's pre-existing social and moral norms: Islam. In accordance with the new Islamic religion, there is only one God and Prophet Muhammad is the final and most significant of all messengers and prophets. God had delivered different codes or systems of regulations for living through his messengers and prophets, culminating them in the Koran, the sacred book of Islam. Two of the many other mortal people who served as these messengers were Moses, the Hebrew prophet and lawgiver, and Jesus, whom Christians believe to be the son of God rather than a prophet.

Islam held the Hebrew Bible, also known as the Old Testament, and the additional twenty-seven books known as the New Testament and the Koran, which make up the Christian Bible, in high regard. According to the Koran, the two Scriptures that preceded it underwent changes from the original forms they were given by God over time, but the Koran would stay flawless, protected by God from such distortion. The new religion, which set itself apart from Christian and Hebrew customs, also proclaimed that through the messengers, prophets, and the Holy Koran, the God of Islam had granted humanity the capacity to discriminate between good and evil. People will thus be held responsible for their deeds on the day of judgement. Muhammad's teachings were subject to fierce and severe criticism. In 622, he departed Mecca in search of safety in Yathrib, following in the footsteps of many of his followers. After Muhammad's arrival, Medina was renamed from Yathrib. The 12-month lunar Islamic calendar was established upon Muhammad's arrival.

### **2.2.5 Gautam Buddha**

Gautam Buddha expounded on the philosophy of life, known as Buddhism. He lived in the sixth century B.C. in northern India. Reincarnation, or the idea of being born again after death, is one of Buddhism's central beliefs. Throughout his forty-five-year journey through India, Gautam Buddha spread the Dharma and his teachings. They assisted everyone along the route, including beggars, kings, and slave girls. Their kindness knew no bounds. Wherever the Buddha travelled, he gained the hearts of the populace by addressing their real emotions. He advised them to evaluate his teachings for themselves to see whether they were right or wrong before deciding whether to follow them. Everyone was moved by his example to show kindness to one another and grow in virtue. He explained the path of Nirvana, a state of liberation and freedom from suffering, by releasing one's attachment to ourselves and desire through three practices, i.e., SILA, SAMADHI and PRAJNA. SILA means virtue, good conduct and morality, which can be attained by the 'five precepts' or 'five rules of training' referred to as 'PANCHA-SILA'<sup>41</sup>.

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<sup>41</sup> I observe, refraining from killing any living beings.  
I observe, refraining from taking what does the owner not give.  
I observe, refraining from committing sexual misconduct.  
I observe, refraining from telling lies.

The two fundamental concepts of equality and reciprocity serve as the foundation for these five precepts. The same idea of equality is included in our Indian Constitution's Article 14 as a basic right. The reciprocity principle: Do unto others as you would have them do unto you is the "Golden Rule" in Christianity. All of the main religions embrace it.

SAMADHI is a method of developing the mind through focus and meditation, which aids in mind control. The final PRAJNA practice, known as "the real heart of Buddhism," deals with insight, wisdom and enlightenment. In conclusion, morality, compassion and the principle of equality are the foundation of Buddhism.

PANCHA-SILA prohibits killing any living being, stealing anything, adultery, cheating and fraud and taking any intoxicant or drugs. These five precepts, referred to as 'PANCHA-SILA', are based on the principle of morality and equality, converted into Buddhism customs and traditions and are now embedded in our laws.

Buddhism believes in rebirth, whereas Hinduism believes in reincarnation. Buddhists speak about our inner soul; if there is no soul or permanent self, then what is it that is 'reborn'? 'Tenzin Gyatso', the fourteenth and current Dalai Lama, who lives as a refugee in India, is considered the next-in-line of tulkus, believed to be incarnations of Avalokitesvara, the Bodhisattva of compassion.

### **2.2.6 Martin Luther**

"Martin Luther"<sup>42</sup>, a German priest, taught moral theology at the University of Wittenberg. He is also regarded as the founder of Lutheranism and a key role in the Protestant Reformation. After being ordained as a priest in 1507, Luther challenged a number of the Roman Catholic Church's beliefs and practices. He particularly argued against and condemned the doctrine of indulgences.

He wrote the Ninety-Five Theses to challenge the Church's use of indulgences at the time. In the Church, indulgences are a necessary step toward salvation. When a Christian sins and turn from their sins, according to this religion, they are pardoned

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I observe, refraining from taking any intoxicant or drug, *available at:* <https://drarisworld.wordpress.com/2015/06/17/pancha-sila-five-precepts-of-buddhist-morality/> (Visited on November 14, 2022).

<sup>42</sup> Martin Luther, Stanford Encyclopedia of Philosophy, *available at:* <https://plato.stanford.edu/entries/luther/> (Visited on September 12, 2023).

and no longer face an eternity in hell, though they might still get a lesser penalty. This penalty could be satisfied by the repentant performing the deeds of mercy. The penitent could fulfil acts of mercy to satisfy this sentence. If the lesser penance is not carried out during life, it must be carried out in purgatory, which Catholics believe to be a place situated midway between Hell and Heaven. Through indulgence, this temporary penalty could be made more bearable. Luther held that the Holy Bible is the ultimate source of law and that human works cannot bring about redemption; only trust in God can. In these ninety-five theses, Luther establishes the notion of repentance as the Christian's internal fight with sin rather than the external system of sacramental confession. Luther also challenges the beliefs on indulgence in a variety of other topics. Luther insisted that the pathway to peace with God was not possible through good works, scholastic reasoning, or religious rituals but through heartfelt belief and faith in Jesus Christ and his atoning death on the cross.

### **2.2.7 Guru Nanak Dev Ji**

The first Sikh guru, Guru Nanak Dev Ji, is revered for his social, spiritual and political ideals that are based on adoration, virtue, fairness and unity. The Guru Granth Sahib mentions the guidance of Guru Nanak Dev Ji as a guiding principle for not only Sikhs but for all religions and communities. Everyone benefits from Guru Nanak Dev Ji's teachings in order to live a moral life. His main principles include:

- 1) Ek-Onkar – One Supreme Reality
- 2) No Discrimination
- 3) Reject Five Sins (Panj Vikaar)
- 4) Kirat Karo (Work Honestly)
- 5) Vand-Shako (Share and Consume)
- 6) Sewa (Selfless Service)
- 7) Kindness and Compassion
- 8) Every life has a purpose to fulfil
- 9) Stand against oppression
- 10) Respect Women

"God is One," says Guru Nanak Dev Ji. As a teenager, Guru Nanak Dev Ji broke laws and societal conventions. His lectures stressed the significance of having faith in your

good Karma and a single greater authority. Guru Ji's belief in friendship and fairness is one of his core teachings. He treated everyone equally, regardless of their race, gender, status, religion, or position. Bhai Mardana and Bhai Bala were his two disciples and Guru Nanak Ji addressed them as "Bhai" rather than by their caste or race as if they were his brothers. Guru Ji discussed the five sins that exist in the human body and mind and he instructed us to reject these five sins or thieves because they weaken us and cause us to neglect our responsibilities. Kam (desire), Krodh (anger), Lobh (greed), Moh (attachment) and Ahankar are the names of these five sins (ego). He advocated for honest work and taught that everyone should use their abilities and talents to live a natural life while honestly earning a living.

Guru Ji thought that responsible individuals should be in charge of helping the less fortunate. He constantly valued and engaged in selfless service. He believed that only through entirely self-sacrificing deeds could one find ultimate satisfaction. Kindness and compassion, in Guru Ji's opinion, have the power to impact and transform the world. All of us learned a valuable lesson about inner fortitude from Guru Ji. He advised speaking out against injustice all the time. He has always supported women's rights. He demanded equality and respect for women in society in earlier verses by stating, "Why to dishonor the one who birthed the glorious kings of the world?"

### **2.2.8 Swami Vivekanand Ji**

Hindu monk Swami Vivekanand was an outstanding individual and the foremost pupil of the Indian saint Ramakrishna in the nineteenth century. He spread the Vedanta and Yoga philosophies of India. He was credited with promoting interfaith understanding, creating relationships between religions and delivering sermons. He was successful in establishing Hinduism as the principal world religion by bringing it to the fore in western nations in the 19th century. He introduced nationalism to colonial India and played a significant role in the contemporary Hindu reform movements there. At the Parliament of the World's Religions in Chicago in 1893, he presented Hindu philosophy. At the meeting, he gave a speech that made him famous. He opened it with the phrase "Sisters and brothers of America..."<sup>43</sup> Hinduism was a

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<sup>43</sup> Swami Vivekananda: Revival and reform in the making of Hinduism, *available at*: <http://dx.doi.org/10.4102/hts.v76i4.6110> (Visited on September 12, 2023).

religion that Vivekanand, a spiritual monk, adhered to. He gave lectures and led countless private and public conferences, courses and meetings. He spread Hindu philosophical principles in western nations. His birthday is observed as National Youth Day in India because of his renown as a patriotic saint.

### **2.3 Evolution of religious customs and rituals in society as a way of life that gets converted into personal laws later on.**

The outcome of all religions leads to the development of rights and duties of persons in their routine life. It leads to the development of a systematic way of life for people living under several religious denominations and following a mixture of different religions. People started living in a society and following a particular religion initially. They felt that they were too interconnected with their own as well as other religions, so they made some social rules and regulations to live peacefully. They adopt these rules as their way of life, inspired by their belief in a particular religion. These rules were later on converted into customs and, after that, laws. So, we can say that religion is directly connected and leads to the emergence of today's laws; Hinduism believes in the concept of Dharma, which later develops as duties and rights of the citizens and is enshrined in our Indian Constitution. Various social ties, contracts and interconnections of persons living in a society pave the way for many customs and slowly become an inseparable part of life. Later, these ties get religious sanctity under various religions and legal sanctions. *Some examples of several acts that converted into their daily lifestyle emerged as customs having religious sanctity and later took the shape of today's laws are described below.*

- **Marriage**
- **Divorce**
- **Adoption**
- **Succession**
- **Renunciation of the world (Sanyas)**
- **Last rites**



### 2.3.1 Marriage

*Marriage is a duty performed in mutual cooperation as directed in the authoritative scriptures for spiritual advancement. Therefore, marriage is essential to avoid the lives of cats and dogs, which are not meant for spiritual enlightenment.*

**Sri Mad Bhagavatam 3.14.19**

As per the best available evidence, it is suggested that marriage was first occasioned approx. 4350 years back. Many anthropologists believe that thousands of years back, families used to live in loosely organized groups of as many as 25-30 people. These groups include several male persons and shared multiple women and children and so on. Then people started to convert to agrarian civilizations with some stable arrangements. The need for marriage emerged, uniting one man with one-woman dating from about 2650 B.C., in the western region (Mesopotamia). Slowly, over the time of several hundred years, marriage started to be embraced as a personal union /institution and it was getting sanctions from the communities also prevailing at that time, like ancient Greeks, Hebrews & Romans. Surprisingly, Love & Religion have little to do with marriage at initial times. Primarily, marriage was occasioned to bind women to men and thus ensure true biological children out of their wedlock. However, later, communities accepted marriage as a license to use women to satisfy their sexual urges. In ancient times, Greek people handed over their daughter to the bridegroom by saying, " I pledge my daughter for producing legitimate offspring. Ancient Hebrew men used to marry & keep several wives. Greeks & Romans kept concubines, prostitutes and male lovers. Wives stayed at home and if they failed to give birth to babies, their husbands left their wives and married someone else.

Marriage is one of the most important long-lasting relationships. Marriage, also called matrimony or wedlock, is a culturally and often legally recognized union between people called spouses. It establishes rights and obligations between them. Throughout marriage, couples face many challenges. Stress affects both spouses and religion play a vital role in helping them be resilient as a couple. Religion helps the couples to live a peaceful and better life by turning them to more unified and committed couples.

Generally, women married with male persons, but historically, in some parts of the India, the girls married with God and dedicated to the service of deity for their whole life. The custom of Devadasi was mainly in practice in southern States of India. In this custom, people leave their daughters in temples for their whole life. These girls trained for the classical dance and transform themselves into an artist. They were dedicated to the worship and never married with human beings during their rest of life. The dedication takes place in a ceremony that is somewhat similar to a marriage ceremony. A Devadasi was believed to be immune from widowhood and was called akhanda saubhagyavati.

Historically, the practice of polygamy was also usual. A man marrying more than one wife is known as polygamy. There was no restriction upon polygamy among Hindus before the enactment of The Marriage Act, 1955. Muslims are still celebrating the practice of polygamy as in their personal laws, marriage with up to four wives is legal and valid.

A child marriage is also a usual practice in India from the ancient times. In spite of stringent laws applicable for the prohibition of child marriages, it is still in practice in India. Under several general and specific laws, the marriage of girls below the age of 18 years and the marriage of boys below the age of 21 years is an offence and punishable. While child marriage is observed for both boys and girls, the overwhelming majority of child spouses are girls. In many cases, only one partner is below the age of majority, usually the female, due to importance placed upon female virginity. In developed countries, the child marriage is outlawed or strictly restricted and the incidents of child marriages are declining in the whole world.

Several cultures also practiced temporary and conditional marriages like Muta marriage in Islam. In some jurisdictions, the practices of common-law marriages and unregistered partnerships were also prevalent. The other provisions of marriage, religion and marriage, polygamy and State laws regulating marriages are discussed in detail in next sections.

### **2.3.1.1 Religion & Marriage**

At that time, Roman Catholic Church was a powerful social institution in Europe. People started to recognize marriage in legal terms after getting the blessings of

priests. In the eighth century, the Catholic Church almost recognized marriage as a sacrament, widely accepted in the religious face. The sacramental element of marriage was codified into canon law by the Council of Trent in 1563, and after religion was included into marriage, there was a minor improvement in women's regard and dignity. Christian society emphasized exclusive access of husband and wife to each other and forced men to remain sexually faithful, but the Church still supported dominating male society with men as the head of the family, overruling their wife's wishes.

According to the Vedic view, a woman is the better half of a man's body since she is in charge of carrying out half of the husband's responsibilities. Every man's primary worry and thought is his beauty when he accepts his wife as a source of sense gratification and once that source is broken, there is disruption or divorce. However, there is no question of consideration of personal attractiveness between them and consequently no disruption of so-called love when the wife and husband both strive for spiritual progress through cooperation. In this materialistic world, where there is no doubt about a person's physical attractiveness or their love for one another, marriage is seen as a responsibility carried out in the mutual cooperation of the husband & wife as directed in the holy scriptures for spiritual growth.

As the history of marriage explains, couples came close to each other and knotted their wedlock ties for producing legitimate offspring and not due to any love or religion. However, after some time, they started feeling deep & mutual love for each other. It leads to the idea of marriage with their love partner and romantic love dives into the deep seas of marriage and so on; the theme of love marriage flourishes in the Middle Ages. Many scholars also believe that the French invented this concept of love marriages. Knight's love for someone else wife and Sir Lancelot's love for Queen Guinevere, King Arthur's wife, were seen as models for initiating love marriages. Literature of the twelfth century explores the desirous feelings by praising her beauty, pink lips and dark eyes and further unfolds many love stories of that time. Love changed marriage in many ways. Women were given tremendous respect due to the feeling of love compared to the circumstances of serving men alone. During colonial rule in America, polygamy prevailed and was accepted by societies. Male-dominating society was officially recognized as coverture, by which the bride gave up her identity

after the marriage and absorbed into his husband's identity. These rules were strict enough due to an American woman marrying a foreigner and losing her citizenship after such marriage.

### **2.3.1.3 State laws regulating marriages**

Currently, marriage almost takes the shape of a contract. Muslim law recognizes a marriage as a contract between the parties. In Muslim marriages, Qazi takes the consent of both bride and bridegroom via the method of proposal and affirmation in the presence of witnesses. In Hinduism, it is accepted as sacramental, but after the passing of The Hindu Code bills in 1950 and the enactment of various personal laws regulating Hindu marriages, divorce, adoption, succession and maintenance laws in 1955 – 56, more or less, marriage becomes an outcome of a contract. Before 1955, there was no concept of divorce in Hindu laws and re-marriage was a sin for a widow. However, as liberalism spreads its feet in society and women's dignity is placed on better pedestals on society's weighing scales, the concept of divorce enters the picture. As of today, marriage is a personal relationship between two consenting partners uniting with each other and there are sound divorce provisions too in most personal laws today giving sanction to divorce for the sake of individual freedom and women's dignity. Nowadays, liberal countries have also started to sanction same-sex marriages, which are still not allowed by personal laws in India and have no recognition in Indian laws.

### **2.3.2 Divorce**

Divorce means the legal dissolution of marriage or untying the marital knots under the rule of law. By eliminating the obligations of marriage, it dissolves the legal ties of matrimony. The Concise Oxford Dictionary of Sociology from 1994 defines divorce as the formal legal dissolution of a legally recognized marriage. An official and long-lasting method of dissolution is divorce. In addition to affecting one relationship, it also causes family disarray and a breakdown in societal structure when one or both members neglect their responsibilities.

Earlier, marriage was considered sacramental or virtually indissoluble. Nevertheless, the viewpoint starts changing with the advancement and changing societal trends.

Marriage which is taken as a spiritual union of two souls has taken the shape of personal and practical commitment, i.e., in other words - making marriage consensual. For many decades, divorces were granted in limited or extraordinary circumstances. Divorce is considered a grievous and unpardonable sin. This stigma prohibits the married couple from walking out of their relationship that was once approved by society.

Now, this scenario has changed. A divorce is a practical approach to marital discord, relieving married partners of an unhappy relationship and giving them the freedom to live a life of their own. Earlier, men were free to divorce their wives, but the wife could not do so quickly. It also needed the grant of Parliament, so it was costly too. The 1857 Matrimonial Causes Act was the first that initiated ordinary people's divorce rights. Divorce was the gateway for couples who remained unsuccessful in giving birth to children.

It was simple to stray from the ways of men under Muslim law. They know about Talaq-e-Sunnat (the most precise form of talaq in the Quran). Some sects also recognized Talaq-e-biddat (pronouncement of triple talaq in one instance). However, after declaring the talaq-e-biddat ineffective by the Honorable Supreme Court, it was now declared a criminal offence by the government. If any person pronounced such talaq, the government has also provided three years of punishment in the Act.

After the passage of The Hindu Marriage Act, of 1955, divorce became legal under Hindu law. Before these regulations, it was essentially difficult for women, in particular, to obtain a divorce fast. The aforementioned Act now includes provisions for leaving oneself, nonetheless, for several reasons, including cruelty, impotence, rejection of the world, conversion to another religion, susceptible ailments, etc. Even bereaved women were prohibited from remarriage in some cultures, which considered it a sin for widows. Social progress was essential in elevating women's status in society and attempting to maintain this position. Moreover, "Hindu laws now recognize mutual consent divorce on the theory of irretrievable marriage breakdown".<sup>44</sup>

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<sup>44</sup> Irretrievable Breakdown of Marriage as a Ground for Divorce, *available at*: <https://www.scconline.com/blog/post/2022/04/15/irretrievable-breakdown-of-marriage-as-a-ground-for-divorce/> (Visited on September 13, 2023).

Divorce is a socially and legally recognized form of dissolution of marriage. Previously, divorce was granted in rare cases, but now almost all states and religions have recognized some form of divorce. Societal attitude toward marriage and divorce is changing day by day. Marriage does not remain within any boundary for consenting couples. They can easily do so if they want to leave the marital bonds. So, the trend is forwarding to make the marriage consensual and if it fails, one can easily break it. Nowadays, the law recognizes other ways of divorce based on the theory of mutual consent. It is believed now to make the living partners stress-free if they are unable to live jointly in a peaceful manner. However, this is increasing in substantial divorce cases in western countries and countries like India. Followers of liberalism supported the various forms of divorce and did not want to tolerate dominating male society. By granting women the same rights and opportunities as men in all sectors, feminists and academics who support feminism work to elevate the status of women in society.

### **2.3.3 Adoption**

Adoption is a process in which a child is transplanted to another family by departing from his/her biological parent's family. The concept of guardianship is designed to provide temporary parenthood and care to youngsters, whereas adoption is designed to provide permanent parenthood to neglected or parentless children. Adoption was first seen in the 6<sup>th</sup> century A.D. under the Roman Law, Codex Justinianus, under which provisions of child adoption were made for a family dying without a male heir from another family, which cannot up bring their children for several reasons. Adoption was also a ray of hope for couples who desire a child, who can take care of them in their declining years, but remained unsuccessful in giving birth to a child due to some tragedy or technical reasons. Due to the increase in abandoned/ neglected children & orphan children, there was a rush in child care centers also, which led to the adoption concept of providing them with better parenthood with all good quality essentials like nutritious food, clothing and education etc. In some countries, the adoption of a male child was also promoted due to the enlargement of the family lineage system through male persons and the succession of their wealth to only male children. There were several laws enacted to support the adoption system. The primary purpose of all these laws was to provide just basic amenities like food,

clothing, education etc., to parentless/ neglected children in the best interest of these children. In the Middle Ages (1300 to 1500), the adoption system was slightly discouraged by the French, Italian and common law systems. All these law systems are tuned to include inheritance only to blood-related persons. Due to the increase in abandoned children, the Church began to regulate the practice of official orphanages and soon private institutions also came into the field to promote childcare homes. “In 1851, The Massachusetts Adoption of Children Act became the first law related to adoption provisions to protect the child's interests”.<sup>45</sup> The Hauge Conventions also played a significant role in giving legal sanctions on inter-country adoption and led to enacting several adoption laws in different countries following the general guidelines.

#### **2.3.4 Succession**

There are different historical succession systems prevailing in society. Mainly it is male favoured and property goes to male successors, but in some communities, it is female favouring also. Religions have a significant role to play in succession laws. There are two well-known schools in Hinduism: the Dayabhaga School and the Mitakshara School. Due to its distinctive understanding of the Hindu Undivided Family and its use of legal sanctions, the Hindu law system is likewise distinct from those of other religions. One Karta serves as the family's head, and an undivided Hindu family's property is distributed to all of its cohabitants upon dissolution. Thus, in this case, all the coparceners are equally inheriting the property in equal shares. Now the question is, who is the coparcener in HUF? Earlier, daughters were not treated as coparceners like male persons. It was the amendment of 2005 in Hindu laws which made it possible and gave equal rights to daughters as well as sons were getting before 2005. By this, one can say that up to 2005, our society was not accepting daughters equal to sons, which was the leading factor among others that increased the crime rate in the society and kept social disparity between men and women. It also leads to gender discrimination and other sexual crimes. One can say that women have

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<sup>45</sup> Did you know the first adoption law was passed in Massachusetts in 1851, *available at*: <https://www.davidandmargaret.org/news-events/past-happenings/naam-2019.html/article/2019/11/06/did-you-know-the-first-adoption-law-was-passed-in-massachusetts-in-1851-#:~:text=It%20wasn't%20until%201851,parents%20and%20adoptees%20into%20consideration> (Visited on September 13, 2023).

to struggle a lot to achieve equal status under various laws; still, there is much disparity and many societies still dominate male attitudes.

### **2.3.5 Renunciation to the world (Sanyas)**

Renouncing the world is the Act of abandonment of all material comforts and achieving spiritual enlightenment. It has been practiced in many religions since ancient times. Hinduism supported it from ancient times and persons renouncing the world under Hinduism are known as Sannyasi. Buddhism and Jainism also support renunciation for achieving the ultimate goal of life, i.e., Moksha. Buddhism termed renunciation 'nekkhamma', which means living a life free from lust, desires and craving.

#### **2.3.5.1 Santhara or Sallekhana, suicide & right to die with dignity**

A religious practice known as Santhara or Sallekhana involves voluntarily decreasing one's intake of food and drinks till one die. Ceasing all physical and mental endeavours, according to Jainism, influences Karma by decreasing human desires, the body and other methods of eradicating reincarnation. Because it is neither a passionate act nor involves the use of poison or a weapon, it is not seen as suicide by Jain scholars. The ritual preparation and practice might go on for years after the Sallekhana pledge. Both men and women are permitted to attend Sallekhana and in the recent era, Sallekhana-related deaths have been comparatively rare.

The freedom of religion and the right to life are contentious topics. “The Rajasthan High Court outlawed Sallekhana in 2015, deeming it to be akin to suicide, but the Supreme Court overturned that ruling in 2016 and reinstated the practice”.<sup>46</sup>

### **2.3.6 Last rites**

Under personal laws, the ceremonies of the last rites are different from each other.

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<sup>46</sup> Julie McCarthy, Fasting To The Death: Is It A Religious Rite or Suicide, *available at*: <https://www.npr.org/sections/goatsandsoda/2015/09/02/436820789/fasting-to-the-death-is-it-a-religious-rite-or-suicide> (Visited on September 13, 2023).



### **2.3.6.1 Hindu beliefs about death**

Reincarnation, or the notion that the soul reincarnates after death in a different body, lies at the heart of Hinduism. Hindus hold that the soul continues to exist and reincarnate even after death, until it understands what its actual nature is. Even if it takes many incarnations and numerous deaths, they strive to get closer to the Hindu god "**Brahma**". They also believe that their actions in previous lifetimes, often known as "**Karma**", will determine their soul's next incarnation.

Hindus think that since the physical body is useless after death, there is no reason to preserve it. They cremate their loved ones because they believe cremation to be the quickest method of soul liberation and aid in reincarnation. Hindus have traditionally been cremated on the banks of the Ganges River in India, with the family members carrying the coffin there. Hindus are now cremated locally and the majority of funeral directors are able to carry out the customs and rituals associated with Hindu cremation.

### **2.3.6.2 Ceremonies of last rites in other religions**

According to the Islamic faith, after a person passes away, they enter what is known as the afterlife. How successfully you lived your life in accordance with Islamic religious teachings will determine your path to the afterlife. Muslims have the view that if you live a decent life, you will enter paradise once you pass away; if not, you will be cut off from everything that is good in the world. Islamic funerals held in cemeteries have two goals: to console the bereaved and to pray to Allah.

As per Islamic funeral rites, burials occur quickly after death. After washing the body, it is covered with a sheet by relatives or family members. After that, the body is transported to a burial place and usually, the burial is taken place outside the mosque. During the funeral ceremony, all family members and relatives turned their faces toward Mecca and prayed to Allah. Followers of Islam hold the view that there will be a physical resurrection of the body on judgement day and they prohibit cremation.

Among Christians, the funeral ceremony is similar to the Islamic religion and the followers of the Christian religion also bury the dead body.

## **2.4 Contribution of different primary schools of jurisprudence in developing legal theories.**

- 2.4.1 Natural law school
- 2.4.2 Historical School
- 2.4.3 Analytical School
- 2.4.4 Sociological School
- 2.4.5 Realistic School

### **2.4.1 Natural law school**

Politics, law, religion and social philosophy have all long been based on the idea of "Natural Law," sometimes known as the law of nature. A set of unwritten laws known as natural law is composed of the moral principles that human nature, which derives from God, has made clear. It is shared by everyone and is universal. It transcends the differences in how different religions, cultures and moral principles are conveyed. Natural law theory has had a considerable impact on how Articles 21, 14 and 19 have been construed in the Indian setting, especially by the Indian judiciary.

#### **2.4.1.1 Natural law jurisprudence school**

A legal school known as "Natural Law" upholds natural law. This concept stands for the conviction that all civic societies are bound by inalienable laws. Natural law is often referred to as the moral law, the law of God, the rule of nature, and the universal law. It is also known as the unwritten law. This school of thinking holds that the law is rational and logical. Morality should logically and analytically lead to rules, according to Natural Law. Therefore, morally repugnant behaviour will be prohibited by the law. God, nature and arguments were the main sources of Natural Law.

The four divisions of Natural law school are as follows:

- a. Ancient period/ Classical period
- b. Medieval period/ Middle Ages
- c. Renaissance period
- d. Modern period

A universal moral order should serve as the foundation for legislation, according to the Natural Law school of thought. Humans "found" Natural Law by using reason and making moral judgments. *The Cambridge Dictionary of Philosophy* states: In moral and political theory, natural law is sometimes referred to as the law of nature. It is a collection of universally necessary objective principles guiding human behaviour, which are frequently thought to involve a superhuman legislator. It is similar to the kind laws of a human ruler.

The emphasis on "universal standards and rights of individuals and nations, which are features of the natural law perspective, is found in both the United Nations Charter and the American Constitution. The natural law theory is reflected in the United States Declaration of Independence. The summary that follows should give readers a feel of the signatories' strong faith in natural law".

***"The unanimous declaration of the thirteen United States of America, July 4, 1776***

*When it becomes necessary in the course of human affairs for one people to sever the political ties that have bound them to another and to assume among the powers of the earth the distinct and equal station to which the laws of nature and God of nature authorize them, due consideration for the opinions of humanity demanded that they should disclose the motivations behind the separation.*

*All men are created equal, their creator endows them with certain absolute rights, among them are life, liberty and the pursuit of happiness and governments are instituted among men, deriving their legitimate powers from the consent of the governed, are truths that we believe to be self-evident".*

Natural law school has had a big impact on American legal theory when it comes to human issues. It becomes vital for one. This legal interpretation is in keeping with the notion that some rights, such as those described in the Declaration of Independence and John Locke's writings, are "absolute." People may possess "natural" or "God-given" rights that the state is obligated to uphold. This point of view logically leads to the notion that people should only be subject to their will.

Henry Thoreau, Mahatma Gandhi, and Martin Luther King Jr. all saw civil disobedience as a moral substitute for a "unnatural" law.

Legal positivists, on the other hand, assert that we are unable to definitively define what "natural" or "universal" law is. Reading the text of the law and watching it in action are the two best methods to understand it. Regardless of how difficult it may be to define it, supporters of natural law would argue that if we are concerned about justice, every law and the judicial system should be held to a higher standard.

#### **2.4.1.2 Divine right theory**

Several theories support the origin of society, but the divine origin theory terms the social system as a creation of God. It explains that as God had created all the animals and objects of this universe, he also made this society.

Divine right theory, the basis of the 'Laws of God & Nature', is the oldest fictional theory of society's origin. As per the theory, King acts as a representative of God on this earth. God rules on this earth through the King and delegates the power to the King; therefore, King is accountable to God for all acts done under his authoritative capacity, but the King is not liable to any human being.

“The Shanti Parva”<sup>47</sup>, one of the eighteen books of the Indian epic Mahabharat, depicts the divine inspirations in Indian traditions. It recites the various duties of the King/ ruler, Dharma and good governance. Manusmriti is one of the many Dharmashastras of Hinduism. Its 7<sup>th</sup> chapter also elaborates on the various duties of a ruler. The Bible describes the King as a representative of God and assumes God as a source of all powers.

The King's ruling power gets forced from his ancestors, who, as a king, are appointed as an authority in a particular boundary to serve by God. King is the supreme authority in divine right theory and only that King has the power to punish the wrongdoer. In Nepal, the King was believed to be an incarnation of Vishnu, but in India, the King was considered a son of the Sun.

Robert Filmer supports the Divine Rights of Kings in his famous work '*Natural Power of Kings*'. He held that a King's authority and power were invested in him by God and that authority or power is absolute without any exception, laying down the

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<sup>47</sup> Shanti Parva in Mahabharata, available at: <https://www.templepurohit.com/shanti-parva-mahabharata/> (Visited on September 13, 2023).

basis of our political obligation. In his view, political obligation is subsumed under religious obligation and does not need any other sanctity.

## **2.4.2 Historical School**

Roman Law served as a model for the historical view of the law. Roman law commentators made an effort to connect the law to contemporary issues. It hastened the development of several other legal disciplines. In the 15th and 16th centuries, Germany began to study Roman law. It had a historical strategy in its infancy.

The 18th century was a time of rationality and reasoned argument. The entirety of this century's legal theory was infused with an individualistic attitude. Governmental structures are replaced by revolution. Because laws are based on natural law principles, thinkers and philosophers believed that crafting rules based on considerations would be unchanging and have universal application.

Other legal specialties were influenced by the study of economics and social philosophers began advocating for the emancipation of the classes. These elements inspired the philosophers to devise fresh approaches to the issues. They looked to history and historical philosophy for direction and illumination, which gave rise to a school of thought that is now known as the Historical School of Law.

### **2.4.2.1 Concept of Historical School of law**

The traditional school of law is built on the axiom that "Law is founded and not made".<sup>48</sup> Friedrich Karl and Von Savigny established the earliest School of Law. According to this school, the public rather than any political power discovers and provides the law, which interacts with people's local conditions. People's customs are seen as the major source of law by proponents of historical schools, which is important to note. The formation of the historical School of Law is attributable to the historical School of Jurisprudence, which maintains that as social mores and practices change, so should the law. The realist and naturalistic schools of law are disregarded by the historical school of law, which places a great focus on God and judges as the primary sources of law.

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<sup>48</sup> Friedrich Karl von Savigny, *Britannica- The Editors of Encyclopaedia*, (Encyclopedia Britannica, 17 Feb. 2023).

The history School of Law has expanded for the following reasons:

1. It was a reaction to the natural school of law, which maintained that certain laws apply to everyone without regard for social, historical, or other factors.
2. It also served as a rebuttal to the positivist school of law, which held that even repressive laws must be obeyed by citizens because they were enacted by the sovereign.

Fundamental ideas of the Historical School of Law:

1. It considers the law to be a consequence of earlier customs, practices and beliefs that were held by a variety of people.
2. It sees law as a natural and biological development rather than an arbitrary, fantastical, or artificial construct. Law is an abstract body of regulations imposed on society, yet it has deep roots in social and economic factors as well as the mindset of its past and present citizens.
3. Law does not apply or hold true everywhere. Every community has its distinct language, customs and constitution that help to shape its legal practices.

#### **2.4.2.2 Henry Maine**

Maine conducted a comparative analysis of the legal systems in numerous communities; his approach greatly enhanced the historical School and produced positive outcomes. Maine claims that the law is created in four stages.

Law is first made by the sovereign with divine inspiration.

First Stage: In the first level, the King is the one who declares law in the form of commandments under the guidance of the deity. It is thought that all orders and directions issued by the King receive divine approval because the King is meant to act on behalf of God.

Customary law is the next stage.

Second Stage: The second step is when the King's orders become established customary law.

Third stage: The priest's possession of the law's knowledge

In the third stage, minority organizations, typically of a religious nature, gain understanding and control of the law as the original lawmakers lose their influence.

Stage four: codification

Maine's theory is considerably more balanced than Savigny's. Savigny did not understand the importance of legislation, whereas Maine did. The primary goal of Maine's study of legal history was to comprehend the past, not to predict the future. Maine's idea promoted optimism about the future and laid the groundwork for the sociological theory of law. Historical law schools have made some tangible advancements in the law that have had a long-lasting impact on society. This School greatly encourages the historical study of law and legal systems, which has instilled a sense of historical perspective. In order to correctly comprehend the law in the contemporary era, it is necessary to go into the past, as this school has demonstrated correlations between cultural evolution and various legal provisions.

### **2.4.3 Analytical School**

“The powerful School of jurisprudential thinking known as legal positivism was founded in the 19th century. The analytical school has a positive outlook on life. The school’s legal experts note that the relationship between the law and the state is its fundamental component. Law is viewed as a directive coming from the state. This School is sometimes referred to as the Imperative School as a result”.<sup>49</sup>

Meaning of positivism:

There are five definitions of "positivism":

- 1) Law commands.
- 2) The analytical conclusion of legal notions is distinct from critical analysis and social and historical research.
- 3) Decisions can be deduced using predetermined rules.
- 4) Rational justifications cannot be used to support or reject moral judgments.
- 5) The law must be kept apart from the law that should exist in its current form.

Correctly, positivism is connected to the fifth meaning.

#### **2.4.3.1 Features of the theory:**

- The goal of the Analytical School of Jurisprudence is to examine the fundamental ideas of law.

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<sup>49</sup> Analytical School of Jurisprudence, *available at*: <https://blog.iplayers.in/analytical-school-of-jurisprudence/> (Visited on September 13, 2023).

- The methodical and eloquent presentation of legal concepts is the analytical School's primary responsibility.
- One goal of the analytical school is to develop a precise and in-depth grasp of the underlying assumptions that underlie all legal reasoning.
- The analytic school views law as the sovereign's order.
- It places a focus on legislation as the foundation of law. The concept of law is the cornerstone of the entire system.
- This School views the law as a closed system of unadulterated facts that excludes any standards and ideals.
- The analytical lawyer is unbothered by ideals. They view the law as a natural phenomenon produced by the state.
- Analytical jurisprudence is significant because it improved the clarity of legal reasoning.

In this School, religion starts differentiating from the law and the law is described as a command of a sovereign. It proves a more powerful ruling system than earlier exclusively religious-based natural and historical schools. A legal system starts developing through analytical thinkers based on fundamental human life concepts. In this School, a set of rules was developed to regulate religious customs and activities and this set of rules started ruling the society to control religious customs and activities. These prescribed rules started overruling prevailing religious laws slowly. *It was the stage when the power had started shifting from the hands of priests to sovereign authority and initiated the separation of religion and sovereign state. By developing a new set of laws and regulation systems, the analytical School gradually, but not wholly, started discouraging orthodox schools.*

#### **2.4.4 Sociological School**

It is a unique arrangement, an implied agreement between the people living in the society surrendering their freedom under the sovereign state's surveillance and the surety of caring for their fundamental rights.



#### **2.4.4.1 Social contract theory**

The frustration of centuries with the unlimited powers of monarchs resulted in the social contract theory. Under this theory, individuals impliedly consent to the sovereignty and authority of the government. In return, the government commits to serving its citizens with all the basic amenities and protecting them from outside aggression. Under this theory, the government is bound to maintain peace, law and order and keep its boundaries safe. Public good, health, education, safety, roads, infrastructure, healthy environment etc., are some domains covered under the duties of authoritarian government to benefit all public.

Thomas Hobbes was the first philosopher who gave complete exposition and support to the social contract theory and related it to modern moral and political theory. John Locke and Jean Jacques Rousseau were other famous philosophers and proponents of social contract theory. In the twentieth century, social contract theory again proposed high values in John Rawls 'A Theories of Justice', based upon Kant's version. David Gauthier was another proponent of social contract theory and enlarged many theory concepts in a new direction. Modern philosophers with different perspectives have opened pandora's box of criticism of social contract theory. However, some believe that social contract theory is an incomplete picture of our moral values and political life.

#### **2.4.4.2 The sociological aspect of religion**

The major goals of discussions of religion in sociology classrooms are to understand the function that religion provides, the inequality and other issues that religion can exacerbate and perpetuate, as well as the part it plays in our daily lives. "No matter how it is practised or whose particular religious perspectives a community favours, Emile Durkheim emphasized the importance of religion for society".<sup>50</sup>

In many respects, religion enhances life's meaning and purpose. There are numerous comprehension challenges in life. Even in today's relatively sophisticated and scientific world, many aspects of life and death remain a mystery, thus religious faith and religion help people make sense of the things that science cannot explain.

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<sup>50</sup> Emile Durkheim, *available at*: <https://iep.utm.edu/emile-durkheim/> (Visited on September 13, 2023).

Second, religion fosters social cohesion and stability. That was one of Durkheim's most important realizations. Social stability is influenced by religion in at least two separate ways. By first providing people with a set of accepted beliefs, it functions as a crucial socialization tool. Second, community religious practise, such as that observed in places of worship, fosters social ties by bringing people together, encouraging their discourse, and facilitating other social relationships.

In a third place, there is a link between the prior topic and religion. Religion sustains society order as a social control mechanism. Religion promotes moral behaviour, which shows people how to contribute significantly to society. The Ten Commandments are arguably the most well-known set of moral guidelines in Judeo-Christian tradition.

Fourthly, religion encourages better physical and mental wellness. By providing comfort to individuals in need and creating social interaction at places of worship, religious belief and practise can enhance psychological health. According to some research, being religious benefits people of all ages, not just the elderly, by boosting life satisfaction, pleasure, and contentment. Religious believers typically live longer than non-believers, and some studies even imply that religion may have a positive impact on physical health.

Religion's main objective is to inspire individuals to work for constructive social change. The Southern civil rights movement was significantly impacted by religion a few decades ago. Martin Luther King Jr. and other civil rights leaders put their lives in danger to integrate the South because of their fervent religious convictions. Black churches across the South hosted meetings, recruiting drives, and fund-raising events for the civil rights movement.

#### **2.4.4.3 Religion, Inequality and Conflict**

Religion, despite having numerous advantages, encourages and supports societal inequality and conflict. This viewpoint was also influenced by Karl Marx, who claimed that religious people often attribute their poverty to their faith. They believe that either because they have disobeyed him or because he is measuring their amount of confidence and trust in them, God wants them to be inferior to others. Many people think that if they go through with their suffering, they will be rewarded in the afterlife.

Because of this, according to Karl Marx, religion encourages the underprivileged to accept their lot in life and maintains the current system of social injustice. He also claimed that because of people's strong religious beliefs, neither the poor nor the working class rebelled to change their circumstances.

Religion contributes to gender inequality by promoting unfavourable preconceptions of women and upholding conventional ideas about how they should be treated as men's servants. The idea that a wife should submit to her husband's authority in humility is supported by the majority of religions and traditional religious beliefs.

The world's history demonstrates that individuals, organisations, or entire communities are exceedingly willing to commit crimes against, assassinate, and fight war on one another as a result of intercommunal or interreligious conflicts. Religion is seen to foster social strife.

Since ancient times, Jews, Hindus, Muslims, Sikhs and other religious or racial communities have endured persecution and murder. Although religion has historically contributed to persecution, torture and wanton killing, it can also catalyze societal unity.

In addition, religion has the potential to violate several women's and children's rights. Some examples pushed by the adherents of some religions include many instances of child sexual abuse by Catholic priests, female sexual abuse by Imams, gender-discriminatory norms and customs harming children's fundamental rights.

Sometimes, the symbolic interactionist method is used in opposition to religious rituals and ceremonies. They can be quite intense and include bodily manifestations such as crying, laughing, screaming, trance-like states, a sense of oneness with others around them, and other physical and emotional manifestations, in addition to other emotional and psychological states. They may have a significant emotional impact even if they do not have a life-changing effect on many people.

#### **2.4.5 Realistic School**

The realist viewpoint in legal jurisprudence is very recent. Its primary home is in the United States. The main tenet of realism is that "law is what the psychology of courts

determined,"<sup>51</sup> or that all judicial and governmental activities together constitute law. "Judges decide and interpret what is law." They underline the element of uncertainty in the law and the role that the judge's personality plays. Law is explained by official activity rather than a set of legal concepts. The sociological approach to a law includes the realist perspective. It is also referred to as a left-wing sociological or functional school for this reason.

#### **2.4.5.1 Characteristics of Realistic School:**

The Realist school of the Realism movement's qualities were mentioned in a few places.

1. There isn't a realistic school, in a way. It is referred to as "realism," a trend made up of legal writings and legal ideas.
2. Realism refers to a conceptual thesis on the law broken down into parts and some social goals. It is implied in a culture where social development has outpaced the application of the law.
3. To further the goal of the study, it also assumes a temporary form of divorce in terms of "is" and "ought." It implies that all ethical considerations for the observer that might obscure the letter of the law are disregarded.
4. It also fosters mistrust of established legal principles and ideas, at least insofar as they seem to describe what courts or regular citizens are doing.
5. In addition, it largely focuses on assessing the law's various provisions in terms of its impact.

The Realist school of law was founded primarily for the following three reasons:

1. The first justification is that it was created in response to sociological jurists who stressed the impact of law on society.
2. The second reason was that it disregarded the Ihering and Pound theories of interest and social engineering.
3. The third reason is that this School was founded to emphasize the significance of courts and judges—the human element is represented by the judges and the attorneys.

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<sup>51</sup> H. J. M. Boukema, *Legal Realism and Legal Certainty* (Franz Steiner Verlag, Vol 66, No. 4, pp. 469-485, 1980).

American philosopher Grey supported the realistic school of law and made a distinction between law and the source of law. He asserted that judges make the laws. According to Grey, every person's legal rights and obligations are decided by the court system or other judicial body of an ant state. He added that statutes and other sources of law, such as public policy, customs and expert opinion, are rendered alive by the courts.

The Realist School made invaluable contributions to the field of law. This school adopts a constructive mindset and is unconcerned with any theories of justice or natural law. The supporters of this school argue that the concept of the "certainty of law" is false. They demand a careful, thorough approach and an examination of all the variables that affect the choice made in the end.

## **2.5 Social change**

The above-discussed theories related to the development of legal jurisprudence and social contract are sufficient to explain the interconnection of human beings. These theories are subject to many criticisms also, which confines the attention of the scholars upon specific vital observations. Society is not a product of God, whereas man is. The collective groups make a society of men and women living in this universe. Force is an essential factor in the evolution of society and still plays an important role. Neither matriarchal nor patriarchal theories be applied universally. Society is emerging gradually. It passes through a long way of developments of civil persons and human relations with each other. The above-discussed theories might illuminate how societies developed into an organized group, but still, these theories do not entirely explain the origin of society. These theories describe how people came into contact with each other and how their acts take the place of customs, which are later approved as valid customs in society. The evolution of customs, the sole justification for which was morality or ethics, was greatly influenced by religion. Several religions are propagated by many Prophets & Gurus, but the base of each religion is almost the same, i.e., morality. *People started describing and differentiating what is right or wrong by using the scale of morality or ethics and during this phase, religion entered society and became an inseparable part of politics.* Natural and Historic Schools keep religion at the top to give commands and

rule in society. The analytical School shifted the power from the hands of priests to the sovereign state, which is now sailing in the waves of sociological and realistic schools.

## **2.6 Codification of personal laws**

As the whole society started transforming into a civilized one, people felt the need for civil laws to regulate the whole society in a justified way. The whole world was divided into different continents, different countries, different states and then different tribal areas and societies. Countries develop different civil laws applicable to them as per their needs, geographical areas, customs and social contracts. The basis of all these personal laws was ethics and morality. Moral principles guide all religions that set the standard for 'what is the right thing to do' and 'what should be prohibited'. More or less, all religions are based upon these ethical principles. However, their preachers may agree or not with another religion and may their style of living life be diverse from another religion; the destination of all religions is almost the same, i.e., 'to live a peaceful life in a justified manner without disturbing anybody else'. Morality must be read broader than religion as it is similar to all religions. Morality and religion are not synonymous. Morality does not depend upon religion, whereas religion may depend upon morality. The five major and oldest world religions (Hinduism, Islam, Christianity, Buddhism and Judaism) have a sense of community in common. A sense of community unites the people, which gives them a unique identity and they pass down several rituals and traditions from generation to generation.

Indian Constitution provides freedom of religion and saves the customary laws which are not inconsistent with the Constitutional provisions. As there are different religions, there are no uniform, personal laws. Each religion has its principles and way of regulating its customs. In 1955 and 1956, the Hindu law was codified and as a result, four new pieces of legislation pertaining to marriage, divorce, support, guardianship and succession went into effect. The 1937 Shariat Act established rules for Islamic communities. The rules that govern the Parsi community are codified in the Parsi Marriage and Divorce Act of 1936.

*To accomplish the objective of analyzing of right to religion and finding the answer to the research question of "whether the right to religion is ensured in true spirit to all persons in secular India?", the study of the historical evolution of religion & emergence of religion in society is made in this chapter. It is discussed in detail how our daily routine acts converted into religious customs and rituals and become an integral part of our life. For a better understanding of religion and the evolution of religion in society, the relationship between morality and religion is also discussed at length. For analyzing the jurisprudential aspect, a comparative analysis of different law schools concerning the provisions of religious freedom, is also made in this chapter and a brief look is given at how personal laws get their place in statutory books.*

## Chapter - 3

### **RIGHT TO RELIGION: A COMPARATIVE ANALYSIS**

*“Have, in the first place granted to God and by this our present Charter confirmed for our heirs and us forever, that the English Church shall be free and enjoy her rights, in their integrity and her liberties inviolate; and we will see that it be so observed; and this is manifest from this, that we, of our mere and unconstrained will, before the contest between our barons and us had arisen, granted and by our Charter confirmed and procured to be confirmed by Pope Innocent III, the freedom of elections which is most important and essential to the English Church; and this we will observe and will to be observed in good faith by our heirs forever. We have also permitted all the freemen of our kingdom, for our heirs and forever, all the underwritten liberties, to have and hold them and their heirs, of our heirs and us”.<sup>52</sup>*

#### **Clause 1 of The Charter of Magna Carta, 1215.**

### **3.1 A worldwide scenario of freedom of religion**

The status of religious freedom varies from nation to nation across the world. States differ on whether or not to guarantee religious freedom to adherents, whether or not to have an official religion, the legal obstacles to treating practitioners and non-practitioners equally, the scope of operation of religious organizations and their religious affairs, the extent to which religious law is used as a foundation for state constitutional law and whether or not morality should be promoted.

The actual application of legislation by the governing bodies in various countries differs from their self-declared positions on religious freedom in law in other respects. Similar procedures, such as requiring residents to declare their preferred religion on official identification cards, will have entirely different effects based on the opposing sociopolitical conditions unique to the respective countries. In their constitutions, more than 120 national states guarantee both religious freedom and equality before the law.

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<sup>52</sup> Clause 1 of The Charter of Magna Carta, 1215, available at: <https://www.parliament.uk/about/living-heritage/evolutionofparliament/originsofparliament/birthofparliament/overview/magnacarta/#:~:text=Magna%20Carta%20was%20issued%20in,as%20a%20power%20in%20itself> (Visited on November 11, 2022).



### **3.1.1 Asia**

Most Asian countries have formally established religious freedom in their laws, but the extent or boundaries of freedom of religion differ in each country. Some countries have anti-blasphemy laws and others have anti-discrimination laws. In many Asian countries, legal-religious discrimination is present. Some countries, considering the activities of Islamic groups as fundamentalist, banned their activities in their region. Several countries have passed anti-conversion laws prohibiting the conversion of peoples' religion either by inducement or compulsion. Some countries like Turkmenistan and Tajikistan have imposed a ban on the practice of religion in their country and China discourages the practice of religion on a broad basis. Islam is the official religion of several Asian nations, while Buddhism is another well-known Asian faith that is practiced in the majority of those same nations. Islamic religious tribunals with various levels of jurisdiction have been created in some nations with majorities of Muslims. Some state governments in Muslim nations actively supervise and guide Muslim religious practices in their territory.

Additionally, there are huge regional differences in the level of religious tolerance in Asia. Religiously motivated violence is practiced in many nations with varying degrees of local government intervention or support. Different religious communities, including Muslims, Hindus, Sikhs, Buddhists, etc., are targets of politically motivated religious violence.

### **3.1.2 Europe**

Almost every European nation formally recognizes religious freedom for all citizens and the majority of them even have anti-discrimination statutes that specifically call out religious freedom as a fundamental human right. However, the enforcement of these religious rights varies and several other nations continue to struggle to put these laws into effect at the local and international levels. There are still official state religions in a few European nations. The majority of nations have also established formal government initiatives to restate properties that were once owned by certain religious groups or religions and were seized or confiscated by earlier governments. Additionally, several European nations offer public funding or other benefits for advancing specific religions.

The level of religious tolerance in Europe varies from nation to nation and is not consistent. In contrast to such societies, which often harbour anti-Jewish and anti-Muslim sentiments as well as both minor and serious acts of physical vandalism or violence motivated by religion, some nations have a high level of religious tolerance among the general people.

### **3.1.3 North America**

The freedom of religion and conscience is guaranteed by every constitution in North America. In many nations, there is no continuous issue of religious freedom breaches that could be caused by government involvement or social pressure, according to reports from the U.S. State Department. Discrimination based on religion is made illegal and consequently prohibited by many countries. Since the days of colonialism, blasphemy laws have existed in seven different nations. However, it doesn't appear that those are currently in effect in their nations.

“In 1930, the Rastafarians began a religious and political movement to erode the hardship of discrimination and religious obstacles they faced during their religious practices in many parts of Jamaica”.<sup>53</sup> Rastafarians were habitual in using cannabis in their religious rituals and some countries have outlawed and banned the use of cannabis. This movement takes its name from the emperor's precoronation name, i.e., Ras Tafari. Ras Tafari has been described as a religion and it is legally recognized in many countries. Rastafari religion is dynamic and continuously changing and developing, with remarkable doctrinal variation among practitioners depending on the category to which they belong. There has never been a single leader at the front face and it is not a unified movement and all Rastas follow it. Thus, it is hard to make broad generalizations about the movement without knowing its complexities. “Darren J. N. Middleton, a scholar of religion, suggested that it is appropriate to say about the Rastafari religion as a plethora of Rasta spiritualities rather than a single phenomenon”.<sup>54</sup>

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<sup>53</sup> McAlister, Elizabeth A., *Rastafari*, (Encyclopedia Britannica, 2 Jun. 2023).

<sup>54</sup> Rastafari, available at: [https://en.sewasew.com/p/rastafari-\(%E1%88%AB%E1%88%B5%E1%89%B3%E1%8D%8B%E1%88%AA\)](https://en.sewasew.com/p/rastafari-(%E1%88%AB%E1%88%B5%E1%89%B3%E1%8D%8B%E1%88%AA)) (Visited on September 13, 2023).

Some states of North America have Roman Catholicism as their state religion and some countries give preferential treatment to Catholic Church. They haven't made it the nation's official state religion, though.

### **3.1.4 Oceania**

All of the Oceania countries officially guarantee the right to freedom of conscience and religion in their constitutions or bill of rights, even though several governments have restricted this freedom due to other factors like morality or public safety. Additionally, despite the apparent legal requirements for tolerance, some nations have local leadership that has communal views that are occasionally in opposition to other religions. Only Tuvalu and Samoa have official state religions in Oceania; a few other nations' constitutions include Christianity as a fundamental component of their founding ideals. A quarter of the Oceania countries have not experienced any significant violations of religious freedom, according to reports from the US government. However, the same percentage of violence against some religious minorities have been documented in the twenty-first century, primarily against Hindus in Fiji, Jews in Australia and some Muslims in Papua New Guinea and New Zealand. These nations have a long history of anti-religious political speech.

### **3.1.5 South America**

Every constitution in South America expressly guarantees the right to freedom of conscience and religion. Some nations nevertheless favour the Catholic Church although numerous nations have expressly banned discrimination along religious lines and no nation in South America has designated any faith as its official state religion. In three South American countries, there have occasionally been reports of vandalism against Jews.

“Article 14 of Argentina's Constitution guarantees the right "to profess their religion freely" to all of the residents of the Argentina state”.<sup>55</sup> Bolivia's Constitution also

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<sup>55</sup> Combating intolerance, negative stereotyping, stigmatization of, and discrimination, incitement to violence and violence against persons based on religion and belief, Report of The United Nations High Commissioner for Human Rights, *available at*: <https://www.ohchr.org> (Visited on September 13, 2023).

establishes religious freedom and separation between state and Church. This Constitution further prohibits any discrimination based on religion. The Constitution of Chile also provides specifically for religious freedom; additionally, it obliges that this freedom must not be "public order, good customs and opposed to morals". This Constitution also establishes a wall of separation between state and Church and prohibits religious discrimination.

The Republic of Columbia's Constitution provides religious freedom and upholds the equality of all religions before the law. In its population census, the Columbian government does not track information by religion. The Venezuelan Constitution guarantees religious freedom so long as it doesn't go against "public morality or decency." It makes "incitement to hatred" or acts of violence against religious groups illegal.

### **3.1.6 Africa**

Legal laws indicating that everyone has the right to freedom of religion are present in the majority of African countries. The scope and depth to which this right is implemented vary from one nation to another. Many nations, particularly in Southern and West Africa, have high levels of religious tolerance, but in other nations, the general public or official institutions actively discriminate against people of different religions. Rastafarians, Christians (in countries with a majority of Muslims), Muslims (in countries with a majority of Christians) and Ahmadiyya Muslims are prominent communities that experience high levels of legal discrimination in Africa (in Muslim countries). Additionally, many nations vehemently reject atheists in society and several prohibit the use of witchcraft. Some nations have made Islam their official state religion and those with sizable Muslim populations favour Islamic customs there. To address family law disputes in their nation, they have also formed Islamic religious tribunals. These courts were established in addition to the secular courts and although this is not a fixed law, they officially play a lesser role.

Many states have regulations allowing religious organizations to register; nevertheless, other governments forbid the formation of religious and political parties. Some nations also administer funding schemes for religious endeavours and offer the

best accommodations to devoted travellers. In some nations, violence driven by religion is also observed in nations with high levels of political instability.

### **3.2 International standards on freedom of belief, conscience and religion**

#### **3.2.1 Scope of freedom of religion under various Covenants**

UDHR provides freedom of religion including freedom to change the religion and this freedom is limited to the thought process of the persons. According to this declaration, “all persons are free to keep faith in any religion and the State has nothing to do with the moral sense of persons”.<sup>56</sup> The internationally endorsed definition of “freedom to acquire, modify, or renounce a religion or belief” is supported by the description given in Article 18(1) of ICCPR. UN Declaration on Human Rights describes freedom of religion as a matter of personal choice of any person to retain any religion or to adopt another religion. Some other significant Conventions and Declarations like ICESCR<sup>57</sup>, CTCIDTP<sup>58</sup>, CRC<sup>59</sup>, ICERDW<sup>60</sup>, CPPCGCSR<sup>61</sup>, ICPRMWMF<sup>62</sup> etc., also promote the agenda of freedom of conscience, belief and religion. Other elements that affect religious freedom include the Human Rights

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<sup>56</sup> Article 18, Universal Declaration of Human Rights 1948, *available at*: [https://www.ohchr.org/en/press-releases/2018/11/universal-declaration-human-rights-70-30-articles-30-articles-article-](https://www.ohchr.org/en/press-releases/2018/11/universal-declaration-human-rights-70-30-articles-30-articles-article-18#:~:text=Article%2018%3A%20Freedom%20of%20Religion,religion%2C%20or%20to%20change%20it)

18#:~:text=Article%2018%3A%20Freedom%20of%20Religion,religion%2C%20or%20to%20change%20it (Visited on November 11, 2022).

<sup>57</sup> International Covenant on Economic, Social and Cultural Rights, *available at*: <https://www.ohchr.org/en/instruments-mechanisms/instruments/international-covenant-economic-social-and-cultural-rights> (Visited on November 12, 2022).

<sup>58</sup> The Convention against Torture and other Cruel Inhuman or Degrading Treatment or Punishment, *available at*: <https://www.ohchr.org/en/instruments-mechanisms/instruments/convention-against-torture-and-other-cruel-inhuman-or-degrading> (Visited on November 12, 2022).

<sup>59</sup> The Convention on the Rights of the Child, *available at*: <https://www.ohchr.org/en/instruments-mechanisms/instruments/convention-rights-child> (Visited on November 12, 2022).

<sup>60</sup> International Convention on the elimination of All Forms of Racial Discrimination against Women, *available at*: [https://www.ohchr.org/en/instruments-mechanisms/instruments/convention-elimination-all-forms-discrimination-against-](https://www.ohchr.org/en/instruments-mechanisms/instruments/convention-elimination-all-forms-discrimination-against-women#:~:text=On%2018%20December%201979%2C%20the,twentieth%20country%20had%20ratified%20it)

women#:~:text=On%2018%20December%201979%2C%20the,twentieth%20country%20had%20ratified%20it (Visited on November 12, 2022).

<sup>61</sup> Convention on the Prevention and Punishment of the Crime of Genocide and the Convention relating to the Status of Refugees, *available at*: <https://www.ohchr.org/en/instruments-mechanisms/instruments/convention-prevention-and-punishment-crime-genocide> (Visited on November 12, 2022).

<sup>62</sup> International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, *available at*: <https://www.ohchr.org/en/instruments-mechanisms/instruments/international-convention-protection-rights-all-migrant-workers> (Visited on November 12, 2022).

Council, relevant treaty organisation precedent, relevant General Assembly decisions, other UN agencies and concepts of international humanitarian law.

All these Conventions & Declarations describe that no one shall be subject to coercion to adopt or change any religion. The HRC<sup>63</sup> has declared that all activities, expressions and practices in the flow of worshipping or praying to any God are embedded in freedom of religion in a broader sense. The concept of practising and worshipping a religion includes ritualistic actions, other behaviours necessary to such acts, maintenance of buildings used for worshipping, the display of objects & religious marks, the way rituals are carried out, the observation of holidays and other special days and more”. The term ‘religion’ also refers to “practices such as customs, dietary restrictions, the style of wearing specific clothing, joining in occasions concerned with different stages of life, specific way of speaking some particular words, becoming a member of any social or religious institution, priests and teachers, the freedom to write, publish and circulate religious literature, to maintain religious institutions and schools, the freedom to hold seminars, etc”.

Similar provisions for religious freedom can be found in Article 9 of the ECHR<sup>64</sup> of 1950, which states that “everyone has the freedom to exercise their religion openly, including the freedom to change their faith and to make their religion or belief evident for worship, practise, or instruction”.

In 1975, 35 European countries mutually agreed to sign an agreement named Helsinki Accords, also known as The Helsinki Final Act or Helsinki Declaration, enacted to improve the political relations between the Soviet Bloc, i.e., the group of socialist states in Central and Eastern Europe, Southeast Asia and East Asia under the dominance of the ideology of Soviet Union. Ten principles make up this Accord and the seventh one was adopted to guarantee respect for basic liberties and human rights, such as the freedom of conscience, opinion, belief and religion. Although this Accord is not enforceable, as 35 big European countries enacted it, it leaves marks of significant impact upon the whole humanity of all nations. Another reason for the

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<sup>63</sup> The Human Rights Committee, *available at*: <https://www.ohchr.org/en/treaty-bodies/ccpr#:~:text=The%20Human%20Rights%20Committee%20is,of%20law%2C%20policy%20and%20practice> (Visited on November 12, 2022).

<sup>64</sup> European Convention for the Protection of Human Rights and Fundamental Freedoms, *available at*: <https://www.echr.coe.int/Pages/home.aspx?p=basictexts&c#:~:text=The%20Convention%20for%20the%20Protection,force%20on%203%20September%201953> (Visited on November 12, 2022).

importance of this Accord is enlarging the scope of human rights, which are not restricted to any religion or religious group only but include the individual belief or thought of the person himself. According to the said Accord's 7th Principle, “all participating states must uphold all fundamental liberties and human rights, including the freedom of conscience, thought, belief and religion and they must all refrain from discrimination based on anything in particular, including sex, race, language, or religion”.

Human rights and religious freedom are described in more detail and detail in the UNDEFIDRB<sup>65</sup> of 1981, which also places some restrictions on the freedom of one to practice their religion or belief. “This proclamation stipulates that the freedom to practice religion as prescribed is not unrestricted and is subject to numerous regulations required to uphold public order, health, morals and/or fundamental freedoms”.

### **3.2.2 Discrimination based on religion or belief**

Article 26 of ICCPR<sup>66</sup> describes that every person is equal before the law and every person is authorized to have equal protection of the law without discrimination. This Article further illustrates that the law shall prohibit discrimination on any grounds, such as religion and guarantees equal and adequate protection against such discrimination to every person. According to Article 27 of the same Covenant, “no one who belongs to a minority religious, ethnic, or linguistic group will be denied the freedom to enjoy their culture, profess their religion, carry out their customs and communicate with other members of their group using their native language”. “No one shall be subjected to discrimination based on religion or belief by any state, institution, person, or group of persons”, according to Article 2(1) of the Declaration

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<sup>65</sup> U.N. Declaration on the Elimination of All Forms of Intolerance and Discrimination Based on Religion or Believe of 1981, *available at*: <https://www.equalrightstrust.org/content/un-declaration-elimination-all-forms-intolerance-and-discrimination-based-religion-or-belief> (Visited on November 12, 2022).

<sup>66</sup> International Covenant on Civil and Political Rights, 1966, *available at*: <https://www.ohchr.org/en/instruments-mechanisms/instruments/international-covenant-civil-and-political-rights> (Visited on November 11, 2022).

of the General Assembly. “The UNC<sup>67</sup> and human dignity are both violated by discrimination against people based on their religion or political beliefs”, according to Article 3 of this proclamation. Any form of discrimination like this must be denounced as a breach of the fundamental human rights enshrined in the UDHR and the ICCPR and it shatters the possibility of amicable and peaceful international relations. “A child related with a minority group or related to indigenous groups shall not be denied the right to profess and practice his or her religion, to enjoy his or her own culture, or to use his or her distinctive language”, according to Article 30 of the C.R.C. “The rights of parents concerning freedom of religion or belief” are demonstrated in Article 18(4) of the ICCPR. By this Article, public schools are not permitted to promote or convey a specific religion's teachings unless the rules are non-discriminatory and take into account parental or guardian preferences.

These Covenants, Accords, Acts and Declarations further specify and compel the states to pass legislation that offers appropriate redress to those whose fundamental rights or freedoms have been violated or damaged by any discrimination based on religion, race, sex, language, or caste.

### **3.2.3 Relationship between the state and religion**

According to the HRC, no State is permitted to restrict the exercise of any of the human rights guaranteed by the Covenant, to discriminate against other minorities, or to hold beliefs or faiths that are different from those that are officially recognised as the state's official religion. Any action that discriminates against any religious group or minority group, limits who can receive government benefits to adherents of the dominant religion, places unique restrictions on specific religious groups, or grants exclusive economic advantages to dominant religious groups violates Article 26 of the ICCPR's ban on discrimination based on religion. Therefore, even in jurisdictions where there is an official state religion, the Human Rights Committee forbids discrimination based on religion. Let's say that a collection of views is recognised as official ideology in a State by its constitution, laws, ruling parties, etc., or by real

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<sup>67</sup> The United Nations Charter, *available at*: <https://www.un.org/en/about-us/un-charter#:~:text=The%20Charter%20of%20the%20United,force%20on%2024%20October%201945> (Visited on November 12, 2022).



behaviour. If so, it must not have the effect of making any minority group or other religious group that rejects or opposes the official ideology ignorant of their right to practice their religion. Anti-blasphemy legislation must be passed by states and written into their legal codes.

In addition, any state that has ratified these Covenants is required to guarantee that men and women have equal access to the freedoms that are protected by the ICCPR. Gender inequality is deeply embedded in our customs, culture and traditions prevailing and having acceptance worldwide. The incidents of prenatal sex selection and abortion practice of female foetuses are highly condemnable and show women's subordinate role in society. State parties are required to give information on some vital topics linked to discrimination based on gender or religion, such as:

- Deaths of women connected to pregnancy and childbirth.
- Infant mortality rates by gender.
- Details on the prevalence of genital mutilation practices and steps being taken to end them.
- Regulation of the wearing of typical or traditional clothing, such as burqas, by women in public places.
- Protection against the violation of women's rights and prohibition of evil practices, such as dowry deaths and female infanticide, which undermine and place the women's right to live in an irreparable situation
- Steps are being done to guarantee women's equal access to the legal system, particularly when it comes to family problems. Extreme gender inequality is displayed in particular religious rituals, which is harmful to women's right to life. These actions have serious consequences for criminal activity and infringement of fundamental rights and freedoms, including:
  - Extremism in religion and restrictions on women's attire.
  - Female Genital Mutilation.
  - Prenatal sex determination and girl infanticide.
  - Discriminatory customs prevail in personal laws regulating marriages, divorce, succession and adoption. Polygamy is the vilest prevailing custom

worldwide; although most countries ban it, this practice has been sanctioned in some religious sects and thus has the sanctity of society.

- Gender discrimination in inheritance laws and management of household finance system.
- Honour killings and dowry deaths.
- Social ostracism includes sexual abuse, women's exploitation in the workplace and outraging of the modesty of women, including stalking and acid attack.
- The rejection of women's right to equal education and employment opportunities.
- Aggravated discrimination against women of minority groups.

### **3.3 Lautsi v. Italy 2011: How God never really went away from society**

“The European Court of Human Rights found in the well-known Lautsi v. Italy case from 2011 that the necessity for the exhibition of crucifixes in classrooms under Italian legislation did not breach the ECHR”.<sup>68</sup> The Supreme Administrative Court upheld the Veneto's Court decision on March 17, 2005, stating that the Crucifix “shows the churchly aspect of moral values and humanity, i.e., reciprocal respect, tolerance, valorization of the person, consideration for one's freedom, affirmation of one's rights, the liberty of one's sense of right or wrong vis-à-vis dominance, civil harmony and denial of unfairness or inequity which identified Italian civilization”. In this way, regardless of the students' declared religion, the crucifix could serve a highly informative symbolic function when placed in schools, even from a "secular" point of view separate from the pious viewpoint to which it related -- a very educative figurative purpose, regardless of the students' declared religion. The cross, according to the Consiglio di Stato, had to be viewed as a mark capable of representing the noteworthy origins of the aforementioned values that established secularism in the State's present legal structure.

The matter was submitted to the Grand Chamber of the Court in March 2010. The Grand Chamber issued its judgement on March 18, 2011 and by a margin of 15:2 overturned the lower chamber's ruling. The impact of a Crucifix on a wall, which is

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<sup>68</sup> Peters Birgit, *Case Analysis - Crucifixes in Italian Classrooms: Lautsi V. Italy*, pp 86-92 (European Human Rights Law Review, 2011).

largely passive, cannot be compared to that of religious instruction or involvement in public discourse with youngsters."<sup>69</sup> the Grand Chamber stated.

### **3.4 Constitutional and statutory provisions of freedom of religion in worldwide countries**

#### **3.4.1 United States of America**

The IRFA of 1998<sup>70</sup> governs the rights to freedom of religion in the United States. The United States has also established a commission under this Act called USCIRF<sup>71</sup>, which is an impartial commission of the U.S. federal government. Every year on May 1st, USCIRF publishes an annual report that evaluates how the American government has implemented the IRFA.

The creators of the Constitution preferred an attitude of religious neutrality because they favoured the separation of church and state. The individuals tasked with drafting the Constitution showed that the government shouldn't have the power to convince its citizens to follow or reject any certain faith. The Constitutional Convention's participants firmly believed in the concepts of religious liberty and the separation of religion and state. They assert that any interference by the government with a person's religious beliefs and practices is a breach of that person's right to religious liberty. As a result, except for two situations, the Constitution normally says nothing about it. First is Article VI, a prescription of any religious tests as a required qualification for any public service and the second is "The First Amendment of the Bill of Rights".

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<sup>69</sup> *Lautsi and Ors. v. Italy*, European Court of Human Rights (ECHR), Grand Chamber (ECHR), App no 30814/06, March 18, 2011, available at: [https://classic.iclrs.org/content/blurb/files/ARTICLE\\_LAUTSI\\_PUPPINCK\\_English\\_BYU\\_Law\\_Review.pdf](https://classic.iclrs.org/content/blurb/files/ARTICLE_LAUTSI_PUPPINCK_English_BYU_Law_Review.pdf) (Visited on October 18, 2022).

<sup>70</sup> The International Religious Freedom Act of 1998, available at: <https://www.congress.gov/bill/105th-congress/house-bill/2431#:~:text=International%20Religious%20Freedom%20Act%20of%201998%20%2D%20Declares%20it%20to%20be,and%20development%20assistance%20to%20governments> (Visited on November 12, 2022).

<sup>71</sup> United States Commission on International Religious Freedom, available at: <https://www.usa.gov/federal-agencies/u-s-commission-on-international-religious-freedom#:~:text=The%20U.S.%20Commission%20on%20International,Secretary%20of%20State%20and%20Congress> (Visited on November 12, 2022).

### 3.4.2 First Amendment of the U. S. Constitution

Without mentioning the First Amendment to the US Constitution, which provides a way for resolving different issues between society and the law, the debate and discussion on religious freedom in the USA are incomplete. The 1<sup>st</sup> Amendment of the US Constitution shields religious and free speech rights against government intervention. This amendment forbids the state from passing any legislation that establishes a national religion or engages in religious discrimination. Furthermore, it forbids the state from restricting speech, imposing speech restrictions, or interfering with peaceful assembly or the free exercise of religion. This amendment was adopted into the Bill of Rights in 1791 and the SC interprets that it would apply to the entire federal government even though it only expressly applies to Congress. This amendment enforces the separation of state and Church. However, the SC has declared some government religious activities constitutionally valid. In *Town of Greece v. Galloway*<sup>72</sup>, the SC allowed prayers to begin specific legislative meetings. “It was decided that a town hall meeting that opened with worship, largely forwarded by Christians of different communities, did not infringe the Establishment Clause of the First Amendment because the worship done by the legislative members are considered for themselves and not for the public. Furthermore, government support for private religious schools was approved by the SC”.

The first clause forbids Congress from endorsing any specific religion, while the second clause forbids Congress from interfering with a person's ability to practise their faith. "Congress shan't make any laws respecting an establishment of religions, or prohibiting the exercise thereof", reads the second sentence of the First Amendment. The second clause, also referred to as the "free exercise clause," protects an individual's right to do anything they like and to execute that right.

The SC also clarified the parameters of the Free Exercise Clause, enabling the government to enact regulations against religious activities like bigamy and peyote usage that are unconstitutional. The Free Exercise Clause has been more strictly protected in recent decades by the SC. The Establishment Clause and the Free Exercise Clause, according to many observers, are irreconcilable because the

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<sup>72</sup> 572 U.S. 565 (2014).

government protects those religious practices that it would otherwise want to restrict through legislation, making the Constitution favourable to religion rather than neutral.

### **3.4.3 Fourteenth Amendment of the U.S. Constitution**

The Establishment Clause and the Free Exercise Clause protections were not mandated by the Constitution prior to the Fourteenth Amendment, and the Bill of Rights specifically only imposes limitations on the federal government. A federal structure of government, in which each state would have the independence to choose how to treat religion in their territory, was firmly supported by a number of the Constitution's framers. However, the Supreme Court has determined in numerous decisions that the First Amendment's guarantee of religious freedom is still enforceable against both state and local governments even after the Fourteenth Amendment was drafted and put into place. In a landmark case<sup>73</sup>, Jehovah's Witnesses were arrested for proselyting in Connecticut. The Free Exercise Clause was violated, according to the Supreme Court, by a local ordinance that demanded a license for religious solicitation.

The recent case of 2014, popularly known as 'Hobby Lobby', is another example in which Supreme Court made interventions into the interaction between the Constitution and religion. In another case<sup>74</sup>, the Apex Court held that “The requirement for contraception under the PPACA<sup>75</sup> violates the right to freedom of religion. In 2012, the U.S. Department of Health and Human Services released certain recommendations that called for the use of contraception. This law requires particular contraceptive techniques to be made available to beneficiaries of employer-sponsored health insurance plans without additional expense. The SC gave split judgement by 5:4 and the majority judges held that the mandate violates the RFRA of 1993<sup>76</sup> in cases involving privately held, for-profit businesses like Hobby Lobby Inc.

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<sup>73</sup> *Cantwell v. Connecticut* 310 U.S. 296 (1940).

<sup>74</sup> *Burwell v. Hobby Lobby* 573 U.S. 682 (2014).

<sup>75</sup> The Patient Protection and Affordable Care Act, available at: <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3001814/> (Visited on November 12, 2022).

<sup>76</sup> The Religious Freedom Restoration Act of 1993, available at: <https://www.law.cornell.edu/supremecourt/text/13-354> (Visited on November 12, 2022).

### 3.4.4 United Kingdom

*“Diversity in religion must be taken into account as a component of the phenomena of "moral pluralism," with which modern democracies must grapple. Despite the fact that the history of the West explains the West's preoccupation on religion, the situation of modern societies requires us to go past this fixation and think about how to fairly manage the moral diversity that now defines them. An application for secular government now covers all moral, spiritual and religious perspectives”.*<sup>77</sup>

Christianity, in various forms, replacing Celtic and Anglo-Saxon paganism as the primary religion, has dominated for more than 1000 years in the UK and all other countries ruling under the flag of the UK. According to the 2011 Census, Christianity is the most popular religion in the UK, followed by Hinduism, Islam, Buddhism, Sikhism and Judaism. Anglicans are the most common denomination group amongst Christians, followed by Baptists, Methodists, Presbyterians and Catholics. When a few sovereign nations came together to become the United Kingdom in 1707, the majority of religious groups lacked the extensive organizational systems necessary to encompass the entire country. Some religious groups have separate structures for individual countries of the UK, while in England and Wales or Great Britain, there was a single standard structure followed by all. In Northern Ireland, major religious denominations are organized on an all-Ireland basis. All this, in the union, constitutes the United Kingdom as a multi-faith and secularized society.

The HRA of 1998 safeguards human rights in the United Kingdom. The ECHR served as the foundation for this Act, which was passed in response to the Convention. Article 9 of the HRA of 1998 guarantees freedom of expression, conscience, and religion, subject to restrictions that are "in line with the law" and "necessary in a democratic society". Religious freedom is promoted by each of the three legal systems that make up the United Kingdom: English law, Scots law, and Northern Ireland law. Wales does not have a separate legal system within the four countries that make up the United Kingdom. The four nations that make up the United Kingdom do not have a separate legal system for Wales. There is no State Church for the entire United

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<sup>77</sup> Jane Marie Todd (ed.), *Secularism and Freedom of Conscience*, (Harvard University Press, Cambridge, MA, 2011).

Kingdom due to the integration of the four constituent nations, which has given rise to an incompatible religious character. The Church of England has been acknowledged as the state church in England, the country's largest constituent territory, where Christianity is the official religion of the United Kingdom. The Church of England is not wholly Protestant or wholly Catholic (Protestant).

The United Kingdom's Monarch serves as the Church's Supreme Governor. Under the guidance of the Prime Minister and the Crown Appointments Commission, the Monarch chooses Church officials, including clergy and lay representatives; nevertheless, the state is not involved in the running of the Church. The General Assembly of the Church of Scotland is in control of its affairs and has the authority to adopt laws governing them. Wales, Scotland, and Northern Ireland do not have official state faiths, and the Church of Scotland has been designated as Scotland's national church by Scottish law. The choice of leadership and spiritual affairs is independent of any political body or the Queen. Some people in the British countryside and some organizations in the United Kingdom, such as Humanists U.K., believed that the United Kingdom should become a secular state, with no official or established religion in the state.

Blasphemy is a criminal offence in Northern Ireland. Law of Libel Amendment Act, 1888 and Criminal Libel Act, 1819 prohibit composing, printing or publishing any blasphemous or seditious libel. In England and Wales, the law forbids any religiously driven hatred speech or act which intends to instigate religious hatred via publication or use of the word in any other manner. Blasphemy is a common law offence in Scotland. Blasphemy is a two-fold offence that violates public decency and order. The first is to determine if the person speaking or writing the libellous statements intended to cause disturbance or not and the second is to determine whether the words are offensive to God or the religion itself.

### **3.4.5 Canada**

The CCRF<sup>78</sup> came into force on 17<sup>th</sup> April 1982 and this Charter gives constitutionally enshrined human rights to Canadians for the first time. The Charter, which is considered to be a component of the Canadian Constitution, is the country's supreme law and any law that conflicts with it has no legal effect. The human rights and freedoms listed in this Charter are not all-inclusive and are subject to two distinct exceptions or limits. First, the Parliament of Canada can opt out of the provisions of guarantees of fundamental freedoms and legal and equality rights by making an express declaration of non-operation with any specific provision of the Charter. Such declaration may remain in effect for five years and be re-issued. The Doctrine of Parliamentary Sovereignty is still in force in Canada although it is ingrained in the country's legal system as an exception rather than the rule because of the extraordinary authority it has. "The second restriction in Section 1 of the Charter reads, The CCRF establishes the rights and freedoms set out in it subject only to such reasonable limits imposed by legislation as may be satisfactorily justified in a democratic nation".<sup>79</sup>

#### **3.4.5.1 Freedom of conscience is much broader than freedom of religion.**

According to Article 18 of the ICCPR, "the right to freedom of thought, conscience and religion is extensive and profound". According to Article 18, "everyone has the right to "religion" and "conscience" freely. The freedom to adopt or practice any religion or belief of one's choice, whether alone or in community with others and to express that religion or belief through observance, worship, practice and instruction must be included in the right to exercise one's conscience". Therefore, the right covered in Article 18 of the ICCPR is not just limited to freedom of religion, including, of course, one's morality that is founded on religion; it also includes the freedom to uphold one's morality even if it is not rooted in a particular religious tradition.

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<sup>78</sup> The Canadian Charter of Rights and Freedom, *available at*: <https://www.canada.ca/en/canadian-heritage/services/how-rights-protected/guide-canadian-charter-rights-freedoms.html> (Visited on November 12, 2022).

<sup>79</sup> J. M. Ross, *Limitations on Human Rights in International Law: Their Relevance to the Canadian Charter of Rights and Freedoms* (Human Rights Quarterly, 6(2), 180–223, 1984).



“Sec. 2(a) of the CCRF was created to ensure that society does not interfere with deeply held convictions that shape how one views themselves, other people, nature and, in some situations, a higher or other order of being. One's actions and behaviours are then dictated by one's beliefs”.<sup>80</sup> “No one is to be coerced to perform in a manner adverse to his convictions or his conscience”, according to Section 2(a) of the Charter.<sup>81</sup> The Canadian SC and the UN. The HRC have both emphasized that religious and moral freedom is the freedom to live one's life following one's religious and moral commitments and convictions. “A loss of moral integrity can be detrimental for both society as a whole and the individual members of humanity”, the Canadian SC has said. “It could cause intense remorse, feelings of guilt and shame, as well as a decline in self-respect. Moral integrity can be crucial for both people with fundamentally secular and religious perspectives. The act of forcing an orthodoxy on someone's conscience is nothing less than "soul rape." The idea of the "rape of the soul" was mainly utilized to encourage religious tolerance. However, it can be viewed as an assault on one's self or identity when disregarding secular ideals leads to the loss of moral integrity”.<sup>82</sup>

According to the HRC, ‘public morals’ are: “Restrictions on religious freedom to protect ethical values must not be founded on a single custom or practice because the matter of ethical values originated from diverse philosophical, religious, social and customary practices. Any restriction on the rights protected by Article 18 or any unfair treatment of anyone who disagrees with or opposes the official ideology is prohibited, even though those beliefs are recognized as the official ideology in constitutions, legislation, governing party statements, etc.”<sup>83</sup>

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<sup>80</sup> *R. v. Edwards Books and Art Ltd.*, [1986] 2 S.C.R. 713, 759.

<sup>81</sup> *R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295, 337.

<sup>82</sup> Martha C. Nussbaum, *Liberty of Conscience: In Défense of America's Tradition of Religious Equality* (Basic Books, New York, 2008).

<sup>83</sup> Human Rights Committee, General Comment 22, art. 18 (48th Sess., 1993), in *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*, U.N. Doc. HRI/GEN/I/ Rev.i, at 35 (1994), available at: <http://www.unhchr.ch/tbs/d0c.nsf/%28Symb01%29/9a30112c27d1167cc12563ed004d8f15? Open document>.

### 3.5 Limitations

Although CCRF, being a part of the Constitution, is the supreme law, it does not provide absolute rights to the residents or citizens of Canada and must be followed by reasonable limitations. These limitations should be just and reasonable and must be justified by the court under the scanner of judicial review. The restrictions outlined in Section 1 of the Charter, which include requirements that they are “established by law”, apply to the freedoms and rights guaranteed by the document. Similar to the Charter, the Universal Declaration contains a general limitations clause that states that rights and freedoms must “be subject to only those restrictions that are declared by law specifically for the consideration of the fundamental rights and freedoms of other people and other necessary requirements of moral values, public order and the general welfare of persons living in a democratic nation”.<sup>84</sup> Regarding these limitations, International Covenant and European Convention are handy interpretive guides as both provisions are elaborative and justified by measuring the scale of jurisprudence. These Covenant and Conventions provide specific clauses for limiting the application of rights and freedoms within their definitions of these rights and allow states to impose measures limiting the rights and freedoms only for specified public purposes. According to Section 1 of the Charter, “these limitations must be ‘prescribed by law’ or ‘in conformity with the law’”, which is required for their implementation in a ‘democratic society’”. “The right to have a free conscience and to choose whether or not to believe are protected by secularism. The freedom to proclaim one's beliefs can, like other freedoms, only be constrained by the rights of others and abide by social norms. The freedom of religion, which is upheld and respected in our nation, must not be abused, called into question by broader social norms, or infringe upon or violate the rights of others to their religion and beliefs”.<sup>85</sup>

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<sup>84</sup> Article 29(2), Universal Declaration, *available at*: <https://www.un.org/en/about-us/universal-declaration-of-human-rights#:~:text=Article%2029,of%20his%20personality%20is%20possible> (Visited on November 20, 2022).

<sup>85</sup> A. S. Chaudhary, “The Simulacra of Morality: Islamic Veiling, Religious Politics and the Limits of Liberalism” *Dialectical Anthropology*, 29(3/4), 349–372, (2005).

### **3.6 International law as an interpretive aid**

While there seem to be several domains within which international law may be helpful for the explanation and interpretation of Section 1 of the Canadian Charter, this does not necessarily mean that such reference is lawfully required or perhaps allowed. Therefore, it is essential to consider Canada's lawful base of international law. In doing this, several distinctions should be kept in mind.

First, consider the three instruments in issue; although they may be similar, they are very different in their legal nature and effect vis-a-vis Canadian laws. The International Covenant & European Convention are both multilateral treaties, but Canada is a consenting party to the latter. The Universal Declaration, although a resolution of the United Nations General Assembly, was initially neither intended nor perceived as having any binding legal effect. The current status of the Universal Declaration will be discussed below.

Second, the proposed forms of reference also fall into two distinctive classes besides the differences found in the instruments. Some suggestions above are international reference jurisprudence interpreting treaty terms analogous to those in the Charter. The remaining suggestions entail looking to the express terms in the three international documents for direct influence on what may be "reasonable limitations" on the Charter rights.

A short and general background of the status of international law within Canadian domestic law may assist in understanding the comparison of both in detail. The role of both customary and conventional international law in Canada follows British common law. As described and accepted by Canadian courts, rules of customary international law form a part of Canadian law under the common law doctrine of adoption or incorporation. However, domestic law is sovereign, so the former prevails when a conflict exists between specific domestic and customary international law.

The basis of the statutory provisions requires that "all statutes should be described and interpreted in plain language and this interpretation should not be inconsistent with the association of countries or with the framed ruling under the international law". This type of outcome is typically avoided by following this rule. It is evident that customary international law may influence how domestic law is described and interpreted in addition to having a potential binding effect.

The status of customary international law in Canadian courts stands on a completely different footing. It is attributable to a distinction between the treaty-implementing and treaty-making functions of government under Canadian and British law. The latter is the function of the executive, whereas the former, at least where the effect of the treaty would be to alter domestic law, is a legislative function. This distinction has given rise to the well-established Canadian and British rule that a treaty must be implemented by legislation before it will become the law of the land, i.e., that no treaty is self-executing. While the courts draw this distinction between treaty-implementing and treaty-making functions, limiting the domestic effect of treaties accordingly, they also recognize the ability of the executive to bind the state internationally to the treaty's terms, thus drawing a further distinction between the domestic and international effects of treaties.

Thus, customary international law has both a binding effect as part of the law of Canada (although subject to the sovereignty of conflicting domestic law) and a persuasive effect. However, the international law of convention has no binding effect unless it has been implemented by legislation. After such implementation, the legislation and not the treaty per se, forms a part of the domestic law.

While the preceding principles are clear, the issue of the potential persuasive effect of unimplemented conventional law is not. Modern authority, particularly regarding the effect of the European Convention on English law, supports the proposition that domestic law should be interpreted following international obligations arising from unimplemented conventions. Nevertheless, the proposition is uncertain in its juridical basis and, accordingly, not without critics. The issue is crucial and debatable in determining the effect of the International Covenant, an unimplemented treaty, on the interpretation of the Charter.

### **3.7 The separation between Church and State**

*"I observe with sovereign reverence that act of the entire American people which declared that their legislature should "make no law respecting an establishment of religion, or prohibiting the free exercise thereof," thus building a wall between religion and government. I share your belief that religion is an experience that only occurs between Man and his God, that he owes account to no other for his faith or his*

*worship and that the legitimate powers of government reach only actions and not viewpoints. Following this manifestation of the nation's supreme will in support of conscience rights, I will watch with true satisfaction as the attitudes that work to restore all of man's inherent rights advance since I am convinced that he has no right that is compatible with his obligations".*<sup>86</sup>

A legal and philosophical concept for describing the political separation between religious institutions and the State is the segregation of State and Church. The process of constructing secular states officially starts with this sentence. Philosopher Thomson Jefferson coined the expression "wall of separation between church and state," which was later made popular by John Locke and other Enlightenment philosophers. The ideas of religious freedom, pluralism, secularism, and disestablishmentarianism are comparable to the notion that the civil state and the church should not coexist. By elevating these ideas, the European countries assumed the social roles traditionally performed by the welfare state and the church. This led to a social transformation that gave rise to a populace that was culturally secular and the public sphere. Depending on the political system of the nation, the degree of separation between the state and the church can range from complete separation (as in Singapore and India) to a state religion (as in the Maldives).

### **3.8 The Age of Enlightenment**

John Locke is frequently cited as the author of the concept of separation of Church and State. A person's sense of personal morality is a right that people with sound judgement cannot relinquish to the state or others, according to John Locke, who also held that the social contract principle necessitated that the government have some control over this sense. The liberty of conscience, according to Locke, is a valid right that was born out of the social contract notion and it must be safeguarded and defended from any governmental control. The American colonies and the formulation of the U.S. Constitution were significantly influenced by these ideas of religious

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<sup>86</sup> Thomas Jefferson, *Jefferson's Letter to the Danbury Baptists: The Final Letter, as Sent*, The Library of Congress Information Bulletin: June 1998, available at: <https://www.loc.gov/loc/lcib/9806/danpre.html> (Visited on November 11, 2022).

tolerance, the significance of a person's right to conscience, and the idea of his social covenant.

Some fideists and Pierre Bayle, who insisted that faith was independent of reason, were the leading proponents of the idea of separating church and state in the 17th century. The 18th century saw the expansion and support of the concepts of John Locke and Bayle, particularly the idea of the separation of Church and State. Montesquieu discussed religious tolerance and the separation of the two in his writings from 1721. A different philosopher, Voltaire, offered arguments and supported the doctrine of separation to a great extent, but in the end, he viewed the Church as serving the interests of the State. Denis Diderot asserts that "the gap between the altar and the throne can never be too vast" in support of a clear separation of Church and State.

### **3.9 The situation among worldwide countries**

Different nations have varying degrees of separation between the state and religious institutions. Many countries have firmly established barriers between the Church and the State since 1780. While there are many various degrees of separation between religion and the state, these two organisations nonetheless have a close relationship in some societies. In some nations with high levels of religious tolerance and freedom as well as strongly secular political cultures, where state churches are still upheld and active or where there are financial ties to specific religious organisations, there are still a number of variations on separation that are practised. Although other religions are recognized, the Constitution establishes Christianity as the state religion of England. 26 bishops (the Lords Spiritual of the United Kingdom) sit in the higher level of government, the House of Lords, while the monarch of the British government serves as the Church of England's Supreme Governor.

The state head of state or other prominent public officials may be forced by law to practice a certain faith in some kingdoms. These top public people are frequently chosen to serve as members of the state religions by the worldly governments.

According to Section 116 of the Australian Constitution, the Commonwealth of Australia (i.e., the federal parliament) is not permitted to adopt any laws that would establish any religion, impose religious observances, or restrict the free exercise of

any religion. No religious test shall be required as a prerequisite for holding any public office or trust under the Commonwealth, according to Section 116. The U.S. Constitution's equivalent provisions form the bulk of Section 116 of the Australian Constitution; however, Section 116 is more constrained than the U.S. provisions and does not bar the State of Australia from passing such legislation. The Australia HC has also interpreted section 116 narrowly, whereas the definition of 'religion' adopted by the HC is flexible enough and has a broad description.

### **3.10 Position in India**

India is a nation with a great mix of religions and customs despite having more than 80% Hindu citizens. Because of its secular nature, India's Constitution does not contain any clauses that favour any specific faith. India's first prime minister, J. L. Nehru, declared it a secular state. By constructing a secular state in India, he combats Hindu nationalism and religious conflicts between Hindus, Muslims, Sikhs, and other religious groups. The Indian Constitution grants religious denominations complete freedom to propagate their religion, but it forbids them from interfering with or promoting religion in state-owned schools. The Shah Bano case, a well-known divorce case, gave rise to a number of critical viewpoints when Congress was charged with caving into Muslim orthodoxy by amending Muslim personal rules and overturning the Supreme Court's decision. In 1947, Pakistan opted to declare its nation as an Islamic country, but India opted for a secular nation. Mahatma Gandhi also played a vital role in making India a secular country at that time as he was a follower of the principle of Ahimsa and favoured brotherhood relationships for every religion. The word "secular" was not included in the preamble of India's original constitution when it was passed, but the nation was nonetheless secular in every way. The Indian Constitution's 42nd amendment made this adjustment.

In the S.R. Bommai case, the Supreme Court determined that India has been secular since its founding. This decision separated the government from religion. However, Indian secularism does not totally sever ties between the State and religion. The Indian Constitution gives the government broad discretion in matters of religion, allowing for actions like the elimination of untouchability and the admission of people from "lower castes" to all Hindu temples. Since the republic's foundation, executive

orders and court rulings have altered the level of separation between religion and the State on several occasions. Personal laws apply differently to different religions when it comes to issues like marriage, divorce, inheritance, maintenance, adoption, etc. The Indian Constitution provides financial aid for constructing the infrastructure of religious schools. According to the Places of Worships (Special Provisions) Act of 1991 and the Ancient Monuments and Archaeological Sites and Remains Act of 1958, respectively, numerous Hindu temples with significant religious significance as well as the Islamic Central Wakf Council are administered, managed, and operated by the state and federal governments.

A variety of issues have arisen in India as a result of the desire to enforce religious law, including the legitimacy of polygamy, unequal inheritance rights, practices of unilateral and extrajudicial divorce that benefit male communities and different readings of religious texts. Because Indian secularism differs greatly from secularism as it is practiced in the West, India and secularism have a problematic relationship. Indian secularism is called "pseudo-secularism," according to its detractors, who also claim that it accepts "minorities and pluralism". Supporters argue that any effort to enact a single civil code to ensure equality before the law for all citizens, regardless of their religion, would destroy the distinctive character of the nation's diversity and impose Hindu sensibilities and ideals over all of India. On the other side, it is criticised as a breach of "Equality before the law".

*To accomplish the objective of the comparative analysis of the right to religion and to find the answer to the research question that "How is the right to religion exercised in other countries as compared to India?" various international covenants and provisions concerning the right to religious freedom, contained in various Constitutions of different democratic countries are analyzed in detail here. International standards on freedom of belief, conscience and religion are analyzed. The provisions of the European Convention for the Protection of Human Rights and Fundamental Freedoms of 1950, The Helsinki Accords, the International Covenant on Civil and Political Rights of 1966, the Universal Declaration of Human Rights etc. are analyzed. A detailed observation is made of the sources that enable the incorporation of Articles 25 & 26 in the Indian Constitution as a people's fundamental right.*



**CHAPTER -4**  
**CONSTITUTIONAL ASPECT REGARDING THE RIGHT TO RELIGION IN**  
**INDIA**

**4.1 Introduction**

India is a multi-religious and self-proclaimed secular state and it has set up an example for other nations following a particular religion officially. It explored various controversial intersections between law and religion. The Indian Constitution's Articles 25 and 26 were passed into law by the legislature and they govern and restrict religious freedom as well as a number of related activities. In order to effectively regulate religious issues and clear the way for peace and harmony in society, the judiciary also leads a crucial role in explaining many contentious and ambiguous terms of the Constitution. Everyone has the right to practice their religion freely under the Indian Constitution's Articles 25 to 28. The President approved the Indian Constitution on November 26, 1949 and it became operative on January 26, 1950. Although it was stated in the preamble of the 42nd amendment to the Constitution in 1976, the Indian State remains intrinsically secular despite this. In the case of *S.R. Bommai v. Union of India*<sup>87</sup>, “the SC rejected the claim that Indian country was already a secular nation. What was accomplished with this amendment is only a formalization of what was previously tacitly stated in sections 25 to 28”.

By that point, the SC of India had developed two key tests—the ERP test and the RD test—to clarify several constitutional provisions. In terms of judicial activism, it represents a turning point. These tests are not described or provided anywhere in the Constitution and even though they were not successfully completed, they still prove to be very helpful in removing the ambiguity that has been raised over time in society. This is comparable to how the idea of basic structure was introduced by the Supreme Court in the *Keshvanand Bharti* case despite not being articulated in the Constitution. As judicial activism is also a dynamic activity, future benches now must show honesty towards their duty and show direness to enhance the provisions of the Constitution more in the right direction. By actual practices tests, Supreme Court set up a room covered by four walls, beyond which all religious activities, customs and

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<sup>87</sup> (1994) 3 SCC 1

practices are not eligible for constitutional protection. Religious denomination tests are used to evaluate which religious institutions or organisations are eligible for protection of religious freedom under the provisions of the Indian Constitution. These two conditions also impose limitations on the range of religious freedom, restrict religious activity, and subtly legitimate the inclination for governmental intervention, which has both advantages and disadvantages. This study will focus mainly on the morality behind religious acts, constitutional provisions of religious freedom and judicial interpretation of religious freedom.

#### **4.2 Challenges in the way of freedom of religion in India**

India has a wide range of religious practises. The four major religions of the world—Hinduism, Buddhism, Sikhism, and Jainism—were born and developed in India. Besides Hindus, India has a significant population of Buddhists, Sikhs, Muslims, Christians, Jains and Zoroastrians. However, approximately 80 per cent of the population belongs to Hindus. Still, some states of India have a majority in other religious communities like Kashmir has a Muslim majority, Arunachal Pradesh, Ladakh, Maharashtra and Sikkim have a significant population of Buddhists, Punjab has a Sikh majority etc.

In accordance with Indian law, everyone has the right to freely practise and disseminate their religion; yet, there have been a few instances of anti-religious incidents, religious intolerance, violence, and riots that have put this freedom in jeopardy. A few examples of religious riots and violence that occurred in India are the Hindu-Muslim riots of 1947, the Anti-Sikh Massacre of 1984 in Delhi, the Anti-Hindu riots of 1990 in Kashmir, the Gujrat riots of 2002, and the Anti-Christian riots of 2008 in Odisha.

Most of Buddhism's growth occurred under King Ashoka's administration (died 238 BCE). The inscription in one of King Ashoka's decrees, which reads, "I am the spirit of the last great emperor of the Mauryan dynasty of India", perfectly captures the essence of this king "My offspring are all mankind. I want all the welfare and happiness in this world and the next for my children and I want the same thing for all

the men”.<sup>88</sup> He committed to upholding the dharma and spreading the gospel to everyone in the name of all humanity. He constantly stated that, in his opinion, dharma is the energetic practice of honesty, mercy and the sociomoral values of nonviolence, compassion and refraining from harming animals. King Ashoka did not mention any philosophical principles or other types of religious theories or worship through his Buddhist beliefs. He adopted a liberal stance on complete religious freedom to practice what one believes in and respect for all religions. He also tried to encourage people to develop moral inner worthiness by leading them down the divine path. Additionally, he urged everyone to respect the beliefs of others, acknowledge their positive qualities and abstain from harshly disparaging their points of view.

Sikh Gurus sacrificed their lives in a threat entirely to the Muslim rulers of the Country and these Sikh Gurus will be remembered for their whole life by everyone for not converting to their religion even at the cost of their lives. The indigenous residents of Kashmir, the Kashmiri Pandits, were threatened with punishment for converting to Islam under the control of Muslim kings. They approached Guru Tegh Bahadur Ji to avoid conversion. Due to Guru Ji's protests against conversion, Aurangzeb publicly killed him in Delhi after torturing him. His son, Guru Gobind Singh, “gave a unique identity to the Sikh community through hair, beards, kirpans and metal bracelets. He exhorted the entire community to stand up against the odds, defend the vulnerable and combat injustice. Two of Guru Gobind Singh's older sons perished in combat with Aurangzeb's soldiers and two of his younger sons were seized and thrown alive against walls by Muslim forces. The Guru Gobind Singh Ji himself died due to an attack by Muslim forces”.<sup>89</sup> Baba Banda Singh Bahadur, the disciple of Guru Gobind Singh, was another personality who chose to lose his life rather than convert to his religion. The whole incident of the battle of Sikh Gurus and their followers against Muslim rulers was an excellent story to describe the agony of the people's hearts due to the forceful conversion of their religion. Even when the

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<sup>88</sup> Amulya Chandra Sen, *Ashoka* (Encyclopedia Britannica, May 1, 2022), available at: <https://www.britannica.com/contributor/Amulya-Chandra-Sen/2663> (Visited on November 11, 2022).

<sup>89</sup> The Anti-Sikh, Pro-Islam Bigotry of the B.B.C., available at: <https://timesofindia.indiatimes.com/blogs/cogito-ergo-sum/the-anti-sikh-pro-islam-bigotry-of-the-bbc/> (Visited on July 4, 2021).

Constitution was not where it is now, people were not ready to sacrifice their religious freedom, even if they had to lose their lives.

In 1947, Muslims again slaughtered the Sikh and Hindu families badly. Racial tensions between religious communities served as the foundation for India's split. The All-India Muslim League, the main Muslim communal party, advocated for the separation of India from Pakistan as one nation. They maintained that Indian Muslims desire a separate country to practice and uphold their Islamic faith. Pakistan declared itself a Muslim country and Islam as its official religion, but India remained secular at that time, although Hindus were at the majority stake in the country and the Muslim population was minimal after the partition. Punjabi Sikhs desired that Punjab be governed similarly to Muslims. Initially supporting sustaining India's unity, the Indian National Congress finally came around to the two-nation doctrine due to the compulsive conditions. Between 5,000 and 8,000 individuals are thought to have died, and over 10 million people were forced to evacuate their homes for their safety in Punjab alone. After World War II, the country's division led to the first occurrence of ethnic cleansing. By the end of 1947, all traces of the Muslim minority in the Indian East Punjab had been eradicated, with the exception of a very small number of Muslims living in the minuscule princely state of Malerkotla.

“Sikhs and Hindus, on the other hand, stood out by being conspicuously absent from Pakistan's West Punjab. Muslims began engaging in widespread violence against Sikhs and Hindus in the Muslim-majority areas of northern Punjab in March 1947, and Sikhs and Hindus engaged in similar violence against Muslims in East Punjab. As a result, many Hindus, Muslims, and Sikhs perished”.<sup>90</sup> Hindus and Muslims alone were responsible for the country's split, which resulted in significant human casualties, a huge setback to the nation's progress and is still having an impact on both countries.

“A Sikh bodyguard killed Indian Prime Minister Indira Gandhi in June 1984 in response for the government's decision to attack the Golden Temple in Amritsar, Punjab. This attack resulted in a deadly battle with communal forces of the Sikh

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<sup>90</sup> Who Began the Violence? The How and Why of Partition, *available at*: <https://www.dnaindia.com/world/comment-who-began-the-violence-the-how-and-why-of-partition-1806615> (Visited on July 4, 2021).

community, demanding more autonomy and greater rights for their region, i.e., Punjab. They criticized and condemned the army's action upon Harmandir Sahib and linked it to an assault on their religious feelings and sentiments. Government figures that approximately 2800 Sikhs were brutally killed in anti-Sikh riots in Delhi and 3350 nationwide, but another independent source estimate this number of casualties between 8000 to 17000 Sikh persons".<sup>91</sup>

### **4.3 DR. B.R. Ambedkar's secular philosophy and drafting of the Indian Constitution**

The Charter of Rights and Duties of Citizens and DPSP<sup>92</sup> was largely the work of Bhim R. Ambedkar. A notable member of the Constituent Assembly who participated in the discussion resolved to add the words "secular, federal and socialist" to Article 1 of the Constitution.<sup>93</sup> DR Ambedkar disagreed with including such words in the Constitution. He described that the "Constitution is a mechanism to regulate the working system of all organs of the State and not to install a particular member or party in the offices. The matters related to the policy of the State and social and economic organizations must be decided by the people as per the need of time and available circumstances in the Country. The Constitution cannot afford a static and rigid policy framework because it will destroy the basic intent of democracy. The F.R., or Fundamental Rights and DPSP are already included in the draught and the principles of secularism and socialism are firmly embedded in the very soul of the Constitution, he continued to argue, so the proposed amendment to include such words is superfluous.

Ambedkar supports the theory of secularism through the principles of justice and equality, which serve the real purpose in a broader perspective rather than sticking with religion and religious activities only, without any conflict. Reading the arguments made in the Constituent Assembly makes it quite evident that neither

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<sup>91</sup> 1984 Anti-Sikh Riots, *available at:* <https://time.com/3545867/india-1984-sikh-genocide-anniversary/> (Visited on July 5, 2021).

<sup>92</sup> The Directive Principles of State Policy, *available at:* <https://www.mea.gov.in/Images/pdf1/Part4.pdf> (Visited on November 12, 2022).

<sup>93</sup> Ambedkar's Vision of a Secular Constitution, *available at:* <https://www.thestatesman.com/opinion/ambedkars-vision-secular-constitution-1502618002.html> (Visited on July 7, 2021).

India's theocratic rulers nor those who drafted the Constitution with the goal of establishing a "secular nation" in mind intended for it to become either. The provisions of the Fundamental Rights, which are applicable to both citizens and non-citizens, as well as those pertaining to equality before the law, equal protection under the law, the right to life, freedom of speech, and expression, and most importantly, the freedom of religion and the right to manage one's religious affairs, more than suffice to show the Constitution's secular nature. These provisions place the Constitution in a particular context and guarantee the unquestionable preservation of its secular character. To explicitly explain these aspects of the Constitution, the 42nd Amendment later inserted the terms "Secular & Socialist" to the preamble.

Ambedkar aspired to establish socialism, equality, justice, liberty and freedom as the cornerstones of India's democratic political system. The backward communities were the target of his desire to end centuries-old oppression and this helped create a secular nation where the sharing of knowledge, feelings of brotherhood and the principle of justice for all developed. These backward communities also received priority on all social platforms.

Going back to the discussions in the first Assembly, it is obvious that the members were split into two groups. One side supported building a wall separating religion and state, while the other advocated for the State to treat all religions equally and without discrimination.

K.M. Munshi argued that since "we all live in a lifestyle that has been developed under the shadow of Hinduism, which propagates that all religions lead to the same god..., we could not possibly have a state that adheres to a particular religion or draw a clear distinction between the state and religion." *The draft committee allowed all religious customs to continue despite contrary to the provisions placed under Articles 25 & 26 of the Constitution. After intense criticism of religious freedom and the validity of religious customs, the Constituent Assembly remained to fail to make a proper distinction between morality and constitutionality of religious matters in our society. Intolerance and minority appeasement are some by-products of this loose-ended drafting of religious issues in the pages of the Indian Constitution.*

It is important to examine religious intolerance and racial harmony through the prism of the fraternity values that Bhim Rao Ambedkar placed into our Constitution. Fraternity is a commitment by the populace to assist the underprivileged groups who depend on our assistance to stand in similar situations and participate in the advancement of the country. Justice, equality, fraternity, and social democracy are so extensively incorporated into our constitution that they form an important component of the Indian Constitution. The Constitution emphasises that religion is a private matter rather than a subject of public concern and includes particular elements of secularism, religious freedom, and freedom of customs and rites from traditional religions.

#### **4.4 Constitutional provisions**

To analyze the textual and conceptual provisions of religious freedom enacted in the Constitution, analysis and criticism of Articles 25 & 26 is a must. The texts of Article 25 as enacted in the Constitution are as follows.

##### **4.4.1 Article 25 - Right to Freedom of Religion**

The remaining clauses of the Indian Constitution came into force on the 26th day of the month of Gregorian 1950, but certain clauses—concerning citizenship, a conditional parliament, election clauses, and temporary and transformation clauses—went into effect right away after receiving the President of India's assent on November 26, 1949. This Constitution took the place of the governing "British Government of India Act, 1935." On November 26, 1949, the President of India ratified the Indian Constitution, which took effect on January 26, 1950. The vast majority of the Constitution's provisions were drafted between 1946 and 1949 by the Constituent Assembly, whose discussions offer important insights into the many different values, issues, philosophies and considerations that went into creating the Indian Constitution. Because the Constituent Assembly debates took place during the unrest-filled early years of independent India, drafting the Constitution was a delicate process. This period was distinguished by a number of notable occurrences, including the violent division of India into two countries, India and Pakistan, the conflict over

Jammu and Kashmir and the death of Mohan Das Karam Chand Gandhi, more often known as Mahatma Gandhi.

The issue of minority rights took on a new level of seriousness, in part as a reaction to widespread communal unrest. The substance and design of the non-secular freedom sections in the Constitution were unavoidably impacted by some of the important notable individuals who served in the Constituent Assembly and held strong beliefs about the place of religion in society.

It would be ironic if the Constituent Assembly's philosophies had influenced the Constitution's treatment of religion. Bhim R. Ambedkar and Jawahar Lal Nehru are the two most notable individuals. The current Constitution might have been created as a result of their opulent discussions, negotiations and clashing opposing perspectives. Contextualizing this outstanding document requires an understanding of their origins and worldviews. He was known for his steadfast resistance to caste hierarchy and prejudice as well as his dedication to social reform and human freedom. Being caste-based and discriminated against as a child led to Ambedkar's opposition to untouchability, which served as the foundation of his policy. He was very personal in his critique of the class system, which ultimately led him to reject Hinduism in favour of Buddhism. His policies were undoubtedly affected by these events because he created politics as a means of addressing societal injustices. His actions were intended to "liberate people from the tyranny and violence of powerful traditions," according to Vidhu Verma.

Ambedkar opposed allowing religion a "large, expanding authority" within the public realm and supported a Uniform Civil Code in its place. He was and still is a controversial figure among Hindus, which is not surprising. The first prime minister of India and the chairman of two Constituent Assembly committees, Nehru is credited with inventing modern India. He was a famous and effective supporter of a secular state in India. He believed that practising secularism was a way to show respect for the nation's diversity of spirituality, culture and religion. He envisioned an independent, modern, socialist and democratic republic that is easily compatible with secularism. Nehru has been termed as a sceptic, agnostic, dissenter, and scientific person. Although Nehru faced severe criticism for his personality, he contributed a lot



to embrace the rich culture of religion in Indian history. He had a view that intermingling religion with politics may prove harmful.

Critics have criticised secularist programmes and Nehru's conception of secularism. Just as judges' personal opinions inevitably going to have an impact on court decisions, the perspectives of the various members of the Constituent Assembly had an impact on the Constitution.

Part III of the Indian Constitution contains the provisions concerned with freedom of religion. The texts written in these articles, in general, are an outcome of the duly consideration of the concept of religious freedom provided in the Constitutions of other democratic countries by the Constituent Assembly. Another source of inspiration cited by J. Patrocinio de Souza is the UDHR, which the UN passed a year earlier than the enactment of the Constitution of India. Articles 25 through Art. 28 are the most crucial provisions for religious freedom. Together, these articles guarantee that everyone is free to profess, practice and spread their religion; that religious denominations are free to conduct their business; that no one is required to pay taxes in order to support any specific religion; and that religious dominance is not permitted in secular educational bodies. Articles 29 and 30 are often referred to as "sections of religious freedom" since they provide protection for the rights of minorities. Here, only the rights asserted under Articles 25 and 26 will be the subject of this research, which will analyse those rights in further detail throughout the whole study. The Constitution's express requirements as well as the Court's use of the two standards outlined above have limited the rights guaranteed by these two provisions.

The conflicting drive of the Constitutional provisions that becomes the subject of legal criticism faced the doors of courts several times. Articles 25 and 26 also describe provisions for State intervention in matters of social advancement and reformation along with the assurance of religious freedom. The Constitution's ambiguous phrasing, according to Vidhu Verma, "encourages debates related to the legitimate concern of non-secular liberty". The assurance of non-secular liberty coupled with the obligation to manage and reconstruct the fundamentals of faith has continued. This is a major issue in Indian non-secular freedom which creates the problem in society. It should be described that the criticism aroused by these constitutional provisions and how they should be interpreted has little to do with the

law. It could sometimes be better described as a heated public controversy. The fallout from judicial rulings on religious issues has sparked serious national crises and enraged non-secular populations across the State.

It should be noted that court decisions do not stand alone, even though it is beyond the scope of this research to investigate the social and political repercussions of each significant case.

The starting lines of Article 25 of The Indian Constitution<sup>94</sup> itself contain a proviso, i.e., “**Subject to public order, morality and health and to the other provisions of this Part**”, which can also be termed as the controlling provision of Article. So, the Article cannot play outside the boundaries of this controlling provision.

#### **4.4.1.1 Exploration of ‘texts contained in the proviso’ of Article 25 of the Constitution of India**

*"Institutions and companies are not included in the definition of "Person" in Art. 25. The Court made it clear that organisations or businesses could not practice or spread religion. Only people were capable of carrying it out and it made no difference whether they promoted their own beliefs or those of the institution as a whole. No matter where it occurred—in a temple, monastery, church, mosque, gurudwara, or parlour—the spread of the concept was safeguarded."*<sup>95</sup>

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<sup>94</sup> The texts of Article 25 of the Constitution of India read as follows –

Art 25 - Freedom of conscience and free profession, practice and propagation of religion.

- (1) Subject to public order, morality and health and the other provisions of this Part, all persons are equally entitled to freedom of conscience and the right freely to profess,
- (2) practice and propagate religion.
- (3) Nothing in this Article shall affect the operation of any existing law or prevent the State from making any law-
  - (a) regulating or restricting any economic, financial, political or other secular activity which may be associated with religious practice;
  - (b) providing for social welfare and reform or throwing open Hindu religious institutions of a public character to all classes and sections of Hindus.

Explanation 1 - The wearing and carrying of kirpans shall be deemed to be included in the profession of the Sikh religion.

Explanation 2 – In sub-clause (b) of clause (2), the reference to Hindus shall be construed as including a reference to persons professing the Sikh, Jaina or Buddhist religion, and the reference to Hindu religious institutions shall be construed accordingly, *available at*: <https://indiankanoon.org/doc/631708/> (visited on November 11, 2022).

<sup>95</sup> H. M. Seervai, *Constitutional Law of India* 1261 (Law & Justice Publishing co., New Delhi, fourth edition, 2001).

#### **4.4.1.2 'Public order'**

It is not easy to answer in simple words what is the real meaning of the term 'public order. Although many eminent scholars define it, it is not defined in the deep texts of the Constitution, which leaves it in the hands of the judiciary and academicians to define it in their way. One can respond to 'public order' as the 'absence of disorder of peaceful, sensible and orderly behaviour of public' in society or public places. It also includes quiet and rational behaviour of people respecting all-other members and communities of the society.

Overreaction exceeding the limits of social behaviour of one person or group of persons or community upon the streets may constitute an annoyance to another. Earlier, the term 'public order' mainly was constrained to physical acts on the streets only, but with the changing scenario and advancement of technology, it covers the vast area of 'public order on all online social platforms, which makes it more complex to define and control by static provisions of law.

Parish constables of the old time used to present the offenders of 'public nuisance,' i.e., riding horses or driving carts or wagons negligently on public streets. Later, these provisions were kept in the statute books to control motorized vehicles and it became the official duty of the police to keep the decorum on the streets. The foremost duty of the state police to maintain the sovereign's peace may be equated with maintaining public order.

Due to changing dimensions of social behaviour via several online social platforms, the problem of maintaining peace in society has also become complex. Although maintaining public order on these online social platforms is not covered in the existing laws, the State enacted "***The Information Technology Act, 2000***" in this direction and covers full provisions to maintain peace and order in society.

#### **4.4.1.3 'Morality'**

"The principles on which freedom can firmly stand can be derived from both morality and religion. Pure virtue is the only reliable foundation for a free constitution".<sup>96</sup> "In

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<sup>96</sup> Charles Francis Adams (ed.), *The Works of John Adams, Second President of the United States*, (Boston: Little Brown and Company, Vol 1, 1856).

France, religion had been observed as the enemy of freedom, whereas in America, George Washington considered religion and morality as 'two pillars of the freedom'.<sup>97</sup> The interrelation of religion and morality is well described in the words of 'Mark Hopkins, an American Philosopher', "***Religion without morality is superstition and a curse and morality without religion impossible.***"<sup>98</sup>. Religion and religious belief systems, as well as the upkeep of law and order and social politics, are all closely related to morality. To sum up morality in a few words is a challenging undertaking.

In the case of "A. S. Narayan V. State of Andhra Pradesh"<sup>99</sup>, in these two paragraphs (Articles 25 & 26), Hansaria J stated that "whereas religion benefits from cutting-edge research and theoretical analysis, dharma prospers in the world as a first-hand case". Religion supports and adds to a culture's evolving phases, while dharma enhances the beauty of spirituality. Dharma assists one to realise the eternal holiness in the heart whereas religion may motivate one to construct a frail, human dwelling for God".

Many philosophers gave different definitions of morality and moral theories as well and unsuccessfully, they tried very hard to provide a uniform definition of morality. In order to comprehend the idea of religion in society and the function of religion in social politics, it is also necessary for this context to research, analyse and compare morality with constitutional morality. Some philosophers say that the terms "religion" and "morality" can be used interchangeably, whereas others disagree and offer other perspectives on the subject. "The general people view religion as true, the wise as wrong and the rulers as beneficial".<sup>100</sup>

"The connection between morals and religious beliefs is at the centre of the morality-religion nexus".<sup>101</sup> Morality can be acquired without being religious. You need empathy, not faith, if you are unable to distinguish right from wrong. The idea that morality depends on religion for its fundamental survival is rejected by Arthur C.

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<sup>97</sup> George Washington's Farewell Address, *available at*: <https://www.mountvernon.org/george-washington/religion/religious-freedom/> (Visited on August 17, 2022).

<sup>98</sup> Biography: Mark Hopkins, *available at*: <https://www.britannica.com/biography/Mark-Hopkins-American-educator-and-theologian>. Encyclopedia Britannica (Visited on August 17, 2022).

<sup>99</sup> 1996 AIR 1765

<sup>100</sup> "Lucius Annaeus Seneca Quotes, *available at*: [https://www.brainyquote.com/quotes/lucius\\_annaeus\\_seneca\\_118600](https://www.brainyquote.com/quotes/lucius_annaeus_seneca_118600) (Visited on August 20, 2022).

<sup>101</sup> Morality and Religion, *available at*: <https://plato.stanford.edu/entries/religion-morality/> (Visited on July 21, 2021)

Clarke. He stated: “The hijacking of morality by religion may be the biggest tragedy in the history of humanity. People increasingly assume that there is an essential link between morality and religion. However, the foundation of morality is simple and does not require any form of religion”.<sup>102</sup> Christopher Hitchens has written that “Morality comes from humanism and is stolen by religion for its purposes” and “the fatal trait of the times is the divorce between religion and morality”.<sup>103</sup>

In 1796, The 1<sup>st</sup> President of the United States delivered his farewell speech, saying that morality deals with core humanity and so national morality lies in the fundamental rights of human beings and one needs to see and compare religion and morality separately. He said, “Let us with caution satisfy the supposition that morality can be retained without religion. Reason and experience prohibit us from expecting national morality to prevail without religious principle”.<sup>104</sup> Karl Wilhelm Friedrich Schlegel opined, “The disagreement between morality and religion exists simply in the traditional classification of things into the divine and the human if one only explains this correctly”<sup>105</sup>.

#### **4.4.1.4 ‘Health’**

Health is not merely the absence of sickness, disorder, or any other disability; it also refers to a person's whole mental, bodily and social well-being. According to Indian law and the Constitution, everyone has a fundamental right to the best possible level of health care, regardless of their political views, socioeconomic status, or religious affiliation. Attainment of peace and security is the core agenda of every State and it depends upon the health of all people in the State. Cooperation between individuals and the State is also necessary for a healthy society. A state can fulfil their dream of achieving the status of a peaceful society by providing adequate health and social measures only. It will be brought peace and harmony among the people living in the society.

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<sup>102</sup> Arthur C. Clarke Quotes, *available at:* [https://www.brainyquote.com/quotes/arthur\\_c\\_clarke\\_141085](https://www.brainyquote.com/quotes/arthur_c_clarke_141085), (Visited on August 20, 2022).

<sup>103</sup> Ralph Waldo Emerson, *The Sovereignty of ethics* (North American Review, Vol. X. 12, 1878).

<sup>104</sup> George Washington’s Farewell Address, *available at:* <https://www.loc.gov/resource/mgw2.024/?sp=243&st=text> (Visited on August 17, 2022).

<sup>105</sup> Religion and Morality, *available at:* <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4345965/> (Visited on August 20, 2021).

Under Article 25, health is taken in its general and natural sense. The definition of "health" has been expanded to include state peace and harmony as well as the provision of a healthy lifestyle free from disruption for all members of society. A fundamental human right, the right to health is enshrined in Article 21 of the Indian Constitution.

#### **4.4.1.5 'Other provisions of this Part.'**

The words 'this part' refer to 'Part-III' of the Constitution of India, which includes Article 12 to Article 35, i.e., Fundamental Rights. These words of the proviso of Article 25 install barriers in the way of absolute religious freedom. The scope of Part - III is broad enough and freedom of religion is placed next to any other fundamental right contained in Part -III. It means that no other right should be affected by religious freedom. Therefore, one cannot abrogate or supersede other fundamental rights of persons and citizens in order to assert their claim to religious freedom.

It is evident from the aforementioned clauses that the protection given by Article 25 is not unqualified and is subject to numerous clauses. Numerous religious rituals and customs were contested after the Constitution was passed in several High Courts and the Supreme Court argued that Article 25 should be protected. By examining the constitutional validity of various contested religious rites and practices, the High Courts and Supreme Court have successfully passed numerous tests. "One of the most criticised practices—the restriction on entrance of women, having specific age above 10 years and below 50 years, inside Sabrimala Temple—was challenged in the Supreme Court, which examined the constitutionality of the fundamental right guaranteed by Article 25 as well as a number of other fundamental rights, including Article 14 and Article 26".<sup>106</sup>

Another landmark case tested by the boundaries of Article 25 is the Tripple Talaq case, in which the centuries-old custom of Talaq-e-Biddat was challenged in the SC. In this case, the five judges' constitutional bench delivered the judgment by 3:2 and held that "instant triple talaq is contrary to Article 14, i.e., Right to equality and hence it is not valid to protect Article 25 in such matters. Observing gender discrimination and violation of several fundamental rights, the Apex court held this custom

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<sup>106</sup> *Indian Young Lawyers Association v. State of Kerala*, 2018 SCC Online SC 1690.

unconstitutional. The majority opinion held in this historical judgment that triple talaq is not fundamental to Islam, whereas CJ. J. S. Khehar and J. A. Nazeer gave a dissenting opinion and wrote separate judgments from the majority judges”.<sup>107</sup>

In the famous case of “Church of God (Full Gospel) v. K. K. R. Majestic Colony Welfare Association”<sup>108</sup>, “The SC stated that no religious text makes it clear that praying should be done while using loud voice amplifiers or drumming, which disturbs other people's peace and tranquilly. If such a custom is in place, it must be observed without violating anybody else's fundamental rights or interfering with their capacity to go about their daily lives. In another case, the Calcutta HC found that while the Azan is without a doubt a fundamental and significant aspect of Islam, the use of microphones is not and the Court placed restrictions on their use before 7 A.M. There is a violation of the residents' fundamental right to leisure and relaxation”.<sup>109</sup>

In Re: Noise Pollution Case 18<sup>th</sup> July 2005, “in order to control sound pollution perpetrated in certain religious activities and to safeguard the environment, the SC issued a number of directives. According to the court, loud fireworks are absolutely forbidden from 10 p.m. to 6 a.m. Between the hours of 10 p.m. and 6 a.m., the Court forbade the use of sound amplifiers, tom-toms, or drums, except for public emergencies. Additionally, the Court directed the State to implement policies to impound all devices that generates too loud noise”.<sup>110</sup>

#### **4.4.1.6 Explanation -1 of Article 25**

According to “Explanation 1 of Article 25 of the Indian Constitution”<sup>111</sup>, carrying and wearing kirpans is considered to be a practice of the Sikh religion. The phrases used to justify granting the Sikh community the right to wear and carry a kirpan—one of the Five Kakkars bestowed by Sh. Guru Gobind Singh Ji to their five men during the historic and epic divan at Anandpur Sahib on March 30, 1699—clearly demonstrate the legislators' intent. These five people are the first to get the two-edged sword

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<sup>107</sup> *Shayara Bano v. Union of India*, AIR 2017 9 SCC 1 (SC).

<sup>108</sup> AIR 2000 SC 2773.

<sup>109</sup> *Maulana Mufti v. State of West Bengal*, 1998 SCC OnLine Cal 73: AIR 1999 Cal 15.

<sup>110</sup> *Re: Noise Pollution Case*, 2005 Latest Caselaw 356 SC.

<sup>111</sup> Explanation 1: Article 25 of the Indian Constitution, available at: [https://www.constitutionofindia.net/constitution\\_of\\_india/fundamental\\_rights/articles/Article%2025#:~:text=Article%2019%2C%20Draft%20Constitution%2C%201948&text=%2D%20The%20wearing%20and%20carrying%20of,profession%20of%20the%20Sikh%20religion](https://www.constitutionofindia.net/constitution_of_india/fundamental_rights/articles/Article%2025#:~:text=Article%2019%2C%20Draft%20Constitution%2C%201948&text=%2D%20The%20wearing%20and%20carrying%20of,profession%20of%20the%20Sikh%20religion) (Visited on August 20, 2022).

baptism and Khanda di Pahul initiation procedures. The five were baptised by Sh. Guru Gobind Singh Ji in a novel and distinctive ceremony called Pahul, which is now famous for the baptism ritual known as Amrit Sanskar and the person baptised as Amritdhari.

In India, the wearing and carrying of the kirpan are allowed everywhere, but it is not so in international aeroplanes following international rules and regulations. In Sikhism, the kirpan has both symbolic and physical functions to use as a defensive weapon and a baptized Sikh, also known as Khalsa Sikh, is a saint first and then a soldier. As per Sikhism, the literal meaning of kirpan is a weapon of defence and is made of two words, i.e., 'Kirpa and Aan mean mercy and blessing 'and it is also opposed to Talwar, which is a weapon of offence.

#### **4.4.2 Art 26 - Freedom to manage religious affairs**

The most controversial legal dramas in India are fought out in the courtrooms. There is a greater likelihood that other delicate problems involving the public interest are also at stake in situations involving strong religious convictions. Gender discrimination, caste discrimination, minority rights, religious freedom, public safety and freedom of speech and expression are a few of the topics related to these numerous procedures. The SC's rulings addressing religion are frequently highly intricate and far from trivial, as the Sabrimala case has shown. One would anticipate that the material of SC issues concerning religion would contemplate the importance of the political and social repercussions.

So why would a court judge whether or not a certain leader was a preacher, or whether or not a certain group is supplemental to Hindu sects? These discussions have no influence on judicial discourse, but it becomes a matter of arguments in the top court of the country. Does it need to be interpreted by the SC judges? The texts of "Article 26 of the Constitution"<sup>112</sup> reply to this question very well. Article 26 affords

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<sup>112</sup> The texts of Article 26 of the Constitution of India read as follows –  
Article 26- Freedom to manage religious affairs Subject to public order, morality and health, every religious denomination or any section thereof shall have the right  
(a) to establish and maintain institutions for religious and charitable purposes;  
(b) to manage its own affairs in matters of religion;  
(c) to own and acquire movable and immovable property; and



religious organisations a lawful shield of protection from government meddling since it gives denominations autonomy over their religious concerns. However, claims of denominational affiliation should not always be taken at face value. To properly invoke the protection of Article 26 a religious organisation must establish that they are a distinctive religious organization. Additionally, to define the phrase "religious denomination" and place restrictions on it, the Court has also provided an interpretation of the protections that Article 26 offers.

This chapter will examine the methods and motivations used by religious organisations to apply for denominational status. The concept of denominational rights is frequently cited in legal defences of religious institutions and practices against State regulation.

Religious denominations have some more benefits to enjoy in comparison to other non-denominational institutes; religious organisations are advised to emphasise their distinctively denominational character. This chapter traces the historical decisions of courts on religious groups to explore the SC responses to averments made and the standards it set to consider such averments. The benefit of Article 26 is provided to only those institutions that identify themselves as a distinctive religious group.

Comprehending both the content and application of Article 26 is essential to understanding the legal challenges involving particular religious groupings. It is crucial to comprehend each and every word of Article 26 for ensuring the rights of religious denominations along with certain limitations. "Religious organisations may claim Article 26 protection exclusively for managing their internal religious matters, not for managing their real properties", the SC said.<sup>113</sup>

There are several important aspects in Article 26's language. For the interests of public order, morality and health, the State has sufficient powers to legislate. Secondly, the rights provided by the Article are not absolute. Even though they are avowedly religious, some rights may be subject to restriction if it is determined that they endanger the general welfare. The scope and intent of these limits have

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(d) to administer such property in accordance with law, *available at*: <https://indiankanoon.org/doc/1858991/> (Visited on November 11, 2022).

<sup>113</sup> *Ratilal Panachand Gandhi v. State of Bombay*, 1954 AIR 388.

frequently been examined by the courts. If it is determined that the freedom provided under Article 26 contradicts other fundamental rights, they may also be invalidated. The judiciary may resolve to give preference to Article 25(2)(b) over the freedom permitted to religious organizations by Article 26 in the event that a religious organization violates legislation covered by that provision. As an illustration, Article 25(2)(b) safeguards the legal aspect of constitutional provisions that “throw open of Hindu institutions...to all classes and sections of Hindus”.

Second, the text of clause (b) doesn't clearly elaborate on the ingredients of religious matters. According to the judiciary, Article 25(2)(a) describes that all economic, political, financial and secular activities related to non-religious matters impacting religious communities are subject to State superintendence. As a result, in its interpretation, Article 26(b) only covers totally and solely religious matters. The courts have also attempted to keep religious and secular issues apart, a topic that will be further covered in the chapter after this one. Religious organisations have exploited Article 26(b) in a variety of circumstances because it is arguably the most ambiguous of all the articles. The rights to govern and administer religious institutions, to control who is allowed into houses of worship, to bar members of rival religious groups or denominations and a host of other rights have all been the subject of heated debate.

Third and most significantly for this chapter, religious denominations rather than specific individuals are accorded the essential rights in Article 26. Although Article 26 of the Indian Constitution concerns with the collective rights of communal groups, religious institutions and denominations and Article 25 of the Constitution specifically grants "freedom of conscience and free profession, practice and propagation of religion to all persons", the Indian Constitution provides religious freedom to both individuals and religious denominations or groups. Numerous opponents have looked at the results of making organisations the holders of rights. The Article does not define what a religious denomination is, so this critical matter has been left to the courts.

The first case to address this question was *The Commissioner, Hindu Religious Endowments, Madras v. Sri Lakshmindra Thirtha Swamiar of Sri Shirur Mutt* (hence referred to as *Shirur Mutt*) in 1954. “The SC has established standards for figuring out whether a group of people meets the requirements for a religious denomination. It is

important to meet these requirements since it clarifies whether a group is eligible to get the benefit of Article 26. The supreme court replaced the assertion test that was previously used with the essential practice test, according to which only those behaviours that were vital to the faith were immune from the state's intrusion".<sup>114</sup> According to the Bombay High Court "Articles 25 and 26 forbid not only faiths or religious views but also all actions are taken in support of those beliefs. Thus, it guarantees that religious observances such as ceremonies, modes of worship, rituals and religious rites fall under the umbrella of religious freedom. What must the indispensable component of religion, must be proved via doctrines, customs and beliefs that religious cultures perceive as vital components for the existence of the religion?"<sup>115</sup>

The court decided in the case *N. Aditya V. Travancore Devaswom Board Kerala* that "any person can be appointed as a priest".<sup>116</sup> In another case<sup>117</sup>, the issue concerned the constitutionality of the *J & K Mata Vaishno Devi Shrine Act, 1998*, "which took away the right to perform worship". The aforementioned Act granted the Shrine Board authority over the management and administration of the funds of the organization. The right to puja is a custom that the State may abolish via the enactment of the legislation, according to the Supreme Court, which found the Act to be constitutionally valid. There are several limitations placed on the rights that are protected under Article 26.

The prerogative or sovereign power of the State to occupy churches, mosques, temples and other houses of worship. There is no inherent violation of religious freedom in taking possession or ownership of places of worship. However, "if the acquisition of a substantial and necessary place of worship breaches their religious freedom, then the purchase of such place cannot be authorised". The SC of India ruled in *M. Ismail Faruqui v. Union of India* that "neither a mosque is an essential component of Islam, nor is it necessary that Namaz be performed solely in a mosque. Namaz can be performed anywhere, regardless of the significance of the location".<sup>118</sup>

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<sup>114</sup> *Commr. of Police v. Acharya Jagadishwarananda Avadhuta*, (2004) 12 SCC 770.

<sup>115</sup> *Hasan Ali v. Mansoor Ali*, (1948) 50 BomLR 389.

<sup>116</sup> AIR 2002 SC 3538.

<sup>117</sup> *Bhuri v. State of J. K.*, (1997) SC 1711.

<sup>118</sup> *M. Ismail Faruqui V. Union of India*, (1994) 6 SCC 360.

In another case “the legitimacy of the Shri Jagan Nath Temple Act of 1954 has been disputed because it violates Article 26(d) of the Constitution and is discriminatory. The petitioner asserted that he had sole authority over the temple's administration because it was his private property. The challenged Act resulted in the Committee being given individual management of the temple rather than the appellant. The Apex Court stated in rejecting the appeal that the petitioner's fundamental right to freedom of religion had not been violated and that the Act only addressed non-religious activities”.<sup>119</sup>

In the case of “Gulam Abbas V. State of U.P.”<sup>120</sup>, the Court may consider the public's interest even though Muslim personal law prohibits moving graves if it considers that the religious freedoms guaranteed by Articles 25 and 26 are not unqualified and are subject to public order. According to the decision in Saifuddin Saheb V. State of Bombay, “the SC concluded that the practice of ex-communication practiced as religious issues by any group violates the basic right under Articles 25 & 26 of the Constitution”.<sup>121</sup> According to Article 26(d) of the Constitution, religious organisations have the right to administer their property, but they are required to do it in accordance with the law. “If the said organization never had the capability to manage property or if it has lost its right, then the same cannot be reinstated under Article 26 and hence cannot be claimed”, the SC ruled in *The Durgah Committee Ajmer V. Syed Hussain Ali*.<sup>122</sup> In another case, the Supreme Court stated: “Even while the State has the right to manage or watch over the trust's assets, it is not legally permitted to take away that power and give it to another organisation that is not even affiliated with the same denomination. The Constitution's Article 26(d) would unquestionably be broken”.<sup>123</sup>

#### **4.4.3 Art 27 & 28 of the Constitution of India**

“Art 27 & 28 describes the secular nature of the Indian Constitution more clearly. Each person is exempt under these Articles from paying taxes to advance any religion

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<sup>119</sup> *Bira Kishore Dev v. State of Orissa*, AIR 1964 SC 1501.

<sup>120</sup> 1982 SCR (1)1077 1981 AIR 2198.

<sup>121</sup> AIR 1962 SC 853.

<sup>122</sup> 1961 AIR 1402, 1962 SCR (1) 383.

<sup>123</sup> *State of Rajasthan V. Sajjan Lal Panjawat*, 1975 AIR 706, 1974 SCR (2) 741.

and from participating in religious instruction or worship in certain educational institutions.”<sup>124</sup>

Art 27 of the Constitution of India – “Freedom as to payment of taxes for promotion of any particular religion”.<sup>125</sup> It prohibits the State from imposing taxes to raise funds for the support or promotion of a particular religion. This article makes a point of describing the Indian Constitution's fundamentally secular nature. No religion can be promoted by the State because none is an official religion recognised by it. By guaranteeing that all religions are treated fairly, this Constitutional provision promotes prosperity for all.

“Article 28 of the Indian Constitution guarantees freedom as to attendance at religious instruction or religious worship in some educational institutions”.<sup>126</sup>

- a) This law was passed in order to control and regulate the teaching of religion in state-funded educational institutions. This action aids in putting an end to coerced worship and religious teaching.
- b) In this article, educational institutions are divided into four categories.
  - a) Institutions that the State maintains entirely (in these institutions, religious instruction is completely prohibited).
  - b) Institutions run by the State but created by any trust or endowment (in these institutions, religious instruction is allowed).
  - c) Institutions recognized by the State (in these institutions, religious instruction is allowed voluntarily only).

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<sup>124</sup> H. M. Seervai *Constitutional Law of India* 1259 (Law & Justice Publishing Company, New Delhi, fourth edition, 2022).

<sup>125</sup>The texts of Article 27 of the Constitution of India read as follows –

“No person may be compelled to pay any taxes, the proceeds of which are specifically appropriated in payment of expenses for the promotion or maintenance of any particular religion or religious denomination”, available at: <https://indiankanoon.org/doc/237570/> (Visited on November 11, 2022).

<sup>126</sup> The texts of Article 28 of the Constitution of India read 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 administered by the State but has been established under any endowment or trust which requires that religious instruction be imparted in such institution.

(3) No person attending any educational institution recognized by the State or receiving aid out of state funds shall be required to take part in any religious instruction that may be imparted in such institution or to attend any religious worship that may be conducted in such institution or in any premises attached to it unless such person or, if such person is a minor, his guardian had given his consent thereto, available at: <https://indiankanoon.org/doc/237570/> (Visited on November 11, 2022).

- d) Institutions receive aid from the State (in these institutions, religious instruction is allowed voluntarily only).

Numerous intellectuals and proponents of secularism criticise Clauses (2) and (3) of Article 28 of the Indian Constitution. No such institution formed under any endowment or trust that mandates the imparting of religious instruction in the institution needs to be administered by the state. Why is it necessary to teach religion in schools when there are so many temples, churches, madrassas and other places of worship? It is up for discussion. People should travel to their religious institutions to impart their specific religious education for the propagation of their religion if they believe that their children also urgently need it, rather than doing it in schools.

#### **4.4.4 Article 14, 15 & 16 – Right to equality**

The Indian Constitution's Articles 14 to 18 provide equality rights. Article 14 of the Constitution of India<sup>127</sup> restricts the State from denying equality before the law or equal protection of the laws to any person within the territory of India. Regarding the admission of women to the Sabrimala temple, the Travancore Devaswom Board remarked, "They were legally able to oversee the temple's management. They demand the upholding of Article 26 in order to protect the privileges afforded to religious organisations. They further claimed that The Kerala Hindu Places of Public Worship (Authorization of Entry) Rules, 1965's regulation 3(b) protected the Sabrimala custom. According to this Rule, women are not permitted to enter a public place of worship if it is customary to do so. In *Indian Young Lawyers Association v. State of Kerala*, this Rule was contested on the grounds that it infringed upon fundamental rights protected by Articles 14, 25, and 26. By a vote of 4:1, a panel of five judges ruled that the ban on admission for women between the ages of 10 and 50 is unconstitutional. The only female judge out of the five who presided over this case, Justice Indu Malhotra, gave the dissenting opinion and opined that "it was not for the

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<sup>127</sup> The Texts of Article -14 of the Constitution of India read as –  
"The State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India", *available at*: <https://indiankanoon.org/doc/237570/> (Visited on November 11, 2022).

courts to meddle into issues of deep religious beliefs and it must be left to individuals practising the religion, in a secular society like India”.<sup>128</sup>

When this rule was first contested in the Kerala High Court in 1991, the court ruled that “it was constitutional and reasonable because it was a long-standing practice that had existed since the dawn of mankind”.<sup>129</sup> The Supreme Court has amalgamated three other related hot issues with a similar point of law under discussion in the proceedings, and the case has now been referred to a larger bench of nine judges to address the questions made in this case. The first case involved Muslim women entering the Dargah, the second involved Parsi women marrying non-Parsi men within the sacred hearth of Agyari, and the third involved female genital mutilation, a practise that is common among the Dawoodi Bohra, a small Islam sect society.

Another significant case involved the declaration of Triple Talaq (Talaq-ul-Biddat) unlawful by the five-judge Apex Court bench. The Judge ruled “According to Article 14 of the Indian Constitution, the concepts of equality and gender justice are inextricably linked. The content and spirit of Indian Constitutional Articles 14 and 15 are incompatible with the conferral of social rank based on patriarchal norms or a social position dependent on the goodwill of the men-folk”.<sup>130</sup>

In the case of *John Vallamattom & Anr. V. Union of India*<sup>131</sup>, a Roman Catholic priest filed a petition challenging Section 118 of the Indian Succession Act of 1925, arguing that it discriminates against Christians and Christian testamentary disposition. When V.N. Khare, CJ, first looked into the background of the aforementioned Act, he discovered that it had ties to long-repealed English laws from the eighteenth century. He went on to say that any law or part of a law that was passed before the Constitution was adopted is invalid if it conflicts with the Constitution. S. 118 was ruled unconstitutional by Khare, who argued that it was religiously discriminatory and in violation of Articles 14 and 15 of the Constitution. In another case, “the Apex Court ruled that the state shall not discriminate against any person in accordance with

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<sup>128</sup> 2018 SCC Online SC 1690.

<sup>129</sup> *S. Mahendran v. The Secretary, Travancore*, AIR 1993 Ker 42.

<sup>130</sup> *Shayara Bano v. Union of India*, AIR 2017 9 SCC 1 (SC).

<sup>131</sup> (2003) 6 SCC 611.

Article 15(2) of the Indian Constitution and put down that differentiation on electoral boards based on religion is unconstitutional”.<sup>132</sup>

#### 4.4.5 The Citizenship (Amendment) Act, 2019

The Citizenship (Amendment) Act of 2019, also called the 'C.A.A.',<sup>133</sup> was passed by the Indian legislation in 2019. Hindus, Buddhists, Christians, Parsis and Sikhs who fled due to persecution in their home countries of Afghanistan, the People's Republic of Bangladesh and Pakistan and arrived in India before 2014 can now apply for Indian citizenship under a planned amendment to the Citizenship Act, 1955. Muslims from eight countries—all of which have a majority of Muslims—are expressly excluded from eligibility under the law and are not accorded any special status. It was the first time in Indian law that religion had been openly used as a foundation for awarding citizenship and it brought criticism from all over the world on this particular issue of disparity in citizenship granting in the Country. The aforementioned amendment legislation of 2019 made eligible citizenship for immigrants who had arrived in India by December 31, 2014 and had faced religious persecution in their country of origin. Those persons will be provided citizenship in the Country after receiving applications from them. The Act conjointly relaxed the requirements of residence for naturalization of these migrants from 12 to 6 years. There will be between 30,000 and 35,000 immediate beneficiaries of the measure, according to Intelligence Bureau records. The amendment has been under fire for being religiously discriminatory, particularly for omitting Muslims. “The Act was criticised by the UN High Commissioners for Human Rights as being fundamentally discriminatory. Although it

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<sup>132</sup> *Nainsukhdas v. State of U.P.*, 1953 AIR 384 1953 SCR 1184.

<sup>133</sup> Section 2(1)(b) of the amended citizenship Act, 2019 states thus:

*“Provided that any person related to Hindu, Sikh, Buddhist, Jain, Parsi or Christian community from Afghanistan, Bangladesh or Pakistan, who entered into India on or before the 31st December of 2014 and who has been exempted by the Central Government by or under clause (c) of sub-section (2) of section 3 of the Passport (Entry into India) Act, 1920 or from the application of the provisions of the Foreigners Act, 1946 or any rule or order made thereunder, shall not be treated as an illegal migrant for this Act”, available at: [https://loksabhadocs.nic.in/Refinput/New\\_Reference\\_Notes/English/09122019\\_104728\\_1021205239.pdf](https://loksabhadocs.nic.in/Refinput/New_Reference_Notes/English/09122019_104728_1021205239.pdf) (Visited on August 14, 2021).*



is admirable that India wants to safeguard persecuted communities, this goal should be accomplished through non-discriminatory legislative protections”.<sup>134</sup>

Indian Union Muslim League had also challenged this amendment act in the Supreme Court and alleged that by enacting the said Act, many Muslims residing in India would be deprived of their citizenship as the proposed N.R.C. will likely deprive the Indian citizenship of many non-Muslims and Muslim persons. While C.A.A. will provide the opportunity for non-Muslim to regain Indian citizenship, this will not be the case for Muslims. The matter discussed in the said petition is sub judice and lying pending in the Supreme Court for its ruling on the critical issue.

The bill's opponents express their worry that it will be used to make many Muslim people stateless because they are unable to meet strict birth or identification proof requirements. The exclusion of the marginalised religious communities from locations like Tibet, Sri Lanka and Myanmar has drawn criticism from analysts. According to the Indian government, it is "unlikely" that Muslims would endure "religious persecution" in such countries because Islam is the official religion of the People's Republic of Bangladesh, the Islamic Republic of Pakistan and Afghanistan. However, Ahmadi and Hazara's Muslim minorities have faced particularly harsh persecution in these countries.

*To accomplish the objective of studying the contribution of the legislature and judiciary in the development of the right to religion as a fundamental right subject to certain restrictions and finding the answer to research questions that "Whether the legislation and judiciary are fairly exercising their powers to ensure freedom of religion? & Whether the judiciary is exercising excessive powers under the preview of judicial review?", the historical development of the Constitution, legislative speeches and comparative analysis of Constitutional provisions are made. It is also analyzed that, while drafting the Constitution, what was the real intention of the draft committee, which makes the picture clearer to resolve the critical issues. The term secularism is explored in this chapter. The detailed analysis of limitations, provided in Articles 25 & 26 of the Indian Constitution, provided under the heading*

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<sup>134</sup> Citizenship (Amendment) Act, 2019, available at: [https://loksabhadocs.nic.in/Refinput/New\\_Reference\\_Notes/English/09122019\\_104728\\_1021205239.pdf](https://loksabhadocs.nic.in/Refinput/New_Reference_Notes/English/09122019_104728_1021205239.pdf) (Visited on August 14, 2021).

*of public order, health, morality and other provisions of part III of the Constitution, is also made. The extent of limitations upon the right to religious freedom and the power of the State for bringing social reform are analyzed in this chapter.*

**Chapter -5**  
**OTHER LEGISLATIVE PROVISIONS CONCERNING RIGHT TO**  
**RELIGION IN INDIA**

Being a democratic country and in the spirit of the constitutional theme, India has enacted many legislative provisions to move the Country on the secular path. Many general and special Acts are enacted and enforced in our Country to maintain religious freedom. Under the preview of Articles, 25 & 26 of the Indian Constitution, centre and State governments have enforced many laws that enable individuals to profess their religion freely and religious denominations to propagate their religion freely. Many statutory provisions are either under consideration by the judiciary or become a matter of debate at academic tables.

The SC held in “each competent government ensures that every person is free to profess any religion and no one is allowed to insult the religious sentiments of other religion”.<sup>135</sup> India has many general and special laws relating to secularism and religious freedom. Indian penal code 1860 provides penal provisions for violating religious freedom and other criminal activities resulting in a communal disturbance. The Indian Penal Code's Chapter XV (Sections 295 to 298) addresses religious offences and their penalty. Nobody has the right to disparage another person's faith or any sacred object from that religion. The Indian Penal Code specifies punishment in the event that this occurs. Religion-related crimes can be broadly categorized into three categories: defiling sacred sites and holy artefacts, offending religious sentiments and disturbing religious gatherings and rites.

In spite of enough statutory provisions being enacted by the legislation, the fundamental issues are not resolved yet. There is a need to re-look these statutory provisions for making these provisions enable for curbing the social issues that are under scanner here in this study. In this sense, it has been observed that Indian law safeguards religious freedom, but due to passage of time, there is a need of fresh application of legal mind on these statutory provisions. The following section

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<sup>135</sup> *Kutti Chanami Moothan v. Ranapattar*, (1978) 19 Cri LJ 960.

discusses several important legal measures pertaining to religious freedom and the country's secularism.

### **5.1 Section 153A of the Indian Penal Code, 1860 - Promoting enmity between different groups on the grounds of religion, race, place of birth, residence**

This section intends to punish those who disparage the founders and prophets of a particular faith or their race, religion, place of birth, domicile, language, etc. This provision is sufficiently broad to embrace and punish offences that incite animosity, hatred, or hostility between different religious, racial, linguistic, or regional groups, castes, or communities. Crimes of moral turpitude are also covered under this section. It is a cognizable offence and the maximum penalty is three years in prison, a fine, or a combination of the two. However, the penalty for a crime committed in a house of worship can be increased to five years in prison and a fine.

This Section faces a stir criticism in the society as it puts the restrictions on religious freedom. “The matter of Wendy Doniger’s book ‘The Hindus: An Alternate History,’ is a good example wherein Penguin India had to decide not to release the book in India when the book faced a case of Section 295-A. The publishers then decided on an out-of-court- settlement. The government is even planning to materialise the recommendations made by the Law Commission and the expert committee headed by T.K Vishwanathan on adding sections 153-C and 505-C to the IPC. But before adding these two provisions, the government must try to fix the loopholes that are associated with Sections 153-A and 295-A of the IPC”.<sup>136</sup>

### **5.2 Section 295-298 of IPC – Of Offences Relating to Religion**

The Indian Penal Code's Chapter XV (Of Offenses Relating to Religion) has five sections: 295, 295A, 296, 297 and 298. In general, there are three categories into which the offences linked to religion can be divided:

5.2.1 Desecration of sacred sites or highly revered things (Sections 295 and 297).

5.2.2 Irritating or hurting people's religious sensibilities (Section 295A and 298).

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<sup>136</sup> Hate Speech in India: An Analysis in light of Section 153A and 295A of IPC, available at: [https://blog.ipleaders.in/hate-speech-india-analysis-light-section-153a-295a-ipc/#Criticism\\_of\\_the\\_sections](https://blog.ipleaders.in/hate-speech-india-analysis-light-section-153a-295a-ipc/#Criticism_of_the_sections) (Visited on September 14, 2023).

### 5.2.3 Upsetting religious gatherings (Section 296).

#### **5.2.1 Defilement of Places of Worship or objects of Great Respect (Sections 295 and 297)**

According to Section 295 of the Indian Penal Code, anyone who wilfully harms a place of worship or a sacred object or insults the religious emotions of any group faces punishment. That person faces a two-year prison sentence as well as a fine. Anyone who enters a house of worship with the intent to harm the building or object is subject to punishment under Section 297 of the IPC. Causing the disturbance to the performance of last rites is assumed to insult of religious sentiments of the community to which the deceased has belonged.

Simply said, Section 297 addresses the penalties for anyone who trespasses in any place of worship, sepulchre, burial, or area designated for burial rites with the intent to offend another's religious sensibilities.

We must be aware of the fundamental components of Sections 295 and 297 in order to fully comprehend their concepts. When someone intends to injure, degrade, or destroy a place of worship or another object, they are in violation of Section 295 of the I.P.C. (declared as a holy object by any religion). These Sections do not criminalise just defiling a place of worship, and Section 295 of the I.P.C. does not automatically make someone accountable for purposefully offending someone's religious sensibilities and feelings. The specific facts and circumstances of each occurrence must be taken into consideration in order to determine if there was an intent to transgress. Because he had no intention of offending any faith, 'A', who practices Hinduism, would not be held responsible under Sections 295 and 297 of the I.P.C. if he removed some dilapidated construction materials from a mosque. He wasn't intentionally trying to offend anyone's faith.

Someone claiming to be a Muslim wave a lit cigarette near the Vimana (a holy object of the Hindu religion). You cannot say that what happened was an accident. The Indian Penal Code forbids and punishes this behaviour. The I.P.C. Section 297 states that it is forbidden to have intercourse in a temple or other sacred location.

Destruction, harm, or defilement are all terms that refer to making something filthy, unclean, or offensive. It includes actions that might alter the location's natural beauty

as well as those that would physically or materially harm the property. The term 'defilement' refers to circumstances in which a holy site or object of worship is covered ritualistically or impurely as well as actual physical devastation.

The demolition of a house of worship or other sacred site is another requirement of this Section. Temples, churches, mosques, synagogues, and kyaungs are revered as holy places of worship by the majority of religions. In the well-known case of "Joseph v. State of Kerala," it was determined that Section 295 of the Indian Penal Code does not apply when the landowner destroys Hindu God images after purchasing a hut that had previously been used as a place of worship by some adherents of a particular faith. The owner had the right to do whatever he had done as long as it served a legitimate purpose, according to the High Court, and he had no intention of hurting anyone's religious feelings, beliefs, or holy objects. The owner was found not guilty of any offences as a result. Even though they are not legally worshipped, religious texts and sacred books like the Bible, the Koran, the Guru Granth Sahib, the Gita, etc. are revered and regarded as infallible. If a person enters a graveyard or place of worship without authorization, they are in violation of Section 297 of the Indian Penal Code. Trespassing is defined in this Section as making an unauthorised entry onto property that is in the possession of another person. The sexual activity would make someone accountable under this Section if it occurred inside a house of worship.

According to Section 297, it is unlawful to interfere with the conduct of funeral rites out of disrespect for a human corpse. Disturbance refers to any overt interference with funeral traditions. In the case of Basir-ul-Huq v. State of West Bengal, "A's" mother passed away. Along with his family, he drove the deceased to the cremation facilities. The accused reported "A" to the police in the interim, saying that he had killed his mother by strangling her. He then interrupted the rites by going inside the cremation sites with the police.

However, it was discovered that A's mother had passed away peacefully. 'A' reported a complaint to the police against the accused under Section 297 of the Indian Penal Code. The defendant received a three-month severe jail sentence after being found guilty of the same offences.<sup>137</sup> "The definition of 'person' must be expanded to include dead people in it. In particular, it covers the 'right to human dignity after

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<sup>137</sup> 1953 AIR 293.

death' and 'right to a respectful burial or cremation' in Article 21 of The Constitution of India, i.e., the right to life".<sup>138</sup>

## **5.2.2 Outraging or wounding the religious feelings of persons (Section 295A and 298)**

### **5.2.2.1 Section 295A of Indian Penal Code, 1860 – Outraging religious feelings.**

A violation of Section 295A is defined as "intentional and malicious behaviour, intended to insult the religious or moral convictions of any class." According to this Section, anyone found guilty of insulting or attempting to insult the religion or the religious feelings of any class of Indian citizens through words (spoken, written, through visual presentation, or through other methods) will be sentenced to the specified term of imprisonment, which may extend to three years, a fine, or both.

### **5.2.2.2 Section 298 of Indian Penal Code, 1860 - Uttering words, etc.,**

Uttering words, etc., for the purpose of insulting anyone's religious beliefs is covered in Section 298. Any person who engages in any of the following actions with the aim to offend another person's religious sensibilities is subject to punishment under this Section, which includes imprisonment for the specified duration (which may be up to one year), a fine, or both:

- Says anything aloud or makes any noise that person can hear.
- Displays any gestures in the other person's line of sight.

These sections of the Indian Penal Code cover the Act that aims to intentionally offend religious sensitivities or feelings.

The Indian Penal Code's Section 295A addresses behaviours meant to offend the religious sensibilities or sentiments of a specific group. In contrast, punishment for actions (verbal or visible) that are intended to offend another person's religious sentiments is addressed in Section 298 of the Indian Penal Code.

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<sup>138</sup> Dimple Jindal, *Fundamental Rights to Religion Amidst COVID -19* pp5441-5456 (Turkish Online Journal of Qualitative Inquiry, Volume 12 Issue 3, July 2021).

### **5.2.3 Disturbing religious assemblies (Section 296)**

The Indian Penal Code's section 296 addresses the crime of "Disturbing Religious Assembly." Anyone who knowingly disrupts a religious ceremony or an assembly that is lawfully engaged in worship is subject to prosecution under this Section and may be imprisoned for the aforementioned duration, which may extend to one year, or fined, or both.

The following are the key components of this Section:

- A legitimate gathering for religious worship or ceremonial purposes.
- The gathering and ceremony should be permitted by law.
- An accused is the one who causes any disruption.
- The accused's actions must be voluntarily undertaken.

Assembly worship is given special protection under this section. Individual worship is not included in this. Unless it hinders the public's normal usage of the streets, a religious gathering is regarded as legal.

### **5.3 The Muslim Personal Law (Shariat) Application Act, 1937**

It is the most controversial Act for many critical customs and practices. Section 2 of this Act provides that the Muslim Personal Law (Shariat) Act will apply for intestate succession, personal property of females, marriage and divorce, maintenance, gifts, dower, guardianships, etc. This Section allows for all Muslim community customs and practices that have remained debated for a long time. As discussed in earlier chapters, the Bohra community, a small sect of Islam, practices the custom of khatna or female genital mutilation and some other sects of Islam practice polygamy and Nikah-Halala. Although all Muslims do not universally accept these practices, still these practices are in fashion, constitutionally protected and not prohibited by the laws. The persons who follow these practices claim that they are essential for their religion and have been practising these customs and practices for a long time. It is not denied that these practices have been followed for a long time, but whether these practices are essential for their religion and constitutionally protected is not decided yet.

Islamic marital jurisprudence permits polygamy for up to four wives. There are different versions of translators of the true Arabic Quran. In Sura 4 (An-Nisa) Ayah 3.



The most reliable version explains this Ayah: “God had permitted you to marry women of your choice, two or three or four; but if you that you shall not be able to deal justly with them, then only one”.<sup>139</sup>

Reading the whole Ayah in one line, it provides to give justice and deal equally with all women to a person who wants to marry and if he fears that he is unable to do so, then he is instructed to abstain from doing so. Given a harmonious interpretation of this Ayah, one can understand that Islamic laws favoured women's dignity and constructed these provisions for the welfare of orphan females by giving them shelter and food security. However, later on, people misused this Ayah for their interest and read a part of Ayah in isolation.

Nikah-Halala is another critical practice prevalent in Islam and applicable through the Shariat Act of 1937. By this practice, if a divorced woman wants to remarry with the same person, she has to marry another man first and after consummating the marriage with her second husband, she has to retake a divorce to make her able to remarry with her former husband. This practice seems derogatory to women's dignity, violating various fundamental rights of women. This practice also upholds male dominance in society, leading to gender discrimination.

The persons indulged in the practice of Female Genital Mutilation claim that this practice is essential for their religion and, hence, not harmful to anyone. They also claim that by applying the Shariat Act, 1937 and Articles 25 and 26 of the Indian Constitution, they are provided with the freedom to profess their religious customs without interruption freely. Critics of this practice say that this practice is done forcefully and without children's consent, so this practice violates the fundamental rights of children. *The Constitutionality of this Act was challenged many times in several courts, some of these cases are decided and some cases are still pending for the consideration of the Court like Mohd. Ahmad Khan V. Shah Bano Begum 1985 (Muslim women maintenance case), Danial Latifi & Anr. V. Union of India 2001 (maintenance to Muslim women case), Shayara Bano V. Union of India 2017 (triple talaq case), Sunita Tiwari V. Union of India (female genital mutilation case), Yasmeen Zuber Ahmad Peerzada V. Union of India (ban upon entry of women in*

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<sup>139</sup> Surah-An-Nisa, available at: <https://quran.com/4/3?translations=17,19,20,22,84,18,21,95,85,101> (Visited on August 20, 2022).

*the mosque for prayer case*), *Mohd. Hanif Qureshi and Ors. V. The State of Bihar 1958 (animal sacrifice case)*, *Mohamed Arif Jameel V. State of Karnataka 2022 (Hijab ban case)*, *Sameena Begum V. Union of India 2018 (Constitutionality of Muslim Marriages Laws validating polygamy, nikah halala and triple talaq etc., case)*. This Act permits the Islamic customary laws and differentiates Islamic laws from other personal laws and general laws of the country. Now, the Apex Court must check the constitutionality and validity of this Act and several customs celebrated under the shadow of the Shariat Act application in cases pending their consideration.

#### **5.4 The Dissolution of Muslim Marriages Act of 1939**

Under this Act, Muslim women can claim divorce from their husbands under specific conditions. However, this Act was enacted for the welfare of Muslim women. However, this Act applies to women only and the right to divorce for men is customary law being regulated by The Muslim Personal Law (Shariat) Application Act, 1937. Under the garb of this customary law, Muslim men are misusing their rights by executing triple talaq or Nikah-Halala activities.

#### **5.5 The Muslim Women (Protection of Rights on Marriage) Act, 2019**

The State enacted this Act to prevent the unconstitutional practice of triple talaq and made it criminally punishable. This Act was enacted upon the guidelines given in a landmark judgment, i.e., *Shayara Bano v. Union of India*, famously known as the "triple talaq judgment", delivered by a constitutional bench of 5 judges, holding the talaq-e-biddat unconstitutional. This Act was also enacted for the welfare of women after a long protest of Muslim women for bringing the amendment in Muslim laws for their maintenance and survival after being divorced and ejected from their matrimonial home by their husbands. However, this Act was also criticized by academicians and legal luminaries from some other angles, as they concluded that this law is gender-biased and there is an intense apprehension of being misused by Muslim women against their husbands. Their point of consideration is that "providing criminal punishment for the civil wrong and proving guilty for punishment based upon the sole evidence of petitioner, i.e., Muslim wife, is unconstitutional.

### **5.6 The Parsi Marriage and Divorce Act, of 1936**

Part III of The Parsi Marriage and Divorce Act, 1936 provides for the Constitution of special Parsi matrimonial courts and the appointment of delegates to hear the matters related to this Act. Part III of this Act comprising Sections 18 to 29, provides for the Constitution of Special Courts for this Act and Section mainly provides that these Courts shall be aided by a special delegate of five persons except for some minor cases of children maintenance or interlocutory orders etc. The provisions of this Act was challenged in the SC as the claimant pleads that this Act violates the right to privacy and restricts Parsi women to go in family court for justice like Hindus. The appointment of delegates works like a jury panel and these delegates are appointed from the local Parsi community. In India, the jury system was abolished in 1959, but this system still resolves family matters in the Parsi community. The claimant's main objection to this Act is that it banned women from going to family court and disclosing private family matters among eminent persons of their community residing in the same city, amounting to the loss of their goodwill among delegates or jury panel. *In the case of Naomi Sam Irani V. Union of India, this matter is pending consideration before the Supreme Court.*

### **5.7 The Kerala Hindu Place of Public Worship (Authorization of Entry) Act, 1965**

According to Section 3 of this Act, places of public worship must be accessible to all sections and classes of Hindus, subject to any customs or practices that are still in effect. The Act was passed with the intention of protecting the freedom of religion granted to any religious denomination to conduct its religious affairs, subject to the restrictions and regulations set forth in Articles 25 and 26 of the Constitution. Nevertheless, this Act appears to have been passed in order to preserve the religious freedom permitted to religious institutions by the Indian Constitution while also allowing admittance to all denominations. While the Kerala Hindu Place of Public Worship (Authorization of Entry) Act of 1965 clearly states that "their custom doesn't allow the entrance of women, having the age between 10 and 50 years, inside the holy shrine temple of Lord Ayyappa" because of "the biological grounds of women's menstruation". *In the Sabrimala case, these provisions were challenged and struck*

*down by five judges' bench of the Supreme Court in 4:1. Now, this case is referred to a larger bench of 9 judges and is pending the final decision. In the appeal, the petitioner has alleged that the Supreme Court was wrong to strike down the provisions of Rule 3(b), which is ultra vires to Section 3 of The Kerala Hindu Places of Public Worship (Authorization of Entry) Act, 1965 as the ban upon entry of women having aged between 10 to 50 years was made by a notification under Travancore–Cochin Hindu Religious Institutions Act, 1950.*

### **5.8 Prevention of Cruelty to Animals (Tamil Nadu Amendment) Act, 2017**

The State of Tamil Nadu enacted this Act to amend 'The PCA Act of 1960' to protect the culture and sports heritage of the State and to protect the existence and well-being of the domestic breeds of bulls. Before the enactment of this Act, an event named 'Jallikattu' involving bulls was criticized on many platforms and this event seemed violative of the right to life and endangered the life of persons involved in bullfights. *This Amendment Act of 2017 changed the Act of 1960 and provided that the provisions of the 1960 Act do not apply to 'Jallikattu'.*

### **5.9 Prevention of Cruelty to Animals Act, 1960**

Chapter 2 of the PCA Act, 1960 provides for the Constitution of 'The Animal Welfare Board of India' to prevent unnecessary pain or suffering of animals. *Section 28 of this Act provides that sacrificing any animal in a manner required by the religion of any community is not a crime, whereas beating, torturing or giving unnecessary pain or suffering to animals or other trivial acts are illegal under this Act and killing or injuring any animal is a cognizable offence and punishable under sections 428 & 429 of IPC, 1860.* The Prevention of Cruelty to Animals Act, 1960's section 4 powers were used by the State to create the Animal Welfare Board of India in 1962. The aforementioned board is in charge of carrying out legislation pertaining to animal welfare and supporting national animal welfare organisations.

### **5.10 Section 306 & 309 of the Indian Penal Code, 1860**

Abetment of suicide is a punishable offence under section 306 of the IPC and whoever makes an unsuccessful attempt to commit suicide shall be punishable under

section 309 of the IPC, 1860. Although the Mental Health Care Act of 2017 has restricted the application of sec 309 IPC, it is still in use in rare cases that prove otherwise. Talking to the provisions of the IPC and relating these provisions with the *'Santhara,' i.e., a religious practice of the Jain religion, leaving ourselves without food to die is a debatable issue. In the case of "Nikhil Soni v. Union of India 2015", Rajasthan High Court held Santhara as a criminal activity equivalent to suicide and directed the state authorities to stop Santhara as it is unconstitutional. The Court further held that this practice is constitutional under religious freedom. The Supreme Court challenged the impugned judgment and in the case of "Akhil Bharat Varshiya Digamber Jain Parishad V. Union of India 2015", the Supreme Court took less than 60 seconds to lift the stay on Jain rituals of Santhara.*

### **5.11 The Arms Act, 1959**

Explanation 1 of Article 25 of the Indian Constitution provides the right to wear and carry kirpan to Sikh persons and clause 5 of Schedule 1 prescribed in The Arms Act, 1959 provides the category of arms that needed licence under the Act.

Clause 5 of Schedule -1<sup>140</sup> prescribed in the Arms Act defines the various arms.

*In the case of Dilawar Singh V. State of Haryana, Hon'ble Punjab and High Court held that the impugned order of the learned session judge directing the petitioner, an Amritdhari Sikh, to appear in Court as a witness without supporting the kirpan is illegal and unconstitutional.*

*In the famous case of D.S.G.M.C. And Ors. V. Union of India 2018, the Apex Court held that there is no such law which per se bans the entry of karas or kirpans or such objects or articles of faith. Every practising Sikh is enjoined to wear the kara and carry the kirpan. Our Constitution has clarified that those articles of faith are deemed a profession of the Sikh religion.*

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<sup>140</sup> The Arms Act's Schedule -1's Clause 5 specified the following:

Weapons besides firearms: Sharp-edged and lethal weapons, including swords (including swordsticks), daggers, bayonets, spears (including lances and javelins), battle-axes, knives (including Kirpans and Khukries) and other similar weapons with blades longer than 9 inches or wider than 2 inches aside from those made for domestic, agricultural, scientific, or industrial purposes, steel batton, "Zipo," and other similar weapons referred to as "life preservers," including any other equipment for creating arms but other than described under category II, that the Central Government may announce in accordance with Section 4 of the Act, *available at:* [https://legislative.gov.in/sites/default/files/A1959-54\\_0.pdf](https://legislative.gov.in/sites/default/files/A1959-54_0.pdf) (Visited on November 12, 2022).

*In another landmark case of Multani V. Commission Scolaire Marguerite – Bourgeoys<sup>141</sup>, the Supreme Court of Canada held that the impugned order of school authorities and orders of the Court of Appeal directing the school student, an orthodox Sikhs, that a symbolic kirpan in the form of any object like a pendant or in another form made of a material rendering it harmless would be acceptable in place of a real kirpan is unconstitutional. Earlier, the Court of Appeal had decided that the freedom of religion provided under Sec-2 (a) of the Canada Charter of Rights and Freedoms ("Canadian Charter") and Sec -3 of Quebec's Charter of Human Rights and Freedoms ("Quebec Charter") is infringed. However, the infringement was justified for Sec- 1 of the Canadian Charter and Sec – 9.1 of the Quebec Charter.*

#### **5.12 The Scheduled Castes and Schedule Tribes (Prevention of Atrocities) Act, 1989**

The Indian Parliament passed the Scheduled Castes and Schedule Tribes (Prevention of Atrocities) Act, 1989, making it illegal to discriminate against and commit hate crimes against those who belong to the scheduled castes and scheduled tribes. This Act, often known as the "SC/ ST Act," was passed because the Indian Penal Code and the Protection of Civil Rights Act of 1955, two traditional punitive laws, were unable to deter these offences.

The State's goal in passing this Act is to provide justice to oppressed groups by creating a unique mechanism that enables them to live honorably and without worrying about being attacked by other dominant communities. The primary objectives of this Act are to safeguard the SC/ST communities against cruelty, to assist in the rehabilitation of those who have been victims of such offences, and to establish special tribunals for the trial of such offences and other matters that are directly or incidentally related. These offences are punishable with heavy penalties and are cognizable but not compoundable.

The dispute started in 2018 when the Apex Court outlawed the practise of automatic arrests and registered criminal charges under this Act, despite the fact that the statute is unambiguous and plainly worded. The Court ruled that an initial investigation by a

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<sup>141</sup> 2006 SCC 6

designated officer not below the rank of deputy superintendent is required in cases under this Act, just like it is in situations where a public employee is arrested. *Two Judges' bench comprised of Justice U.U. Lalit and Justice Adarsh Goel further held that "restrictions on granting anticipatory bail are unconstitutional."*<sup>142</sup>, but the government turned the clock back on this issue through an amendment and they inserted a new section 18A which laid down that there was no requirement for a preliminary inquiry before filing an F.I.R. It is also described that provisions of anticipatory bail under Section 438 of CrPC would not apply to any offence committed under SC/ ST Act. Several petitions had been filed to nullify the amendment, but all were in vain and the matter is still disputed. Whether the freedom and reputation of any person can be sacrificed in the hands of the provisions of this Act is a matter of debate.

*Now, the Supreme Court has upheld the constitutional validity of the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Amendment Act of 2018, enacted to nullify the effects of the Court's 20th March 2018 judgment which had diluted the provisions of the Act.* Pre-arrest bail should only be given in exceptional circumstances when denying it would result in a miscarriage of justice, Justice S. Ravindra Bhat wrote in a separate ruling concurring with Justice Arun Mishra.

In accordance with the modified SC/ ST Act, senior police officers may file a First Information Report (F.I.R.) in cases of atrocities against S.C. and S.T. without first conducting a preliminary investigation or receiving prior authorization.

### **5.13 Anti-conversion laws**

Religious conversions have sparked much criticism and have caused many casualties in Indian families. These forceful conversions resulted in many troubles in the convert's life. Different types of hostilities threatened death, forced marriage, being killed or being disowned by elders & relatives of the families.

The first anti-conversion law in the country was enacted by the Indian State of Orissa in 1967 under the name "OFRA of 1967".<sup>143</sup> This Act states that "no one shall directly

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<sup>142</sup> *Dr Subhash Kashinath Mahajan v. The State of Maharashtra & Anr.*, (2018) 6 SCC 454.

<sup>143</sup> Orissa Freedom of Religion Act of 1967, available at: <https://cjp.org.in/wp-content/uploads/2017/12/ORISSA-FREEDOM-OF-RELIGION-ACT-1967.pdf> (Visited on August 18, 2021).

or indirectly, by coercion, provocation, or by any false pretence, convert or attempt to convert any person from one's religious faith to another, nor shall any person facilitate a such conversion."<sup>144</sup> This law carried both a jail sentence and a fine as penalties for violations. In a prior decision, the Orissa High Court declared that this Act was unconstitutional and that the state parliament lacked the power to pass laws regulating religion. However, the State of Madhya Pradesh also approved a law that year that contained the same provisions. The HC of State MP dismissed the petitioners' contention and upheld the Act's validity. These petitioners alleged that this Act infringed the fundamental rights guaranteed by Article 25 of the Indian Constitution. Later, the decisions regarding both acts were contested before the Supreme Court, which sided with Madhya Pradesh's decision by reversing the Orissa High Court's decision.

Following that, numerous other states adopted legislation with comparable punitive measures and sang the same tune. In 1978, the State of Arunachal Pradesh passed the "Arunachal Pradesh Freedom of Religion Act"; since then, similar laws have been passed in the respective States of Chhattisgarh, Tamil Nadu, Gujrat, Himachal Pradesh, Uttarakhand, Uttar Pradesh and Jharkhand. *Now, there is a total of 9 states having such laws passed by them to control the forceful conversion of religion by some evil persons.*

#### **5.14 The Places of Worship (Special Provisions) Act, 1991**

" The Places of Worship Act was passed by the legislature in 1991. It safeguards and defends the fundamental rights guaranteed by the Indian Constitution. The Preamble emphasises the need of protecting the freedom of expression, worship, and religion. It supports the values of human dignity and equality. Tolerance, respect for all religions, and recognition of the equality of all religions and religious views are key components of the brotherhood ideal."<sup>145</sup>

Any person "must not convert any house of worship associated with any particular religious denomination or any portion thereof into a place of worship of any other section of the same religious group or denomination or any other section thereof,"

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<sup>144</sup> *Ibid.*

<sup>145</sup> *M Siddiq (D) Thro. Lrs v. Mahant Suresh Das & Ors*, (2019) 4 SCC 641.



states this 1991 Act. It declares that a house of worship's religious nature will remain unchanged from the way it was on August 15, 1947. The Act made it clear that no part of the law would apply to the disputed edifice at Ayodhya, which served as a house of worship, or to any lawsuits, appeals, or other related actions.

Section 3 of this Act creates a bar upon all to convert the status of any place of worship into a place of worship of another religious group, but Section 5 specifically exclude the Ram Janam Bhoomi-Babri Masjid from the application of this Act.

Recently, the constitutional wires of this Act were again challenged in the Supreme Court and now it is under consideration by the Apex court. *In the landmark case of 'Dr M Ismail Faruqui v. U.O.I.', The issue of the State acquiring a holy site was reviewed by the Apex Court. The Court determined that "Every piece of immovable property is subject to acquisition. A religious practice that is practiced everywhere is offering prayer or worship. Where such prayers can be said would not be a necessary or indispensable aspect of such religious practice unless the location had some significance for that religion that makes it a necessary or indispensable part thereof. Unless the mosque had some special significance in Islam, performing "Namaz" there was not essential to Islam.*"<sup>146</sup>

### **5.15 The Hindu Religious and Charitable Endowments Act of 1951**

The Constitution of India secures religious freedom and freedom of management of religious affairs to religious denominations, which include the administration of religious institutions. Hymns and prayers from the Vedic era did not refer to temples and in the later Brahmana era, temples were built to house god images. Charities started to grow at that time and important endowments for religious reasons, including landed property, were well established. Later, a cult of religious worship emerged and the desire to gain religious merit drove donations for philanthropic and religious causes. The general Hindu public's welfare and convenience are thereby served by the establishment, endowment and maintenance of Hindu temples.

Before that, it was a private matter, but by that point, the temples had evolved into a hub for the support of the fine arts, including architecture, art and other fine arts, as

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<sup>146</sup> (1994) 6 SCC 360.

well as a source of inspiration for the social and cultural life of the communities. After some time, temples started to function as a hub for education, the development of piety and learning and they proved to be an effective tool for alleviating poverty; this development was made public. The HRCE Act of 1951 is intended "to reform the management of Religious Institutions". *"The Court has categorized the right of management of a religious denomination temple and held that a law that completely removes the right of management from the hands of a religious institution and vests it in any other authority would violate the right assured under Article 26 of the Constitution of India"*, according to the court's ruling in *K. Mukundaraya Bhenoy V. The State of Mysore*.<sup>147</sup> In another case, the court held that the word 'Hindus', generally comprises all sections of Hindu denominations in it. The inability of Hindu religious institutions by Hindu religious denominations is impacted by Article 14 of the Indian Constitution. In this case, the State has repeatedly failed to uphold its duty to demonstrate the grounds for its exclusion.<sup>148</sup>

The Kerala HC ruled in the case of *T. Krishnan v. G.D.M. Committee*, "The Indian Constitution unquestionably protects the freedom to govern one's religious affairs, which includes the right to use trust assets or revenue for the religious goals and purposes specified by the trust's creator. The use of the right would amount to an unjustified intrusion on the autonomy of religious institutions".<sup>149</sup> "The State must embrace all religions and religious individuals equally because the State has no official religion. The *Bal Patil and Anr. V. Union of India* case was decided by the SC. They are free to practice their religion, faith and conscience without interference from the government".<sup>150</sup>

*In the case of "Ratilal V. State of Bombay", the Apex Court held that "regarding affairs in religious matters, the right of administration given to a religious body, is a guaranteed fundamental right which no legislation can swipe out, on the other hand, as regards the administration of property which a religious institution is entitled to own and acquire, if a law takes away the right of administration from the religious denomination and vests it in any other or secular authority, it will amount*

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<sup>147</sup> AIR 1960 Kant 18, AIR 1960 Mys 18.

<sup>148</sup> (1970) 1 MLJ 170.

<sup>149</sup> 2007 (1) KarLJ 1.

<sup>150</sup> AIR 2005 SC 3172.

*to a violation of the right which is guaranteed by Article 26 (d) of the Indian Constitution”.*<sup>151</sup>

*In Shirur Mutt Case, “the Supreme Court agreed with the Madras High Court that many of the sections of the 1951 Act were ultra vires of the Constitution”.*<sup>152</sup>

### **5.16 Noise pollution (Regulation and Control) Rules, 2010 of the Environment (Protection) Act, 1986**

While making prayers, Mosques, temples and Gurudwaras use loudspeakers. Although no institute can use loudspeakers to exceed the limits prescribed under the 2010 rules, some religious institutes ignore these guidelines. Even the religious processions held during the night shall need permission from the authorities, but nobody cares about these rules. There is a need for strict obedience to these rules to protect the environment from noise pollution.

*In the landmark case of Noise Pollution (V), In re, (2005) 5 SCC 733, the Supreme Court has issued essential guidelines to restrict loudspeakers and other sound-producing instruments.*

- A loudspeaker, drum, tom-tom, trumpet, or sound of any instrument or sound amplifier cannot be permitted to use without taking written permission from the concerned authority designated by the respective State government and cannot be permitted to use at night time (between 10 pm and 6 am) except in public emergencies.
- The government can permit loudspeakers between 10 pm and 12am-midnight during any religious or festive occasion for 15 days each calendar year. It is also directed that the State as a whole would be contemplated as a unit and the respective State government has to announce 15 days in advance when this privilege would apply.
- Loudspeakers shouldn't be louder than 10 dB(A) over ambient noise regulations or 75 dB(A), whichever is lower, in public spaces.

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<sup>151</sup> 1954 AIR 388.

<sup>152</sup> *The Comm. Hindu religious endowments Madras v. Sh. Lakshmindra Thirtha Swamiar of Sri Shirur Math* 1954 SCR 1005.

- At the edge of the private placement, the peripheral noise level of a private sound system shall not be more than 5 dB (A) over the ambient air-quality standard designated for the region in which it is utilised.

### **5.17 Environment Protection Act, 1986**

In most of western and northern India, Dussehra is celebrated in honour of Rama. Religious institutes and persons following their religions celebrate their festivals by burning crackers and effigies. Mainly in the Hindu religion, the festival of Diwali and in the Sikh religion, the day of Guru Parv is celebrated by burning crackers and Hindu people celebrate the festival of Dussehra by burning the effigies of Ravana, Meghnatha and Kumbh Karana. Dramas and dance music plays based on the Ramayana (Ramlila) are performed at parade grounds and fairs featuring effigies of the demons Ravana, Meghnatha and Kumbha Karana.

On the evening of Dussehra, these effigies are burned on bonfires while they are still full of crackers. Diwali and Guru Parv firecracker celebrations increase the amount of dust and other pollutants in the air. After shooting, tiny dust particles land on nearby surfaces that are covered in dangerous compounds.

*In the case of Arjun Gopal V. Union of India, the Supreme Court has issued guidelines “to fire green crackers only, which are lesser pollutants than ordinary crackers and less harmful to the environment”. In this case, Justice Sikri delivered a favourable judgment and held that “burning of firecrackers during festivals like Diwali is not a core and essential religious practice and even if it is so, Article 25 is subject to Article 21 of the Constitution. We feel that Article 25 is subject to Article 21 and if a particular religious practice threatens people's health and lives, such practice is not entitled to protection under Article 25”.*

### **5.18 Hindu Succession Act, 1956**

Hindu Succession Act, of 1956 deals explicitly with succession rules among the Hindus. This Act provides separate provisions for the succession of men and women and due to this, this law attracts criticism. Section 8 of this Act provides general rules for the succession in the case of males describing class 1 heirs as first preference and class 2 heirs as second preference. These classes are defined in the schedule appended

to the Act. *The most criticized issue among the classification of these classes is that the father is placed as 2<sup>nd</sup> class heir in the given schedule and it is purely gender-discriminatory as there is no proper justification and base of classification for such discrimination.* Regarding the matter of equal share of daughters in the property of their parents as compared to sons, the State had already removed this discrimination by amending the Act in 2005. All sections of society appreciated this amendment.

### **5.19 Guardians and Wards Act, 1890**

There is no general law of adoption. Hindus are regulated by Hindu Adoption and Maintenance Act, of 1956 and other communities like Islam, Christians and Parsis do not validate adoption. However, the Guardians and Ward Act permit them to approach the court. Adoption is the transfer of a kid from the family of birth into another family through a gift from the adoptive parents to the adoptive parents. Adoption is the legal affiliation of a child. *It was determined in Mohammed Allahabad Khan v. Mohammad Ismail that there is nothing in Muslim law that is comparable to adoption as it is recognised by Hindu law.*

The objective behind the promotion of adoption is two-facet. One is the welfare of orphans and the second is the well-being and maintenance of childless parents. Due to several reasons, including medical complications, many couples remain unsuccessful in giving birth to a child. However, they can take pleasure in childhood through adopted children, which makes their life happy and ejects them from hopeless life.

### **5.20 Special Marriage Act, 1954**

Our country mainly celebrates marriages under the personal laws of the bride and groom. However, personal laws do not validate inter-caste marriages. To overcome this issue, the State enacted the Special Marriage Act of 1954. This Act regulates all marriages irrespective of the religion and belief followed by the party. This Act applies to the whole territory of India and even to all Indian nationals living abroad. This Act is used chiefly for the performance of inter-caste marriages. According to this Act, the bride and groom must both be at least 18 years old. The Indian Succession Act controls who inherits the assets of couples who get married under this Act. The major goals of this law are to recognise a specific type of marriage in

specified circumstances, to allow for the registration of specific types of marriages and to allow for divorce. Although, this Act was enacted to increase fraternity and brotherhood by removing the communal differences among the different communities, still persons are not easily convinced to marry under this Act as it makes the persons, marrying under this Act, unable to claim their civil rights. Goolrokh Gupta V. Burjor Pardiwala case will decide if a Parsi women loses her own religious identity after solemnizing her marriage under the Special Marriage Act 1954.

*In the case of Goolrokh Gupta V. Burjor Pardiwala, specific provisions of this Act are under challenge and the Apex Court has merged this case with the Sabrimala case now, pending review by nine judges' bench of the Apex Court.*

*To accomplish the objective of studying the contribution of the legislature and judiciary in the development of the right to religion as a fundamental right subject to certain restrictions and finding the answer to research questions that "Whether the legislation and judiciary are fairly exercising their powers to ensure freedom of religion? & Whether the judiciary is exercising excessive powers under the preview of judicial review?", various legislative and statutory provisions are analyzed in this chapter. The judiciary's views on the validity of these legislative provisions challenged in several courts are also considered. Comparative and critical analyses of personal laws are made. The essential religious practices concerning these legislative provisions and judicial pronouncements are discussed in this chapter.*

## Chapter -6

### **JUDICIAL PRONOUNCEMENTS WITH SPECIAL REFERENCE TO DISSENTING OPINIONS OF COURTS**

Several customs prevail in our society; these have indulged in our life so deeply that we cannot leave them behind. These customs have developed our usual lifestyle and directed us on how to manage our life. These customs play a significant role in events like birth, marriage, death ceremonies, etc. No such event is possible without these customs and as these customs are prevailing for a very long time in our society, these customs have implied sanction of the society. However, as time passes, things will change and so on, our society regulates laws also. After the enactment of the Constitution, only those customs are valid and enforceable, which are not contrary to public policy and prevailing for a long time. After the enactment of the Constitution of India, a flood of petitions were filed in the Indian Courts to check the constitutionality and validity of these customs through the lens of public policy and it is directed by the Supreme Court many times that the customs prevailing under different personal laws must be fair and genuine and must not be violative to the fundamental rights of others, which is a significantly more comprehensive check upon these customs, as the bouquet of fundamental rights is very big and affecting almost to the whole society in an any-how manner. Some notable judgments from the records of the Supreme Court and various High Courts are discussed below to re-check the constitutional validity of these critical customary practices and rituals.

#### **6.1 The ambit of this chapter is divided into three parts.**

6.1.1 Showing the compatibility of religious practices with constitutional provisions.

6.1.2 Analysis of dissenting opinions of courts on specific issues related to religious freedom.

6.1.3 Showing the instances where the right to life shall overpower the right to religious freedom.

### **6.1.1 Showing the compatibility of religious customs and practices with constitutional provisions.**

#### **6.1.1.1 Practices related to marriage and divorce**

*“Marriage is a duty performed with mutual cooperation as directed in the authoritative scriptures for spiritual advancement. Therefore, marriage is essential in order to avoid the life of cats and dogs, which are not meant for spiritual enlightenment”.*<sup>153</sup>

Whether the practice of bigamy or polygamy, nikah halala or other gender-discriminatory practices related to marriage or divorce are an integral part of any religion and whether these practices are a mandate of religions?

Polygamy, nikah halala and other Muslim marriage customs are being contested in Sameena Begum v. Union of India and are currently being reviewed by the SC. The petitioner requests that Section 2 of the Muslim Personal Law (Shariat) Application Act, 1937, be declared illegal in this case because it approves of polygamy and nikah halala. The petitioner further requests that Nikah-Halala be classified as an act of rape under section 375 of the IPC of 1860, the practice of triple talaq be classified as cruelty under section 498A of the IPC and polygamy be classified as a crime under section 494 of the IPC. The practice of triple talaq has already been declared unlawful in the case of Shayara Bano v. Union of India and the State has also introduced the "Muslim Women (Protection of Rights on Marriage Act, 2019" to make it a crime. In the petitioner's final request, he or she has asked that the Law Commission of India be ordered to publish its report on the UCC.

Multi-wife marriages are practiced under a tradition known as polygamy. The followers of Islamic laws assert that polygamy is an integral element of Islam as the Holy Quran permits marriages between four women, despite the fact that it is presently only permitted under Islamic rules due to social reform efforts.

The practice of Nikah-Halala, also known as tahleel marriage, is common in Islamic communities. It requires a woman who has been divorced by her husband to marry

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<sup>153</sup> A. C. Bhaktivedanta Swami Prabhupada, *Srimad Bhagavatam* 3.14.19 (Bhaktivedanta Book Trust Publications, U.S.A., 1980).



another man first and then after consummating her marriage to her second husband, she must obtain a new divorce that allows her to wed her ex-husband again. Nikah-Halala is haram, or prohibited, according to the Hadith of the Islamic prophet Muhammad. Small Muslim minority groups frequently engage in this behaviour, particularly in nations where triple talaq is still used. A detailed analysis of the notable judgments is a must to discuss all the provisions of the Constitution concerned to these issues and the legality of these practices as per the Constitutional norms.

In Hindu traditions, marriage is considered a sacrament contrary to a contract in Islamic culture. In Hindu marriages, the exchange of rings, exchange of garlands, henna ceremony and Kanya-Daan are some common and usual ceremonies. In contrast, in Sapat-padi, seven rounds by the wedding couple around the holy fire is a compulsory ceremony and after the seventh step during Sapat-padi, a married couple gets tied into a marital knot with each other.

Although many other religious ceremonies are also prevalent among Hindus, the above-discussed ceremonies are the most significant. There are several cases in which a woman remains unable to prove his valid marriage for succession and maintenance and the Court has observed that it is the Sapat-padi, which is the essential practice in Hindu traditions, without which no marriage is said to be valid.

After independence, our legislators codified Hindu laws into four parts and brought uniformity in marriage, divorce, maintenance, succession, adoption and guardianship laws. After several Hindu religious reforms, the enactment of this Act and various amendments made from time to time in these Acts, some unique features get embedded in the characteristics of Hindu marriages that, up to some extent but not entirely, convert the nature of Hindu marriages from sacrament to contract. *Contractual marital obligations and monogamy are the most common features in each personal law except in Islamic laws, where the unique arrangement of polygamy also allowed up to four wives.*

In Islam, contrary to Hindu laws, marriage is treated as a contract between the marrying couples and if any contracting parties are minor, then the consent for marriage is given by the father or natural guardian of that person. In Islamic marriages, the bridegroom and bride are both asked by the Qadri for their consent to the marriage and the moment they give their consent in the presence of two witnesses,

they get tied into the marital knot. So, in Islamic laws, marriage is treated purely as a social contract and arrangement between the contracting parties. In Islam, a male person is allowed to perform marriage with four wives, whereas a female cannot marry two or more persons at the same time. This practice is criticized for various reasons, like violating equal rights for women and keeping more than one wife simultaneously.

In the landmark case of *Khursheed Ahmad Khan V. State of U.P. & Ors.*, Justice A. K. Goel and Justice T. S. Thakur wrote, *“What is allowed or not allowed by religion does not become a religious practice or a core religious principle. The mere fact that a practice is allowed by religion does not confer implied legitimacy”*.<sup>154</sup> The High Courts of Bombay, Allahabad and Gujarat declared in historic decisions that a religious activity did not automatically become legal just because it is sanctioned by religion. Without violating Article 25 of the Constitution, a legislature could control such a practice. In a different historic case, the Court ruled that **“religious faith was protected under Article 25 and not religious practices which may run counter to public order, health, morality, or other provisions of section 3 of the Constitution”**.<sup>155</sup>

Constituting a division bench, Chief Justice Chagla and Justice Gajendragadkar ruled in another important case, *State of Bombay v. Narasu Appa Mali*, that *“Religious activities must be distinguished clearly from religious faith and conviction. The State upholds religious belief and faith. Religious practices must be put aside before the general welfare of the State's citizens if they are incompatible with public order, morality, health, or a social welfare strategy that the State has initiated”*.<sup>156</sup> The Bombay Prevention of Hindu Bigamous Marriages Act's constitutionality was contested in this landmark case because it contravened Articles 14, 15 and 25 of the Constitution.

Judges cited American court rulings to support the idea that laws and acts are meant to guide behaviour; they cannot, however, interfere with religious convictions or practices. Although the Hindu religion acknowledges the need for a son for religious

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<sup>154</sup> 2015 SCC OnLine SC 105.

<sup>155</sup> *Javed V. State of Haryana*, AIR 2003 SC 2003.

<sup>156</sup> AIR 1952 Bom 84.

efficacy and spiritual redemption, the idea that polygamy is a fundamental aspect of Hinduism is unacceptable. Division Bench further held that *“the right of State to legislate on questions relating to marriage is undisputed. The State has a vital interest in social institutions like marriage. Not universally recognized, still, a vast majority of the person in the world accepts that monogamy is a very desirable and praiseworthy institution of one male and one female person. Therefore, if the State compels Hindus to become monogamists, it will be counted as a measure of social reform. In the matters of social reform, the State is empowered to intervene in the matter and to legislate upon that issue concerning social reform under Article 25 (2) (b), even though it may be an intrusion in religious rights”*.<sup>157</sup>

Defining the social reform in the Narasu Appa Mali case, their Lordships said that *“In a democracy, the legislature of elected representatives of the people is supposed to represent the will of the people. If the legislature establishes any policy concluding that monogamy tends to the welfare of the State, then the court of law will welcome this social reform and such legislation will not be in violation of Article 25(1) of the Constitution”*.<sup>158</sup>

According to the Allahabad High Court, polygamy is permitted in Islam “Although Muslims were allowed to have up to four wives under their personal law, it is incorrect to argue that polygamy is a fundamental tenet of any religion. *Neither is it a matter of freedom of belief, faith or conscience, nor is it made obligatory by any religion*. No law that promotes social transformation as a State programme can be termed as intrusion into religious freedom”.<sup>159</sup> Muslims may be allowed to marry four different women, regardless of their religion, in order to have as many children as they choose. However, no religion imposes a requirement to engage in polygamy or a bigamous marriage.

The Gujrat High Court thoroughly examined the principles of Muslim personal law and their religious foundation in the case of R. A. Pathan v. Director of Technical Education. According to the judiciary, “usually, a religious practice signifies a command, which a faithful must heed and obey. A command that can be considered a

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<sup>157</sup> *State of Bombay V. Narasu Appa Mali*, AIR 1952 Bom 84.

<sup>158</sup> *Ibid.*

<sup>159</sup> *Badruddin v. Aisha Begum*, (1957) All LJ 300.

religious practice cannot be compared to the permits granted by sacred texts. The conclusion is that there is no indication in the Holy Quran extract that performing plural weddings is a matter of Muslim religious practice. Bigamy is not a religious principle nor a practice and it is most definitely not a requirement of any religion. Invoking Articles 15(1), 25(1), or 26(b) to defend bigamy or polygamy is outside the purview of religious freedom".<sup>160</sup>

Although it is prejudiced to make any remarks over the pending issues before the Court, under the scope of this research study conducted here and as a right of free speech and expression provided in our Constitution, it is concluded after analyzing so many landmark judgments of several High Courts and Supreme Court that, the practice of polygamy, nikah halala and other gender-discriminatory practices related to marriage and divorce are found to be immoral and against the ethics of all religions. The proviso of Article 25 puts restrictions upon immoral acts and describes that religious freedom shall not be provided to the activities performed against the public order, health, morality and other provisions of part III of the Constitution. These practices are also found to be violative of Articles 14 & 15, derogatory to the status of women in society, which is against the moral theme of the Constitution and hence not acceptable. It is declared here that any conclusion drawn here is not done to prejudice the pending issues before any court of Indian territory and the motive of this study is to bring social reform only.

#### **6.1.1.2 Jury system in Parsi personal laws closing the doors of family courts**

The famous case of K. M. Nanavati led to the death knell for the Jury system in India, but the system is still prevailing and followed by the Parsi community for resolving their marital issues. They are still using the culture of a Jury system comprising five eminent persons from their community residing in the local region, whose decision is taken as final and no appeal would lie to the decision of the Jury. *In 2017, a Parsi woman named 'Naomi Sam Irani' of Panchgani in Maharashtra filed a petition in the Supreme Court challenging "The Parsi Marriage and Divorce Act, 1936" and seeking abolition of the Jury system applicable to their community as she alleged*

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<sup>160</sup> (1981) 22 Guj LR 289.

*that involvement of public into intensely private dispute is violative of her fundamental rights of privacy and right to live with dignity.*

The Parsi community is required to file any marital problems solely in the special courts established under "The Parsi Marriage and Divorce Act, 1936," namely the Parsi Chief Matrimonial Courts and the Parsi District Matrimonial Courts, even though the government established the Family Courts in 1984. *The petitioner Ms Irani further alleged that the Act of 1936 is violative of women's rights as this Act prohibits women from filing their cases in family courts, set up to promote mediation and reconciliation process for speedy settlement of marital disputes.*

Now, the issue is under consideration of the Supreme Court, but analyzing the several provisions discussed in the study here and not prejudicing to the court issues, concludes that enforcing the woman seeking a divorce for compulsive remedy of Jury alone and restricting her to go in general family courts seem violative of her fundamental rights and unconstitutional. The reasoning behind this conclusion is that no personal law can restrict the judicial remedy and if any personal law restricts the judicial remedy, as in Parsi personal laws, insofar is liable to strike down up to the extent of that restriction. Although the matter could be sent to the Jury or social reformers acting as arbitrators and conciliators, it should be done with the consent of both parties only.

#### **6.1.1.3 FGM: Female Genital Mutilation & Khatna**

Some Islamic sects, including some in India, practice FGM<sup>161</sup> in 27 nations in North and Sub-Saharan Africa as well as Asia. FGM typically begins when a girl is seven years old and involves full or partial clitoral hood cutting with a blade and that too without anaesthesia. The purpose of this ceremony is to restrain a woman's sensuality. Female genital mutilation consequences might range from discomfort to infection. The Dawoodi Bohra community, a Shia Muslim group with one million followers in India are performing FGM, khatna or khafz. The Bohra community insisted on it as a

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<sup>161</sup> FGM, i.e., 'Female Genital Mutilation, ' comprises all procedures involving cutting the external female genitalia or another injury to the female genital organs for non-medical reasons, as defined by the World Health Organization (WHO), *available at:* <https://www.who.int/news-room/fact-sheets/detail/female-genital-mutilation> (Visited on November 11, 2022).

necessary ritual for properly rearing their daughters. They do this to help their girls prepare for maturity and marriage as well as to keep them from engaging in undesirable sexual activities like masturbation and premarital sex. Specifically, "religious scriptures, published over 1000 years back, stated the obligation for both males and girls as acts of religious purity," according to Mufaddal Saifuddin, a spiritual leader of the Dawoodi Bohra. Additionally, he stated that members of the Bohra community must adhere to local laws and refrain from performing Islamic practices including female circumcision in nations where such practices are prohibited. FGM is reportedly practiced by several Bohra groups, notably the Sulemani and Alavi Bohras and other Sunni communities in Kerala. "This issue was raised in Supreme Court via P.I.L. filed by Sunita Tiwari, a Delhi-based lawyer, in 2017 and sought a ban on FGM in India".<sup>162</sup> After receiving the petition, the Supreme Court requested comments from the Central and four State government ministries.

P.I.L. petitioners claim that this practice violates children's rights under Indian Constitutional Articles 14, which guarantees equality and 21 provides right to life. According to the petitioner in opposition, Articles 25 and 26 protect the community's right to practice their faith because "Khatna" is a basic part of their religion.

There is "no official record or study which establishes the occurrence of FGM in India," the Agency of Women and Child Development claimed in December 2017. The government would criminalize FGM if the practice wasn't stopped voluntarily, according to the same ministry.

2018 saw the Supreme Court submit the P.I.L. to a five-judge panel before moving the case to a bigger seven-judge court and ruling that it will be investigated with other women's rights concerns. Regarding the power of the Court to determine whether a religious practice is necessary, it has been declared a "seminal issue." By forwarding the case to a larger bench of nine judges, the SC has now combined it with two other cases and the Sabrimala temple case and the decision is still being considered.

#### **6.1.1.4 Ban on entry of women at religious places**

There are several places of worship where the entry of women is banned from different perspectives. These practices are centuries old and the proponents argue that

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<sup>162</sup> *Sunita Tiwari v. U.O.I.*, (2019) 18 SCC 719.

these practices are essential to their religion and belief. As these customs and practices are continued from immemorable times, these practices get the implied sanction from society. However, modern social activists argue that it is discrimination against gender and hence violates human rights. There are a lot of public interest litigations filed in the various High Courts and the Supreme Court for lifting the ban of entry of women under different cases have different facts. However, directly or indirectly, the issue is the same in all these cases, i.e., gender discrimination and women's dignity and rights. One important and most discussed case among all these cases is the Sabrimala case which is under consideration and placed at the desk of the Supreme Court for deciding these critical issues. The second case of women's entry into mosques or dargahs is also merged with the Sabrimala temple case. The Supreme Court has merged three other similar cases with the Sabrimala case to answer all these questions collectively and to remove any ambiguity of these issues having similar matters under different situations. There are two different cases of women entering in mosque or dargah, one is famously known as the Hazrat Ali Dargah case and the other is the Hazrat Nizamuddin Dargah case. In 2016, the Bombay HC delivered the historical judgment of lifting the centuries-old ban on entrance of women inside Hazrat Ali Dargah, which led to the petition of the Nizamuddin Dargah case in the Delhi HC. The versions of woman entry in the Sabrimala case and woman entry at Dargah cases are somehow different in the Sabrimala case, the only woman having the age between 10 to 50 years are banned from going inside the holy shrine, but in other cases, the entry is absolute for all women.

#### **6.1.1.5 The sacrifice of animals for religious purposes**

The PCA (Regulation of Livestock Markets) Rules, 2017, were passed by the State in 2017. Later on, the Supreme Court heard arguments challenging these regulations. The petitioners claimed that an integral component of their faith involves animal sacrifice at religious rites and that these prohibitions go against religious freedom. The Supreme Court overturned the clause forbidding the sacrifice of animals for religious purposes after hearing arguments from the petitioner and the respondent, so this practice is no longer prohibited. What is a religious ceremony and which is an essential ceremony of religion? The judiciary ruled that “only those religious practices

and ceremonies, which are based upon the fundamentals of any religion or religious myth and without which the very existence of that particular religion may disappear, can be treated as an essential practice for that religion and only that practice may attract the protection of Article 25 & 26 of Indian Constitution.”<sup>163</sup>

#### **6.1.1.6 Wearing religious clothes, objects and marks like hijab, dupatta, turban, kirpan etc.**

Why people used to wear a turban in ancient times and how did it become the dress code of the Sikh profession?

In ancient times, people wore a turban to avoid sunlight, air, rain, etc. And it was not confined to Sikhism only. People of all religions used to wear turban or dastar in a different style. The turban is a long cloth twisted and turned around the head. The length, width, colour and fabric may differ as geographical region changes, but the construction and concept of the turban remain the same. The turban has been in use for a long time. The origin of the turbans is not conclusively known, but the earliest evidence of wearing a turban may be found in a royal sculpture from Mesopotamia dating from 2350 B.C.E. Thus, it is evident that it is not confined to Sikhism only and it was in use even before the advent of Christianity and Islam. It is also described in India's Vedic literature and the Old Testament. Various sculptures from India dated 100 B.C.E. provide detailed visual evidence of the use of turbans. Dastar has become significant in Sikhism since the time Guru Nanak Dev Ji honoured Guru Amar Dass Ji with a special kind of dastar while declaring him the next Guru. Guru Arjun Dass Ji was also honoured with dastar after the death of Guru Ram Dass Ji. The turban has become an inseparable part of the Sikh religion for centuries. Since the time of the first Sikh Guru, Guru Nanak Dev Ji, the followers of Sikhism have been wearing a turban. The tenth Guru, Guru Gobind Singh Ji, said that;

"Kanga dono Waqt kar, pag chune kar bandhai."

It means, "Comb your hair twice a day and tie your turban carefully, turn by turn."

One of the famous Sikh historians, Bhai Rattan Singh Bhangu, an author of 'Sri Gur Panth Parkash', wrote in his book;

"Doi vele utth bandhyo dastare, paher aatth rakhyo shastra sambhare..."

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<sup>163</sup> *Commr. of Police v. Acharya Jagadishwarananda Avadhuta*, (2004) 12 SCC 770.



Kesan ki kijo pritpal, nah ustran se katyo vaal.”

It means, "Tie your turban twice a day and carefully wear weapons 24 hours a day... Take good care of yourself. Do not cut your hair."

The spiritual and royalty leaders initially wore the turban and they used to adorn it with jewels and accessories to display wealth. In many forms, the use of the turban has been vital in many religions and cultures. In ancient Egypt, people used to wear a turban as an ornamental headdress. They called it 'pjr' and later on, from which the word 'pugree' is derived and commonly used in India. The Middle East, some sections of Africa, northern India, Turkey and rural portions of Persia are still using it today. Turbans are mostly worn by men, yet there is historical and literary evidence that reveals women occasionally wore them as well.

Historically, the turban has also been referred to as a turbant, turband, tulbend, or dulbend in various locales and languages. As an alternative to the word "turban," this cloth is also referred to in India by the names pag, pagri, safa, potia, dastaar and veshtani. In particular, Sikhs are required to wear turbans, which they refer to as "dastaars," but Muslim religious authorities term them "kalansuwa". Mostly, 1.7% population of India and 1.5% of Canada, comprising the Sikh community, wear the turban or dastaar to help identify them.

Surprisingly, there are many different turban styles to be found around the world and they vary from culture to culture and religion to faith. People in Muslim countries would traditionally wear a turban wrapped over a cap called a kalansuwa, which can be either conical or spherical and produces various turban shapes. People wear flat circular-wrapped white or black turbans, especially in Iran. The Jaipuri pagri and Gaj-Shahi pagri are two highly well-known forms in the Indian state of Rajasthan. There are many experts known as pagribands who are skilled in the art of turban tying and the royal families hire these people for their services. The colours of the turbans differ in different cultures and religions. These colours show different moods and religious values at different customary and ceremonial occasions. The colours ochre and saffron are associated with saints, prosperity and valour, respectively. Muslims wear green, which is regarded to be the colour of paradise, while dark blue is reserved for

condolence visits and blue and white turbans are worn religiously by Sikhs in north India.

In some regions, the turban has a symbolic significance that goes beyond its evident use as a fashion accessory or cultural artefact. It acts as an introduction to their religion or culture and grants the wearer a specific identification as a member of a specific community or tribe. Sikh males typically don a peaked turban to show respect for God's creation by concealing their never-cut hair. A turban is supposed to signify a man's honour and honour for his family. The exchange of turbans signifies everlasting friendship and gifting a turban to someone is considered a great token of love and esteem. It is presented as a gift to nearer and dearer ones on many occasions of life like birth, marriage and death. The exchange of the turbans also shows the family's long relationships, whereas removing somebody's turban is considered a grave insult to that person. Hence, it is considered an intrinsic part of all ceremonies from birth to death.

Hijab is a piece of cloth worn by Muslim women to cover their hair to maintain privacy from unknown persons and maintain modesty. The concept of the Hijab is not unique to Islam and is embraced by other religions, such as Christianity and Judaism. The verses 30-31 in Surah 24 and verses in 59 Surah describe the tradition of wearing modest clothes.

The verses 30-31 in Surah An-Nur 24

“Tell the believing men to lower their gaze and be modest. That is purer for them. Lo! Allah is aware of what they do. And tell the believing women to lower their gaze and be modest and to display of their adornment only that which is apparent and to draw their veils over their bosoms and not to reveal their adornment save to their husbands or fathers or husbands' fathers, or their sons or their husbands' sons, or their brothers or their brothers' sons or sisters' sons, or their women, or their slaves, or male attendants who lack vigour, or children who know naught of women nakedness. And let them not stamp their feet so as to reveal what they hide of their adornment. And turn unto Allah together, O believers, in order that ye may succeed”.<sup>164</sup>

The verses 59 in Surah-Al-Ahzab

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<sup>164</sup> Dr Mustafa Khattab, The Quran-Surah An-Nur 24, *available at:* <https://quran.com/en/an-nur> (Visited on August 20, 2022).

“O Prophet! Tell thy wives and thy daughters and the women of the believers to draw their cloaks close round them. That will be better, that so they may be recognized and not annoyed. Allah is ever Forgiving, Merciful.”<sup>165</sup>

It is clear from the verses taken from The Holy Koran that Allah Almighty Himself commands the women to cover their bodies with a cloth. Although the word Hijab, Niqab or Burqa is not found in these verses, the harmonious interpretation of these verses refers to covering the body in such a way that outsiders or unrelated male persons cannot see the beauty of women and get attracted to her beauty. The words used in the verses "lower their gaze", "draw their veils over their bosoms", "not to display their adornment", "be modest", "not to stamp their feet", etc., refer to the code of modesty. Covering the head and body is the same as in the Biblical injunction for women to cover their whole hair.

In Islam, the holy book Koran directs Muslims to wear modest clothes. Following Koran, women used to wear Burqa, Niqab and Hijab. Similarly, in Sikhism, men wore turbans showing the sign of faith and respect for their religion. In Sikhism, a turban, also known as dastar, represents equality, spirituality, piety, self-respect and honour. Several incidents are challenging, specific wearing in public places such as a burqa, hijab or turban for security purposes, peace in society and obedience to State laws. The Supreme Court had often considered the essential nature of wearing such clothes and objects as turban, hijab, kirpan etc., showing religious faith by the people in their religion. After considering both sides' views, the Supreme Court pointed out two main issues, the first is to keep peace in society and to avoid any threat to national integration and minority communities and the second one is to describe the extent of religious freedom and to protect these rights from violation. It is clearly showing the direct conflict between the State and society. The State wants to put maximum restrictions on religious customs and practices which are unconstitutional and are not uniform in civil nature to save the basic rights of other communities. Developing the legal perspective and framework in the light of a realistic approach instead of an orthodox school is another motive of the State. Whereas society wants full liberty and

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<sup>165</sup> Dr Mustafa Khattab, The Quran-Surah-Al-Ahzab 33, available at: <https://quran.com/33/33?translations=19,21,95,85> (Visited on August 20, 2022).

to live freely, specifically in the matters of civil nature like their eating habits, wearing clothes, religious practices and other customary habits. The views of both sides are significant and all must adopt a balanced approach to make a progressive State.

#### **6.1.1.7 Santhara - Sacrifice of own life for the salvation**

The Jain community has traditionally practiced Santhara, a form of voluntary fasting in which one gradually reduces the amount of food and liquids consumed till one die. In Jainism, it is seen as a way to erase rebirth-influencing karma by ceasing all physical and mental activity as well as a way to thin out human desires and the body. Jain scholars do not view it as suicide because it does not involve the use of poisons or weapons, nor is it an act of passion and practice. The ritual preparation and practice might go on for years after the Sallekhana pledge. The right to life and the freedom of religion are hotly contested issues. In 2015, the Rajasthan HC banned the practice of Santhara and held it equal to suicide but again in 2016, the SC stayed the ruling of the Rajasthan HC<sup>166</sup> and re-permitted Sallekhana. A similar practice prevails in Buddhism also. Lord Buddha himself dies by this practice. The Rajasthan HC had previously ruled that “Santhara is considered suicide and is therefore illegal under Section 309 of the IPC, while aiding and abetting it is also illegal under Section 306. Even though a custom is centuries old in a particular faith, it cannot be allowed to infringe on a person's right to life. The right to life cannot be disregarded and cannot ever be compromised”.<sup>167</sup>

In another landmark verdict<sup>168</sup>, the Supreme Court has also approved live wills by patients on withdrawing medical care if they fall into an irreversible coma and acknowledged passive euthanasia as legal. The court acknowledged passive euthanasia in the 2011 case of Aruna Shanbaug, allowing the withdrawal of life-sustaining treatments from patients who were unable to make an educated choice. In order to hasten the death of a terminally sick patient, medical treatment is withheld from them in a technique known as passive euthanasia. Earlier, the Supreme Court

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<sup>166</sup> *Nikhil Soni V. Union of India & Ors.*, 2015 Raj HC.

<sup>167</sup> *Ibid.*

<sup>168</sup> *Common cause (A regd. society) v. Union of India*, AIR 2018 SC 1665.

ruled that assisted suicide and passive euthanasia were illegal in the Gian Kaur case. It was stated that the right to die is not a part of Article 21. The Court went on to point out that the right to die was irreconcilable with Article 21's definition of life with dignity, which only includes those parts of life that enhance its dignity. Later, the Apex Court set comprehensive instructions for passive euthanasia in India in the well-known case of Aruna Shanbaug. In the recent decision of Common Cause v. Union of India, the Supreme Court expanded the purview of Article 21 to encompass the right to die with dignity and specifically stated that the right to die with dignity is embedded in Article 21.

If we compare the religious and customary activities with legal sanctions of passive euthanasia, then we find the wires of both topics, achieving the same consequences (i.e., end of human life), are relatively different. In the case of passive euthanasia, the patient is irrecoverable and in a vegetative state. Passive euthanasia is allowed in that case to lessen his pain from the illness and let him die with dignity, but in the case of customary practices, it is not so and these practices are based upon the myth of achieving the Moksha or Nirvana or the highest state of enlightenment for which purposefully we take birth on this earth. It is somehow comparable to suicide and a matter of discussion is how can a religion allow any person for suicide based upon myths and beliefs as it is contradictory to the fundamental principles of the Constitution.

#### **6.1.1.8 Jallikattu - Celebration of sports as a religious heritage**

During the traditional performance known as Jallikattu or Sallikkattu (performed between 400 and 100 B.C.E. in classical Tamil), a bull is released into a crowd of onlookers and several onlookers make an effort to grab the large hump on the bull's back with both arms and hang on to it as the bull tries to flee. By clinging to the hump as long as they can, participants attempt to stop the bull. Riders may need to travel a certain distance in order to remove flags from a bull's horns. The Jallikattu play is customarily performed as part of the Pongal festival celebrations in the Indian state of Tamil Nadu on Mattu Pongal Day, which is observed every January. Prize money was introduced to encourage participation and it became a platform for bravery demonstrations. Since there have been several incidents of injury and death connected

to the sport, both to the players and the animals forced into it, animal rights organisations have fought for a ban on Jallikattu. As a result, the Court has repeatedly prohibited it over the years.

The PCA Act of 1960 is a welfare law and the Tamil Nadu Regulation of Jallikattu Act of 2009, which was enacted by the State to preserve the sports heritage, was declared unconstitutional by the Apex Court in the case of "Animal Welfare Board of India V. A. Nagaraja & Ors. 2014" because it is incompatible with this Act and prohibits the performance of the sport. However, in response to public outcry against the ban, a new ordinance was created in 2017 to keep the Jallikattu going. This ordinance was eventually approved as an amendment Act, which amended the "The PCA Act of 1960" provisions and granted this sport legal validity. The Amendment Act of 2017 was recently the subject of a P.I.L. filed before the Constitutional Bench of SC, which is made up of five judges. The SC dismissed the P.I.L., declaring that it would not intervene in the case and instructed the petitioners to file their appeal regarding the contentious bull-taming festival with the High Court.

#### **6.1.1.9 Firing crackers and burning of effigies**

The festivals of Diwali, Dussehra, Chatt Puja, Jagadhatri Puja, Kali celebration, Govardhan Puja, Christmas and Guru Parv, on the occasions of the new year & wedding ceremonies, are widely celebrated in whole world by firing crackers. It's effect on air quality has been researched by many eminent research scholars from different countries. Firecrackers contribute to environmental pollution in several ways. It is frequently noted that no religion forbids the lighting of fireworks or the pollution of the environment. According to the SC's ruling in the case of Arjun Gopal v. Union of India, "if a specific religious practice is affecting people's lives, then such practice is not entitled to any protection of religious freedom".<sup>169</sup> This approach adopted by the Supreme Court seems correct regarding Constitutional norms. The Supreme Court held that "they cannot impose the blanket ban on crackers as it is a matter of huge employment, but they give the recommendations to manufacture and

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<sup>169</sup> (2017) 16 SCC 280.

sale only 'GREEN CRACKERS' only, which emits less pollution and do less harm to the health of human beings".<sup>170</sup>

#### **6.1.1.10 Validation of inter-caste marriages in personal laws**

Almost every religion has enacted personal laws to govern marriage, divorce, death ceremonies etc. These personal laws bar the performance of inter-caste marriages and do not validate them. The texts of Section 5 of the HMA of 1955 specifies that "A marriage may be solemnized between two Hindus" and Section 2 defines the term Hindu including Virashaiva, a Lingayat, a follower of Brahmo, Prarthana or Arya Samaj, a Buddhist, a Jain or a Sikh person but excludes notably those persons who are Muslims, Christians, Parsis or Jews by religion. Under the provisions of the Shariat Act & Islamic laws, Muslim women cannot marry a non-Muslim man. Similarly, in other religions, the marriage between two persons may occur as per their rituals and religious ceremonies.

To validate inter-caste marriages, the State enacted The SMA of 1954, in which religion or religious ceremonies do not become any limitation or disqualification to perform such marriage. However, for divorce, succession, maintenance etc., the couples performing the marriage under The SMA of 1954 are governed by the provisions of this Act in their future and not by the customary laws. The bar of application of personal laws was enacted and applied to bring uniformity in the laws of both couples. However, sometimes, a man or woman is prohibited from performing their religious rituals and ceremonies due to this provision. In the case of Goolrokh Gupta V. Burjor Pardiwala, famously known as the Parsi-excommunication case, the Gujrat High Court comprising three judges, refused to direct the trustee of the Agyari in Valsad district in south Gujrat to permit her entry and to perform rituals. This petition was filed by a Parsi woman who had married a non-Parsi, seeking permission to enter and worship in Agyari and attend the last rites of her parents.

The Gujrat High Court denied this plea, ruling that regardless of her decision to convert or not, "the woman would be presumed converted to the faith of her husband

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<sup>170</sup> *Arjun Gopal V. Union of India*, (2017) 16 SCC 280.

and lose her identity as a Parsi."<sup>171</sup> The Supreme Court provided interim relief to two Parsi sisters and allowed them to participate in the funeral rites of their parents and said that "they would examine whether they can pray as Parsis in the fire temple or not?" Now the matter is merged with the leading case of the ban of entry of women into Sabrimala temple, along with two other cases having similar religious issues. Now, a nine-judge bench of the Supreme Court would decide the issue of loss of religious identity by marrying a person of another religion, which is a case like the case of ex-communication from their community for the performance of religious rituals and ceremonies and similar to the facts of Bohra-excommunication case, which is also pending and not decided yet.

#### **6.1.1.11 Use of loudspeakers at holy places**

Many Public Interest Litigations were filed in different courts seeking a ban on loudspeakers in mosques and temples. In the case of *Irfan V. State of U.P.*, the division bench comprising Justice Vivek Kumar Birla and Justice Vikas Budhwar held that "the law has now been settled that using loudspeaker from the holy places like the mosque is not a fundamental right to religion and hence not protected by the Indian Constitution". Another division bench comprising Justice Shashi Kant Gupta and Justice Ajit Kumar of Allahabad HC held that "no person can be compelled to listen something that he does not find agreeable or necessary because doing so would be a breach of his fundamental rights", When interpreting the statute governing the use of loudspeakers in mosques, temples and other places of worship in 2005, the Supreme Court made it quite apparent that such use "is not related with any religion or religious beliefs." The SC reached the important conclusion that "right to life includes pollution and noise free environment in it" in order to resolve this pressing matter. "No one may claim a fundamental right to cause noise pollution by employing amplifiers or loudspeakers and loudspeakers are not necessary to disseminate the devotion of any religion", the supreme court ruled in its clarification.

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<sup>171</sup> Priyanka Sunjay, "Goolrokh Gupta v. Burjor Padriwala: A Chance to Redeem, Update and Rationalize the Law" (OxHRH Blog, 26 February 2018), *available at*: <https://ohrh.law.ox.ac.uk/goolrokh-gupta-v-burjor-padriwala-a-chance-to-redeem-update-and-rationalize-the-law> (Visited on November 11, 2022).



#### **6.1.1.12 Devadasi Pratha in India**

In India, Devadasi Pratha was in existence. “A devadasi is a female artist, trained for classical dance and is dedicated to the worship and service of a deity or a temple for the rest of her life. The dedication takes place in a ceremony that is somewhat similar to a marriage ceremony. A Devadasi was believed to be immune from widowhood and was called akhanda saubhagyavati. During the time of Buddha, Amrapali, a devadasi, was declared as Nagarvadhu by the King. The word “Devadasi” might connote “Servant of god”, but in reality, a girl child who is dedicated to the goddess is no more than a prostitute”.<sup>172</sup> Under British rule, devadasi system was initially made illegal in 1924. A number of laws were enacted to eliminate the Devadasi Pratha from the Indian society. The Karnataka Devadasis (Prohibition of Dedication) Act, 1982, The Tamil Nadu Devadasis (Prevention of Dedication) Act, 1947, The Andhra Pradesh Devadasis (Prohibition of Dedication) Act 1988, The Maharashtra Devadasi System (Abolition) Act, 2005, The Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989, The Indian Penal Code, 1860, The Immoral Traffic Prevention Act, 1956, The Juvenile Justice Act, 2015, The Protection of Children Against Sexual Offences Act, The Protection of Women from Domestic Violence Act, 2005 are some significant Acts that contributed towards putting the ban of Devadasi Pratha in India.

Dr. Muthulakshmi Reddy and Muvalur Ramamirtham Ammal are the key personalities in making reforms from the devadasi system in India. Some of the key reforms made by them are:

Dr. Muthulakshmi Reddy was the driving force behind the law that ended the Devadasi system and was instrumental in increasing the Indian minimum marriage age of women. She was put forward as a vice president for the Madras Legislative Council in 1927 by the Women's India Association and she introduced the Bill to end the devadasi practice in the Council in 1930. She resigned from the Madras Legislature in 1930 in protest over Mahatma Gandhi's imprisonment.

Muvalur Ramamirtham Ammal was a Tamil social reformer. In Chennai province, he worked to abolish the Devadasi system. The Chennai Devadasi System Abolition Act

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<sup>172</sup> Devadasi, *available at*: <https://nasa2000.livejournal.com/52482.html> (Visited on September 12, 2023).

was passed as a result of the awareness he raised via his innovation and ongoing campaigns to abolish the Devadasi System. In 1947, the Devadasi system was abolished by the Act.

## **6.2 Analysis of dissenting opinions of courts on specific issues related to religious freedom.**

The conflict of religion is as old as the religion itself is and the conflict upon clarification of scope and ambit of Articles 25 & 26 of the Constitution comes with the enforcement of the Constitution. Limiting the scope of this study to Constitutional provisions only, it is not essential to discuss here the cases prior to the independence of India.

All this starts with the case of *Hasanali V. Mansoorali*<sup>173</sup> decided on 1<sup>st</sup> December 1947 by two judges' bench of the privy council. The petitioner in the case of *Sardar Syedna Taher Saifuddin Saheb V* contested Section 3 of The Bombay Prevention of Excommunication Act, 1949, relying on this ruling. The State of Bombay argued that “the provisions of the impugned Act making the ex-communication as invalid, infringes the rights of the community provided under Article 26(b) of the Constitution”, and in this case, the Supreme Court comprising the bench of five judges reached a split decision of 4:1. “It is incorrect to state that the Privy Council in the case of *Hasanali V. Mansoorali* ruled that the right of the *Dai-Ul-Mutlaq* to excommunicate a member of the community was a purely religious matter, according to Chief Justice Sinha's own dissenting judgement in the same case. For bringing the social reform, the civil rights of any community member were justiciable and liable to interference by the judiciary and legislation”.<sup>174</sup>

*The crux of the majority judgment is that the matter of ex-communication is a matter of a purely religious nature and is under the domain of heads of religious institutions. In contrast, the dissenting opinion concluded that it is not purely religious and some civil rights are violated by ex-communication. The dissenting view compared the act of ex-communication to untouchability, which is*

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<sup>173</sup> *Hasanali V. Mansoorali*, (1948) 50 BOMLR 389.

<sup>174</sup> *Sardar Syedna Taher Saifuddin Saheb v. St. of Bombay*, AIR 1962 SC 853.

***unconstitutional under Article 17 and held that the intrusion of both State organs is required to bring social reform.***

As of today, this judgment conflicts with several other judgments delivered by the Hon'ble Supreme Court and unfortunately, for social reform, the Supreme Court remained unsuccessful in correcting its mistake even after passing 60 years of this judgment and legislation remained to fail to enact any law for bringing social reform in religious issues even after the passing of 75 years of independence of India.

In 1962, a seven-judge Constitutional Bench ruling in the Shirur Mutt case ruled that “A belief or practice cannot be excluded from religion by the court; rather, it must be determined whether it is an important component of the religion in question. As a result, the protection of all religious practices is guaranteed right under Indian Constitution”. The SC ruled in the Durgah committee case of 1961 that “the freedom of religion shall be provided to those religious practices which are an essential and an inseparable element of religion and to no other”.

In the case of the Central Board of Dawoodi Bohra Community and Anr. V. State of Maharashtra, the validity of the judgment of Sardar Syedna Taher Saifuddin Saheb was rechallenged for re-consideration in 1986 and a bench of 5 judges took 18 years to hold that this matter should be sent for the consideration of 5 judges' bench and not for seven judges' bench. It is a misfortune of the people of Indian country that the matter is still unresolved. The SC has questioned the constitutional legality of various religious rituals in past historic judgments, such as triple talaq and Sabrimala, but the question of what constitutes fundamental religious practices was not covered. As the conflict between a judgement of seven judges and five judges' benches shall not be resolved by a bench of the SC having less strength than seven judges, which is still pending in the SC and has not yet been decided, a bench of five judges of the SC has now referred to this issue for consideration of nine judges.

The Court had framed seven issues to discuss and to remove all the confusion and contradictions of historical judgments considering the importance of social reforms by State intrusion and the scope of religious freedom. Discussing all the critical issues framed in this reference case one by one is pertinent and giving observations based on different views in historical judgments will help find the correct view.

## 6.2.1 Issues framed in Sabrimala reference case to 9 judge's Constitutional bench

### 1. *What is the scope and ambit of the right to freedom of religion under Article 25 of the Constitution of India?*

#### Views of earlier courts

In the case of Commissioner of Police V. Acharya Jagadishwarananda<sup>175</sup>, writing a dissent note, it was held by Justice Lakshmanan that “Article 25(1) guarantees to every person freedom of conscience and the right freely to profess, practice and propagate any religion. This right is not limited to citizens alone but covers all persons residing in India. However, the right to freedom of religion guaranteed by this Article is subject to restrictions that the State may impose on the grounds of:

- 1) Public order, morality and health
- 2) Other provisions of part III of the Constitution
- 3) Regulating non-religious activity associated with religious practice
- 4) Social welfare and reform and
- 5) Throwing open Hindu religious institutions of a public character to all classes of Hindus”.<sup>176</sup>

“The entire notion and breadth of religious freedom are that there is no restriction upon the right to freely profess, practice and disseminate religion, except those imposed under the State's police power and the other provisions of Part III of the Constitution”, he asserts. It indicates that the rules of man's conscience determine his relationship with God and that the State plays no role in determining that relationship. Freedom of conscience and religious conviction cannot be used as an excuse to evade the obligations that every citizen has to the country, such as going through military training, swearing to serve in the military, etc.

However, a man's right to exercise his religious and free speech rights cannot take precedence over the general good of the community and societal morality. Instead, these rights are absolute and cannot be overridden. According to this viewpoint, the

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<sup>175</sup> *Commr. of Police v. Acharya Jagadishwarananda Avadhuta*, (2004) 12 SCC 770.

<sup>176</sup> *Ibid.*

State has “the authority to repress such religious conduct that is detrimental to the general welfare. Aside from that, any conduct that supports a religion must adhere to the nation's criminal laws. It must be remembered that just because a certain group may label something as religious, it does not make it less morally repugnant. Therefore, even if it adheres to a religious body's credo, polygamy or bigamy may be outlawed or constituted a basis for exclusion from exercising political rights”.<sup>177</sup>

The US Supreme Court ruled in the historic case of *Minersville School District v. Gobitis* that “saluting the flag is an essential gesture of national unity and it was designed so to make an attachment of children who attend the common schools with institutions of their country flourishing a sense of patriotism and that the law requiring students to do so did not violate their right to freedom of religion”.<sup>178</sup>

In his dissenting opinion in the case of *Sardar Syedna*, Justice Sinha compared excommunication with untouchability and concluded that “The purpose of the Act is to put an end to all the harm that results from treating someone as a pariah, denying him human dignity and denying him the freedom to follow his conscience. As a result, the impugned Act is meant to infringe freedom of conscience”.

Justice I. Malhotra wrote the dissent note in the famous *Sabrimala temple* case and stated that “questions of strong religious sensitivities should not be generally be tampered with by the law”.<sup>179</sup>

Based on the aforementioned critical examination, it is first noted that the religious freedom guaranteed by Article 25 is not unrestricted and is subject to laws governing public morality, health and order as well as those in Part III of the Constitution. The State can make laws in matters of secular and economic nature except for pure religious beliefs and faith. The earlier courts relied on the essential practices test. However, they did not emphasize that if the religious custom or practice is against the other provisions of fundamental rights, then the ambit and scope of Article 25 are not superseding over and above those fundamental rights, especially when the matter concerns Articles 14, 15 and 21.

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<sup>177</sup> *Commr. of Police v. Acharya Jagadishwarananda Avadhuta*, (2004) 12 SCC 770.

<sup>178</sup> 310 U.S. 586.

<sup>179</sup> *Indian Young Lawyers Association v. State of Kerala*, 2018 SCC Online SC 1690.

Secondly, it was found that religious beliefs and faith are protected under Article 25 and not all practices. Religious practices should derive their force from religious beliefs and faith, but it is impossible to permit unconstitutional practices in the name of religious freedom. The check is to test the practices without giving any emphasis to religion and if the rituals, usages or practices are found to be violative of Articles 14, 15 and 21, then these practices must be held unconstitutional. There is no scope for any religion to give these practices any recognition contrary to the Constitutional provisions.

**2. *What is the interplay between the rights of persons under Article 25 of the Constitution of India and the rights of religious denominations under Article 26 of the Constitution of India?***

**Views of earlier courts**

“Institutions, as such, cannot practice or spread religion”, a panel of seven justices said in the Shirur Mutt case. “It is irrelevant for Article 25 of the Indian Constitution whether these individuals propagate their personal views or the ideals the institution upholds”.

Every person is allowed to practice and spread their religion under Article 25 and all religious groups and sections are allowed to conduct business in accordance with their religious convictions under Article 26. The interplay between these two sections is that when religious freedom is provided to every person without any exception, it is implied that every religious denomination is covered under Article 26. In many cases, some sections or sub-sections of the leading religious group, claiming separate identities, were not provided religious freedom as per Article 26. This conclusion seems wrong as no religious denomination can be constituted without persons and whenever every person is covered under Article 25, then who are these persons constituting a religious denomination or separate community that courts did not intend to cover under Article 26?

The religious denominations or sections claiming religious freedom under Article 26 covered all religious institutions, communities and groups having separate existences and common faith.

**3. *Whether the rights of a religious denomination under Article 26 of the Constitution of India are subject to other provisions of Part III of the Constitution of India apart from public order, morality and health?***

**Views of earlier courts**

Justice Sinha stated in his dissent note written in the Sardar Syedna case that “Article 26 permits religious institutions to manage their religious affairs. However, several acts concerned with religious institutions may have other aspects of economics, financial and political domains. These covered a wider scope than Article 25(1) or Article 26(b). Therefore, there is a need to draw a line of separation between purely religious acts including the rites and ceremonies combined with a specific type of praying, which is the basic fundamental of the religious institution and activities of other domains which may relate to religious institutions at several steps, but which are not exactly related to religious customs, rites and ceremonies the performance of which is an essential or inseparable part of the religion”. Only the former would be saved by Article 26(b). Now, in the ex-communication case, Justice Sinha noted that the "expelled person is restrained from not only religious freedom but also from several civil rights. The act of burying the deceased in the specific burial ground kept reserved for that community and several other property rights belonging to the group, are all disputes of a civil nature and don't concern purely religious issues. Ex-communication touches the religious issues but in reality, it is a matter of civil nature”.<sup>180</sup>

Although it is not explicitly given in the proviso of Article 26 that religious freedom provided under Article 26 is subject to part III of the Constitution, if we give harmonious interpretation to the whole texts of Article 26, then the following observations are found.

It is undisputed that religious freedom is subject to public order, health and morality.

It is also undisputed that religious freedom provided under Article 25 is given to every person without any exception.

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<sup>180</sup> *Sardar Syedna Taher Saifuddin Saheb v. St. of Bombay*, AIR 1962 SC 853.

It is pertinent to mention that morality has enough broader scope to cover Articles 14, 15 and 21 in it and if any religious practice fails the test of Articles 14, 15 and 21, then it impliedly fails the test of morality.

It is incorrect to claim that Part III of the Indian Constitution's provisions does not apply to the range and extent of Article 26.

The Supreme Court confirmed the legality of the U.P. Sri Kashi Vishwanath Temple Act, 1983 in the case of *Sri Adi Vishweshwar of Kashi Vishwanath Temple Varanasi & Ors. V. State of U.P. & Ors.* The Temple's management and administration were split between religious and secular roles by the court. Because they were neither necessary nor important to the practice of the faith, the legislature was able to pass a statute that prohibited the government from interfering with people's daily religious activities.

In a landmark case, the court ruled that “religious practices like the Agamas must correspond to the Constitutional mandate and not practice exclusion based on Constitutionally forbidden criterion like caste”.<sup>181</sup>

In the case of *Narasu Appa*, it was held that “personal laws are beyond the sphere of part III of the Constitution and hence, cannot be struck down by the Court.”<sup>182</sup> Writing a dissenting note in the triple talaq case, CJ. J. S. Khehar and J. A. Nazeer held that “...proposition in the *Narasu Appa* case must be taken to the present declared position of law, upheld by several Supreme Court judgments including by two Constitutional benches. Shariat Act 1937 recognizes Muslim personal law as a 'rule of decision'.

Therefore, the proposition that the 1937 Act confers statutory status on Muslim personal law cannot be accepted. Triple talaq cannot be held violative to part III of the Constitution as Muslim personal law or Shariat is not based on state legislation. Hence. It cannot be tested on the touchstone of being a state action”. On the contrary, J. R. Nariman and J. U. U. Lalit's majority judgment held that “triple talaq cannot be held as essential in Islam merely because it has continued for a long. It does not adhere to the Quranic principles and is therefore bad in theology and law. The conclusion of the Bombay High Court in *Narasu Appa Mali* is contrary to the plain

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<sup>181</sup> *Adi Saiva Sivachariyargal Nala Sangam V. Government of Tamil Nadu* (2016) 2 SCC 725.

<sup>182</sup> *State of Bombay V. Narasu Appa Mali*, AIR 1952 Bom 84.



language of the Article, which clearly defines 'law' as including 'any...custom or usage having in the territory of India the force of law. 1937 Act is not regulating triple talaq; hence it can be tested on the anvil of Article 14 of the Constitution of India. Moreover, the observation in *Narasu Appa Mali* is obiter and does not constitute the ratio of the judgment”.

**4. *What is the scope and extent of the word 'morality' under Articles 25 and 26 of the Constitution of India and whether is it meant to include Constitutional morality?***

**Views of earlier courts**

The scope and extent of morality are broader enough to include Constitutional morality. In the case of *Shayara Bano*, Justice Kurian Joseph held that “what is morally beautiful that must be done and what is morally ugly must not be done. It is law or Shariat and nothing else can be law. What is held to be bad in Holy Quran cannot be good in Shariat; in that sense, what is bad in theology is bad in law as well”.<sup>183</sup>

Justice Sinha favoured the in-depth examination of constitutional morality, which is “Social welfare legislation that fully implements contemporary ideas of individual freedom to choose one's lifestyle and eliminates all those egregious and antiquated methods of invading the liberty of conscience, faith and belief. Additionally, it is concerned with protecting human dignity and eliminating any limitations that prohibit an individual from leading a fulfilling life as long as he does not violate the rights of others. The government had no choice but to create a new crime declaring that no one had the right to deprive another person of their civil rights only because the latter did not exhibit a specific pattern of behaviour”.<sup>184</sup>

The scope of constitutional morality is limited to the principles of the constitution and morality in itself covers all the aspects of good things in life. The scope of morality is much broader and the rule of morality gives the teachings of humanity. Undoubtedly, all religions are based on morality and no religion is immoral. Based upon these

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<sup>183</sup> *Shayara Bano v. Union of India*, AIR 2017 9 SCC 1 (SC).

<sup>184</sup> *Sardar Syedna Taher Saifuddin Saheb v. St. of Bombay*, AIR 1962 SC 853.

principles of morality, the Constitution makers incorporate the provisions of fundamental rights in it with well understanding. Morality is directly seen in the provisions of part III of the Constitution, i.e., fundamental rights. Article 14 & 15 remove discrimination based on gender, race, caste or religion, Article 17 removes untouchability, Article 21 provides for the right to life and Articles 25 & 26 provides religious freedom. The sphere of morality is wider than the sphere of Constitutional morality as it is limited to the provisions of the Constitution, but Constitutional morality is fully covered in morality. Morality is the genesis and Constitutional morality is species.

***5. What is the scope and extent of judicial review concerning religious practice as referred to in Article 25 of the Constitution of India?***

**Views of earlier courts**

It is observed in the study that freedom of religion is provided to religious beliefs and faith and the State may regulate religious practices. If religious practices are found to be violative of the provisions of the Constitution, then the State may ban these practices for social reform irrespective of the fact that the practice was followed by the followers of the religion from immemorial times. In the case of Commissioner of Police V. Acharya Jagdishwarananda<sup>185</sup>, Justice S. Rajendra Babu and Justice G. P. Mathur, jointly writing the majority judgment, held that “there cannot be additions or subtractions to the essential or integral parts of practices of the religion as they are the very essence of that religion and alterations will substitute the fundamental character of the religion concerned. In order to determine whether or not a particular practice is an essential part of religion, the test must be whether the absence of the practice itself fundamentally alters the religion”.

In the same case, Justice Lakshmanan wrote in his dissenting opinion that “one religious denomination is allowed to carry out its religious practice but another religious denomination is restrained from carrying on religious practice and almost similar religious practices”, which “the same make out a clear case of discrimination in violation of the principles of Article 14 of the Constitution”. Both the majority and

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<sup>185</sup> (2004) 12 SCC 770.

minority judges' points of view appear to be valid to a point but fall short of providing a solution.

The court ruled in the Durgah Committee case that "Articles 25 and 26 guarantees for the protection from State intrusion into vital and integral components of religions only."<sup>186</sup> The court further stated that superstitious, ancillary and pointless religious practices would not be awarded an exemption. Furthermore, it was stated that "the privilege is provided not only with regard to matters of doctrine or belief, but also extends to acts done in furtherance of religion, such as rituals, observances, ceremonies and modes of worship, which are considered to be fundamental components of the religious practices".<sup>187</sup>

The Constitutional Bench's majority of justices in the Shayara Bano case concluded that triple talaq was an optional religious practice that was against the Quran's teachings and hence violated Sharia law. Faith cannot be regarded as endorsing an activity as an essential or positive principle if it is only authorised or not banned by that particular religion.<sup>188</sup> Like triple talaq, the practice of ban of entry of women into holy places, the practice of FGM, the practice of Santhara and the practice of animal sacrifice etc., all are discussed and tested by the angel that whether the practice is essential or non-essential for any particular religion and perhaps, the Supreme Court has overlooked other aspects of the Constitutional provision for testing the Constitutional validity of religious practices, a significant and blunder mistake made by the Constitutional benches.

The proviso of Article 25 clearly describes that religious freedom is subject to "public order, health, morality and other provisions of part III of the Constitution". Analysis of several majority opinions and minority opinions of Constitutional benches concludes that it is the Constitution only, which is over and above all the doctrines and principles and nothing else contrary to the provisions of the Constitution shall be saved, even if it is essentially religious practice or custom. The Courts should check the constitutionality of the religious practices first, not the essential or non-essential character of the custom or practice. Earlier, the Courts checked the essential nature of

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<sup>186</sup> *The Durgah Committee Ajmer V. Syed Hussain Ali*, 1961 AIR 1402, 1962 SCR (1) 383.

<sup>187</sup> *Ibid.*

<sup>188</sup> *Shayara Bano v. Union of India*, AIR 2017 9 SCC 1 (SC).

the religious practice first and failed to check the illegal and unconstitutional practices. Religious institutions are also taking shelter from this flawed principle of essential practice, but it is unacceptable how we can validate an unconstitutional practice under the shadow of religion. The Supreme Court established the test for fundamental religious activity in the Shirur Mutt case in 1954. The Supreme Court's seven-judge panel ruled that determining the core beliefs of religion requires primarily examining its own doctrines. Under Articles 25 & 26, the protection is only given to religious beliefs and faith and not to profess unconstitutional activities.

In the triple talaq case, Justice Abdul Nazeer and Justice J. S. Khehar wrote a dissenting opinion, gave a positive approach, validated the legislative intrusion into matters like triple talaq and recommended framing a law governing triple talaq. They restrained themselves from interfering in such religious matters.

Justice Indu Malhotra, who dissented from the majority opinion in the Sabrimala Temple case, brought up the locus standi issue and stated that “to entertain a P.I.L. at the behest of persons who are not worshippers at Sabrimala temple would open the floodgates of petitions to be filed questioning the validity of religious beliefs and practices followed by other religious sects”.<sup>189</sup> Defining the scope and extent of judicial review concerning the locus standi is clearly under the domain of power of the courts.

The viewpoint taken by Justice Malhotra seems partially correct and perhaps she has overlooked the issue of infringement of the right to equality and ignores the practices of religion acting derogatory toward the social status of women. The scope of Public Interest Litigation is wider enough to include all the matters concerning the issues of the violation of Constitutional rights in it and religious rights extending to the civil and other fundamental rights of all persons are not an exception to this rule.

It is fair enough to conclude that the courts have ample power to adjudicate the matters of social reforms, including the issues touching religious institutions.

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<sup>189</sup> *Indian Young Lawyers Association v. State of Kerala*, 2018 SCC Online SC 1690.

**6. What is the meaning of the expression "Sections of Hindus" occurring in Article 25 (2) (b) of the Constitution of India?**

**Views of earlier courts**

As was held in several cases, including the Shirur Mutt case, S.P. Mittal V. Union of India case and Sabrimala case, a religious denomination that is determined to be a part of the primary religion is not a separate group and as a result, cannot demand the protection of Article 26 of the Indian Constitution separately.

The 1949 Indian Constitution includes measures for social welfare, reform and the access of all Hindu castes and sections to public Hindu religious institutions. The wearing and carrying of kirpans shall be viewed as a component of the Sikh religion's profession, as I explained under the same Article. Explanation II states that references to Hindus are to be interpreted to include individuals who practice the Sikh, Jaina, or Buddhist religions, as well as references to Hindu religious organisations.

Article 25 (2) (b) texts allude to providing for social welfare and reform or opening up Hindu religious institutions of a public character to all classes and sections of Hindus. In the case of Commissioner of Police V. Acharaya Jagadishwarananda, the dissenting opinion of Justice Lakshmanan held that "...the argument that the Ananda Marga sect of religion, which has been recognised as a religious denomination, does not qualify for the same protection as a religion under Article 25(1) of the Indian Constitution, is unpersuasive. According to the principles of their faith, they have full freedom to decide essentials rights & rituals required for their religion and no outside authority has the right to interfere with their choice".<sup>190</sup>

The definition of "Sections of Hindus" given in Article 25(2)(b) is inclusive and its ambit is wider enough to cover all big or small sections and sub-sections of Hindus in it, as the text describing the clause itself declares that "...Hindu religious institutions of a public character to all classes and sections of Hindus". Another reason behind this conclusion is that, under Article 25 (1), religious freedom is provided to all persons and it seems not correct that the legislators intended to limit the freedom of religion to a particular group and not to provide religious freedom to sections of Hindus in other sub-clauses of this same section 25.

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<sup>190</sup> (2004) 12 SCC 770.

***7. Whether a person not belonging to a religious denomination or religious group can question a practice of that religious denomination or religious group by filing a P.I.L.?***

**Views of earlier courts**

In the famous case of *Sabrimala*<sup>191</sup>, lone dissenter Justice Indu Malhotra points out the issue of locus standi. She emphasized the issue that “a person has no locus standi to challenge the customs of any religion in which he or she has no belief or faith. If any person wants to follow any specific religion or converts to his religion, he must accept that religion in pure form and not in any amended form describing that he does not like this or that practice of that religion. The tenets of the religion cannot be challenged by persons belonging outside of their community or having no faith in that religion”.

The viewpoint of Justice Indu Malhotra seems partially correct. Dividing the religious matters into two different domains, i.e., religious beliefs and faith and religious practices, customs and rituals, the issue of locus standi can be quickly resolved. The matters concerning purely religious beliefs and faith did not attract any challenge from a non-follower. However, if any religious practice violates the most important fundamental rights among Articles 14, 15 and 21, then the locus standi of any person from the general public, irrespective of his religious belief or faith in that religious custom, via P.I.L. under the provisions of Indian Constitution is legal and should be maintainable.

**6.3 Showing the instances where the right to life shall overpower the right to religious freedom.**

This study discusses and critically analyses several landmark judgments delivered by the Hon'ble High Courts and Supreme Courts of India and foreign countries. It is observed in many instances that religious customs practiced by religious denominations and their followers violate the most important fundamental rights enshrined in the Constitution of India. Several practices claimed as essential religious practices are violative of Articles 14, 15 & 21 of the Constitution of India. Customs of

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<sup>191</sup> *Indian Young Lawyers Association v. State of Kerala*, 2018 SCC Online SC 1690.

FGM in Bohra communities, Santhara in Jainism, the practice of Jallikattu, unconstitutional methods of divorce in many communities, matters related to excommunication from the community, burning of crackers and effigies on several festivals, practices of Nikah-Halala, polygamy and bigamy, carrying of weapons in public places are directly in conflict with Constitutional provisions. The dissenting opinion of Justice Sinha, delivered in the case of 'Sardar Syedna Taher Saifuddin Saheb V. The State of Bombay', seems accurate and fit to apply in all these cases to resolve all these critical issues lying pending in several courts for some decades.

#### **6.4 The ambit of right to life**

Judicial activism makes the aura of the right to life more comprehensive enough to include several indirect rights affecting the life of human beings in it. From time to time, the Supreme Court has included many rights under the category of the right to life and enlarged its sphere. In the case of Justice Puttaswamy, the Constitution bench of the Supreme Court upholding the dissenting opinion of the A.D.M. Jabalpur case held that the right to privacy is an integral part of the right to life. Although it took 40 years for the judiciary to correct their findings of the A.D.M. Jabalpur case, it is still good that the right to privacy gets its correct position under the sphere of the right to life and becomes part of fundamental rights. In matters concerned with this study, there are several dissenting opinions in line waiting yet to be upheld by the Supreme Court.

*Enlarging the scope of the right to life, the Supreme Court held in many cases that this is the most important fundamental right enshrined in the Constitution of India and neither is there any exception which may supersede the right to life nor can it be sacrificed by anyone.* After scanning the religious practices in various instances, it is observed that these practices conflicted with the right to life. There is no need to discuss the elements of Article 21 of the Constitution again and it is enough to conclude that religious belief or faith is different from religious practices, which need to be regulated through Constitutional provisions. If religious practices violate Article 21 of the Constitution, they must not be protected under Articles 25 & 26 and must be held unconstitutional. Articles 25 & 26 protect religious belief and faith and those practices that do not contradict the Constitutional provisions.

Critical analysis of several judgments shows that, although the Court accepts the view that no immoral or unconstitutional religious practice should be continued, they themselves seem confused with upholding the constitutional validity of these customs and practices. They overlook the constitutional aspect, which is well enshrined in Article 25 as a limitation of the right to religious freedom and moving round in a loop of self-deduced "essential practices test", which is nowhere defined in the Constitution. Now, the nation needs to come out of this loop to give a definite and clear-cut direction to the nation to make it a progressive nation.

In the case of FGM, female genital mutilation or khatna, children's private parts are cut by using a blade. In consequence, bleeding and sometimes death of the child occurs. It violates Article 21 of the Constitution.

Santhara is practiced for the sacrifice of one's own life. Though the purpose is a religious one, religion does not allow the sacrifice of the life of a human being or one's own life and even if religion allows it for a particular purpose like salvation etc., then it is contradictory to the provisions of the Constitution and violating Article 21 of the Constitution. Any such practice, taking the life of a human being for any purpose, is unconstitutional.

Jallikattu is a fighting play between a man and a bull. The purpose of Jallikattu is to show bravery, but sometimes it causes serious injury or death to the players or candidates involved in the play. Hence, it is violative of Article 21 of the Constitution. Unconstitutional methods of divorce, polygamy and bigamy leave the women in a vegetative stage, too, without any income resources to maintain daily life. As discussed, the right to live with dignity is also a part of the right to life and is embedded in Article 21 of the Constitution. Departing the ways from the life partner in an unjudicial manner, unfair treatment of the wife, cheating with the life partner and leaving a person helpless for her survival is a violation of her right to live with dignity and hence violative of the right to life.

Different cases of ex-communication are discussed in this study and it is observed that ex-communication violates Articles 21, 25 & 26 of the Constitution, as it prohibits the person ex-communicated from performing several functions, acts and rituals or customs necessary for his life.



Carrying weapons like tridents, swords or kirpans etc. in public places without any license to use the weapons is a threat to the life of human beings. Any such act causing a threat to the life of another person shall not be protected under religious freedom and it violates the right to life provided under Article 21 of the Constitution. Public institutes may frame guidelines on this behalf and in general, a person should not be allowed to enter or trespass by compulsion, having such weapons with him, inside the premises of that public institution without prior approval of the authorities of that institution. Any such religious mark may be a symbol of religion for him, but do not forget that the right to religion is a private right and private rights are subject to some limitations in public places.

The burning of crackers and effigies pollutes the environment and causes serious health issues to human beings. It is observed in this study that it violates the right to a clean environment embedded in Article 21 of the Indian Constitution.

*To accomplish the objective of the study of the compatibility of religious practices with Constitutional provisions and to find the answer to research questions that "whether the customary practices are in consonance with Constitutional provisions in India?; whether dissenting opinions of courts are important to give shape to right to life and religion?; whether the State should interfere in the evil practices prevailing in the society in the name of religion?" various critical religious customs, practices and rituals are discussed in detail in this chapter. In the 1<sup>st</sup> chapter, the practice of FGM or khatna, extra-judicial divorce, marriage-related customs and ceremonies, the sacrifice of one's own life in Jainism for getting salvation, the cultural sports of Jallikattu, the sacrifice of animals for the religious purpose, burning of crackers and effigies on festival events, use of loudspeakers at holy places, gender-discriminatory religious customs like ban upon entry of women into holy places, practices of polygamy or bigamy etc., are discussed in detail in this chapter.*

*In the second part of this chapter, a critical analysis of several judgments, especially dissenting opinions concerning the right to religious freedom, is made. The Constitutional bench's view is considered by isolating the opinion of judges individually.*

*In the third part of this chapter, all the instances are observed closely where the right to life shall overpower the right to profess religion. Incidents of FGM or khatna, ex-communication, animal sacrifice for religious purposes, Santhara in Jainism, Jallikattu, crackers burning, loudspeakers in holy places etc., are critically analyzed.*

## **CHAPTER - 7**

### **THE THEORETICAL OUTCOME OF THE STUDY**

Analyzing the Supreme Court Judgments and legislative provisions deeply, it has been observed that there is a need to change the theoretical concept to deal with religious freedom. Considering the significance of fundamental rights and sphere of religious freedom and matters of personal choice, the 'Theory of Religious Secularism' is deduced as an outcome of the study. This theory will help to shape the secular State in a true sense and strengthen the spirit of brotherhood and fraternity. It will also give direction to the State authorities to resolve the pending issues for a long time.

It is pertinent to describe that this theory is an outcome of the dissenting opinion of Justice Sinha delivered in the case of Sardar Syedna 1962. The State has lost more than 60 years to resolve these issues by ignoring the dissenting opinion of Justice Sinha and the loss is unaccounted for. There are a number of other dissenting opinions that tried to speak loudly but put to remain silent by the majority judges on some critical and debatable issues. Another outcome of this study resulted in the "Doctrine of Persisting & Constructive Positivism' helping us resolve those issues. These theories are elaborated on and discussed here in length and all the critical situations are also tested by applying the theories. These theories may lead to a new direction for setting a peaceful society. However, no theory can be perfect in all situations, but thinking out of the box is a good initiative for resolving critical issues.

## **7.1 Explanation of theories**

### **7.1.1 Theory of Religious Secularism: An analysis of the scope and limitations of religious freedom in India**

#### **7.1.1.1 Introduction**

Religion is a subject of belief and faith, whereas religious practices and customs shall be observed through Constitutional norms and provisions. This theory divides the scope of religious freedom into two parts, i.e., the right to pray religion privately and the right to practice religious customs in a public place. By dividing so, this theory defines the scope and limitations of religious freedom under two circumstances differently. The author describes that freedom of religion provided under Articles 25 & 26 is limited to the Mens Rea, i.e., to keep belief and faith in the existence or non-existence of any god. But, celebrating religious practices and customs is an Actus Reus component and differs from Mens Rea, which must adhere to the principles of part III of the Constitution. This means that no religious practice shall be allowed to violate the fundamental right of any person and all religious practices must pass the test of constitutional vires enshrined in Articles 14, 15 and 21 and the moment these practices pass this test, only after that these practices can claim the protection of Articles 25 & 26. Constitution has nothing to do with the essential nature of religious practices and the theory of essential practices test is a flawed and self-deduced theory of Supreme Court judges taking the whole issue in the wrong direction.

#### **7.1.1.2 Religious freedom is a personal right that must be enjoyed within a limited scope in public places.**

It is a personal choice to profess any religion or not to profess the other religion, but nobody has any right to hurt the feelings of other persons professing the same or different religions. While entering a public place or institution, where that public place or institution is guided by uniform or secular rulings, the administration may make rules in regards to the wearing or non-wearing of religious clothes or objects deciding the dress code inside that particular public place or institution.

The right to religious freedom does not allow intruding into other persons' freedom. When we enter a public place comprising a community of different religions, every person has equal freedom of religion. It is correct that religious freedom is a matter of personal choice and the person carries their rights along with him, but, standing in a public place, nobody can use his right in an absolute way. It must be controlled by the guiding rules of that public place.

### **7.1.1.3 Religious Secularism: The scope and limitation of Religious Freedom**

It is complicated to define 'secularism' in a few words. It is described by many national and international philosophers and interpreted by several courts. Secularism does not mean 'not following any religion', but it is just concerned with the State's actions restricting it not to give undue favour to any religious group or not undermining the feelings of any minority religious group. Most provisions of the Indian Constitution are borrowed from the Constitutions of other countries and it is highly influenced by the secular philosophy of DR. B. R. Ambedkar. Due to the complex nature of the secular structure, people cannot understand the exact sphere of the right to religious freedom. People have freedom of religion but do not have any right to trespass in a public place where secular norms are generally ruling and do not have any right to violate the fundamental rights of any person. People having a deep belief in their religious wearing may not compel any secular or other religious institution to enter forcefully without their permission and accepting their norms. Being neutral or secular is the best solution to control the spread of enmity among religious groups.

Some countries favour the wall of separation between the State and Church, but some follow flexible policies. The position of secularism in India is not very apparent; consequently, the judiciary and legislation are acting contrary to each other. In detail, there is a need to define the sphere of secularism and the boundaries of the right to freedom of religion. The State authorities, social welfare institutions, Central and State universities, colleges and other educational institutions at large must take the pain to educate the people about their fundamental rights, the scope and limits of their fundamental rights and fundamental duties.

In France, the 'Doctrine of laïcité' is applicable, similar to secularism in India. The French word '**Laïc**' comes from the Latin '**laicus**', which is a loanword from the Greek '**laïkós**'. The suffix used in the French language, '**ité**' is equivalent to '**ity**' in English. Secularism is deeply rooted in France and strictly adhered to it. In France, the 'Doctrine of laïcité' means strict separation of Church and State and in this doctrine, Laïcité relies on the strict division between private life and public life. The scope of private life is limited to personal matters, including the choice of religion, belief and faith in it, whereas in the public sphere, each individual is equal to all other citizens and appears as simple as the other persons. In the public sphere, there is no specific emphasis given to any people related to ethnic and religious matters. Although India is already a secular country, similar to France, India still lacks strict compliance with secularism and people are just engaged and stuck in the irrelevant talk about what to wear, what to eat and what to speak in public on national platforms. In France, people criticize the laïcité as they argue that it prevents the believer from observing his or her religion and is an infringement on the individual right to religious freedom. Criticism is always welcome for positive change and social reform, but to resolve critical social issues, defining the sphere of private and public life in clear terms is a need of time.

After considering pertinent precedence, Justice Sinha came to the judgement that, in accordance with Article 26 of the Indian Constitution, religious denominations had a constitutional right to control their religious affairs. The activities related to religious convictions, however, "may have many effects and types, including economic, financial, political and other," as stated in Art. 25 (2)(a). These were more comprehensive than Articles 25 (1) or 26 (b). As a result, the Court was compelled to "draw a line of separation between practices consisting of rites and ceremonies connected with the specific kind of worship, which is the basic tenet of the religious community and practices in other matters which may attach with the religious institutions at various points, but which are not intimately connected with rites and ceremonies the performance of which is an essential and integral part of the religion." Only the former would be protected under Article 26 (b).

The constitutional framework seems to be more grounded in and robust on the relationship between civil rights and religion that Justice Sinha highlighted. The views

of religion and secularism were quite positive in DR. B. R. Ambedkar's mind. During the deliberations in the Constituent Assembly, Dr Ambedkar noted that religious views in this country are so diverse that they affect every aspect of life, from conception to death. There is nothing that is not religious and social matters will come to a standstill if personal law is to be upheld. A posture of the like cannot possibly be taken, in my opinion. It is not unusual to suggest that in the future we should endeavour to limit the concept of religion in order to avoid straying from practices and rituals that might be connected to ceremonies that are truly religious. Ambedkar's principal concern was to make sure that the State's ability to enact reformatory laws should not be limited by giving religion an expansive interpretation in a country like India, where the impact of religion was much stronger than in the West. For instance, regulations governing tenancy or succession do not always need to be based on religious principles. He distinguished between questions that are "really religious" and those that touch on other aspects of a person's life while yet including a religious element. By using judicial deception, the divide between "essentially religious behaviours" and inessential ones has replaced the distinction between "essentially religious practices" and those that are only incidentally religious. Furthermore, Justice Sinha's argument that an ostensibly religious act loses Constitutional protection to the extent that it restricts an individual's civil rights appears to be supported by Ambedkar's examples of tenancy and succession.

The dissension of Justice Sinha is more in line with the secularism of the Indian Constitution. Gary Jacobsohn has suggested that a more accurate description of the Court's religious freedom jurisprudence is (in his words) "ameliorative secularism" in a thorough analysis of the subject. An attitude toward religion that permits the State (or the Court, as the case may be) to intervene in religious practices in order to ensure individual autonomy and freedom is the embodiment of ameliorative secularism, which contrasts with the "wall of separation" view prevalent in the United States. There is a more substantial liberal philosophical argument here: Liberalism places a high focus on individual freedom, yet it is now widely accepted that for humans, individual freedom and self-fulfilment frequently depend on affiliation with and engagement in groups (including religious groups). Group rights are also included in a liberal constitution, not because groups are worthwhile in and of themselves but rather

because they are essential to leading a full existence. Therefore, the State can interfere through reformatory measures in as much as organisations fail to fulfil the fundamental prerequisites for individual autonomy (for example, by wilfully oppressing women or compelling people to adopt the prevailing ideology under threat of excommunication). Several Supreme Court rulings contain the concept of "ameliorative secularism," but the opinion in *Sastri Yagnapurushadji* by Gajendragadkar C.J.I. is the most striking example.

#### **7.1.1.4 Freedom of religious belief and faith does not include the right to practice any unconstitutional activity.**

It is observed that protection under Articles 25 & 26 is provided to religious beliefs, faith and all customs practiced in furtherance of those religious beliefs and faiths. It is implied that religious practices and customs are included in religious beliefs and faiths, but it is wrong to presume that this protection is provided to all religious customs or practices irrespective of their Constitutional validity. It is nowhere provided that Articles 25 & 26 allow the practising of any custom without verifying the constitutional validity of the same. In reality, it is provided in explicit texts that the religious freedom provided under Article 25 is subject to public order, health, morality and other provisions of part III of the Constitution of India. There is no room for confusion or ambiguity in reading these simple texts and the courts have bent the matter in a different direction of essential religious practices test instead of checking the Constitutional validity of religious practices. The conflict starts in the *Sardar Syedna* case<sup>192</sup>, which is, unfortunately, still unresolved. The complexity of the matter was increased in the case of *Shirur Mutt* as a bench delivered that judgment of seven judges and after that, several judgments comprising five judges stood in favour of the dissenting opinion of Justice Sinha but of the most negligible effect.

#### **7.1.1.5 The 'Doctrine of Ethical Religion'.**

Every religion is based upon morality and no religion is immoral. If any religious denomination, group, institute or community claiming religious freedom provided under Articles 25 & 26, alleges that any religious custom, usage, practice or ritual is

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<sup>192</sup> *Sardar Syedna Taher Saifuddin Saheb v. St. of Bombay*, AIR 1962 SC 853.



essential to their religion and these custom, ritual, practice, or usage fails the first step of the two-tail test, i.e., wires of Articles 14, 15 & 21, then the State should declare such religious group, denomination, institute or community as an illegal congregation assembled for illegal motive and hence, the State should declare that congregation as unconstitutional. *The author describes the 'Doctrine of Ethical Religion' and states that being caretaker of all fundamental rights, the State is duty-bound to save all fundamental rights provided in Part -III and it is settled law that Articles 14, 15 and 21 are not defeasible rights, whereas religious freedom is provided to a limited extent. The author has given a neat reply to this conflict that either religion must be 'moral' or there will be 'no religion'.*

More or less, the approach described in Doctrine of Ethical Religion shows a clear and accurate version of religion and demarcates the boundaries for the performance of religious activities.

#### **7.1.1.6 Veil of Religion**

*To set up a peaceful society, people don't need to remove the veil from their faces; rather, they need to remove the veil of religion from their minds.*

All persons are born free and equal in society for claiming their rights and dignity. It is after the birth of a human being that he or she is covered with religious clothes according to the religion of the parents of that person, which means that, in reality, no person is free to choose his religion at the time of his birth. One can also say that religion, religious principles and philosophy are put over the coming generations under compulsive situations and not by freedom. Later, after attaining a suitable age for understanding the social structure and religious beliefs, he is free to change his faith or belief in any other religion. To change his religion, a person needs a rational understanding and affirmative decision to follow what he believes is better for himself, but it is not so easy for him and sometimes the decision to change religion attracts severe criticism from his near and dears. Change in religion also affects the civil contact of the person with others. Here the question is whether civil life should be affected by the change of religion of any person. The answer in plain language is

‘NO’. Freedom of religion should be concerned only with the right to belief and faith in the existence or non-existence of any god. It should not make any effect on the civil life of the person. It is his personal domain how he thinks, what he believes is good or bad for his life and how he wants to live his life. All persons, who took birth on this planet are equal in nature, so applying different laws on persons taking birth in different religious families is not an accurate way to deal with any society. Merging religion with civil life is a confusing stage and it is making things complicated for everyone. Under this confusion, States are trying to do religious reforms and religious institutions are trying to rule over the people, otherwise, they both have no link with these fields.

Wearing religious clothes and objects should be dealt with by adhering strictly to the doctrine of laïcité applicable similarly in France. A clear demarcation between private and public spheres should be made to distinguish between personal and social activities.

***Undoubtedly, religious rights are private rights and every person carries their personal rights along with him, but while entering into the public sphere, he or she must adhere to the principles of secular society and those principles must be clearly defined in the public domain to remove all type of confusions.***

The solution to these religious conflicts can be found by removing the veil of religion from the status of any person. It is a need of time to look into the basic state of nature of human beings, which will easily set the uniform principles for everyone to decide their civil and contractual obligations towards other persons with whom that person is concerned irrespective of the religion they believe or follows.

A person might be related to other persons in different roles like a father for his children, a husband for his wife or a child for his parents. He or She is fully liable for all his civil and contractual liabilities, but due to some misconceptions of different religions and the adoption of different customs in different religions, there are a number of personal laws validating different civil and contractual liabilities among the contracting persons.

It is worthful to understand this notion via an example of the property rights of a Hindu woman compared with a Muslim woman while divorcing her husband, which is totally different in the event of such divorce. The concern in both cases is the same,

resulting in the divorce of husband and wife and making both persons free from their marital ties. *Is it the fault of a Muslim woman to take birth in a Muslim family and adopt Muslim laws by compulsion, which deprives the woman of her fundamental rights? It is debatable.*

The conclusion is that the civil and contractual liabilities of persons should be regulated by secular civil laws that have no relation to the religions of the persons and these civil laws should be uniform for all persons. There is already a set of secular civil laws enforced in India; the need is to apply these laws uniformly. Special Marriage Act 1954, The Guardians and Wards Act 1890, The Child Marriage Restraint Act 1929, Juvenile Justice (Care and Protection of Children) Act 2015, Protection of Child from Sexual Offenders Act 2012 and The Indian Succession Act 1925 are some good examples.

#### **7.1.1.7 State is responsible for maintaining the civil life of persons and not for religious principles.**

The State is a sovereign power and caretaker for the civil life of all persons, including fundamental rights. Whereas the religious institutions and their followers have self-implied religious rules upon them and wish to compel the State to protect their self-implied rules that have no concern with the State authorities.

Neither the State is empowered to enforce religious principles nor the State can be deprived of its supremacy for civil rulings in society by any religious body. Maintaining law and order is also a subject matter of the State that can't be interfered with by any religious institution. The State is fully empowered to enforce civil laws and it can't interfere in religious matters deeply related to belief and faith in the existence or non-existence of God. Whereas religious institutions are fully empowered to regulate their religion and manage religious affairs, they cannot overrule the civil laws of the State. The domain of both authorities is totally different but sometimes overlaps, which needs to be separated by the clear demarcation of their spheres.

### **7.1.1.8 Code of Uniform Religious Ethics**

Strengthening the brotherhood, unity and fraternity among persons of different communities is a basic motive of the Indian Constitution and this motive is well enshrined in the preamble of the Constitution also. Applying different rules to different persons is against this spirit of fraternity. There should be a Code of Uniform Religious Ethics that provides a way of life to live in a better way and have a common spirit of all religions.

Religious preachers or leaders should come forward to frame common principles having a common set of beliefs and it must be accepted by all religions and they should perform their fundamental duty to bring peace to society by applying these principles uniformly.

They can do so by issuing a common list of do's and don'ts.

Like as:

- Don't tell a lie
- Don't steal anything
- Don't sexually assault anyone
- Respect the girl and woman
- Respect your parents
- Respect for the rights of other persons
- Perform your fundamental duties
- Don't hurt the religious feelings or sentiments of any person

These are some good examples.

7.1.1.9 'Two-Tail Test' to check Constitutional validity and essential nature of religious practices or customs.

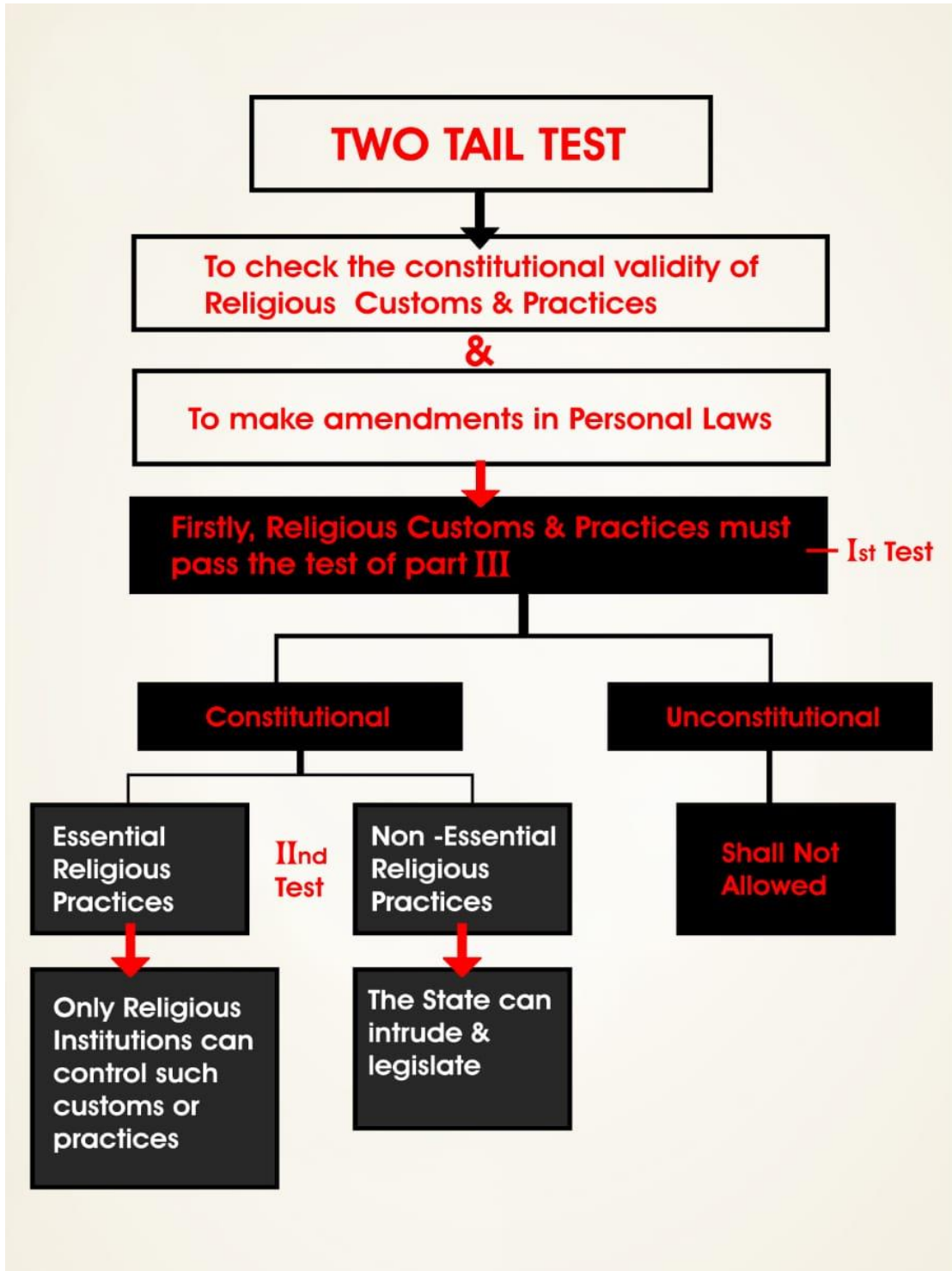


Figure 7.1 – Flow Chart representation of ‘Two-Tail Test’. *Source:* Author compilation

In a situation where the right to life clashes with the right to religious freedom, the preference will be given to the right to life and the right to religious freedom cannot be used as a weapon to abrogate the most important fundamental right, i.e., right to life. The essential practice test deduced by the Supreme Court is not exhaustive in resolving religious conflicts. This test does not examine other constitutional fundamental rights defined in Articles 14, 15 and 21. Any religious custom, ritual, practice or usage must pass the test of Articles 14, 15 and 21. The essential practice test will be exhaustive if it is converted to the **‘Two-Tail Test’**. In this test, the religious practice, custom, usage or ritual should be tested on the wires of Articles 14, 15 and 21 in the first step. If the first test fails, these religious practices, customs, usages or rituals should be held illegal and unconstitutional. If the first test passes, these religious practices, customs, usages or rituals must go through the second step, i.e., the essential practice test, in an unmodified form as conducted earlier.

Applying the ‘Theory of Religious Secularism’ & ‘Doctrine of the Two-Tail Test’ and specifically talking to the issues in conflict with Articles 14, 15 and 21, it is suggested that State should ban these practices immediately without any question of freedom of religion. *The practice of polygamy, all illegal practices of divorce, nikah halala, female genital mutilation, Santhara, self-flagellation, animal sacrifice for religious purposes etc., are in direct conflict with Articles 14, 15 and 21 and these practices must be banned as it is concluded in the study that the protection of religious freedom is provided to personal belief & faith and not to the unconstitutional practices.*

Although all the matters discussed here are under consideration of several courts or a matter of debate at the desks of national platforms and it will be prejudiced to say anything about the constitutionality of these practices, a framework may be drafted to check all the corners of conflict properly and to take the matter into consideration of the sphere of constitutional wires. The issuance of suggested guidelines is within the scope of this research study, without which the real purpose of this study will be defeated. The outcome and conclusion derived after the application of several doctrines deduced in this study and the suggested guidelines issued to check the constitutionality of religious practices and customs are placed here after the application of the two-tail test for the reference of future research scholars to do

advanced research upon new topics beyond the scope of this study, academicians having participation in debates or legal luminaries having participation in deciding the matters of the constitutionality of these practices.

This test was developed to replace the test of the essential practice test, earlier deduced by the Supreme Court. The essential practice test is nowhere mentioned in the Constitution and is only the product of judicial activism. As the test of essential practices is not fully competent to answer all critical questions we have, it is suggested to rely upon the two-tail test to get a better result. The reason behind the reliability of the two-tail test is that it checks the constitutionality of the religious practice first and then after the essential nature of the practice. It seems rational reasoning to answer all the critical social issues that perhaps no one can contradict. If still there will be a criticism of this test and the above-discussed doctrines deduced as an analysis of this study, it would be welcome for debates and further deep analysis of the concerned topics by future research scholars.

7.1.1.10 Application of the ‘Theory of Religious Secularism’ in some critical situations

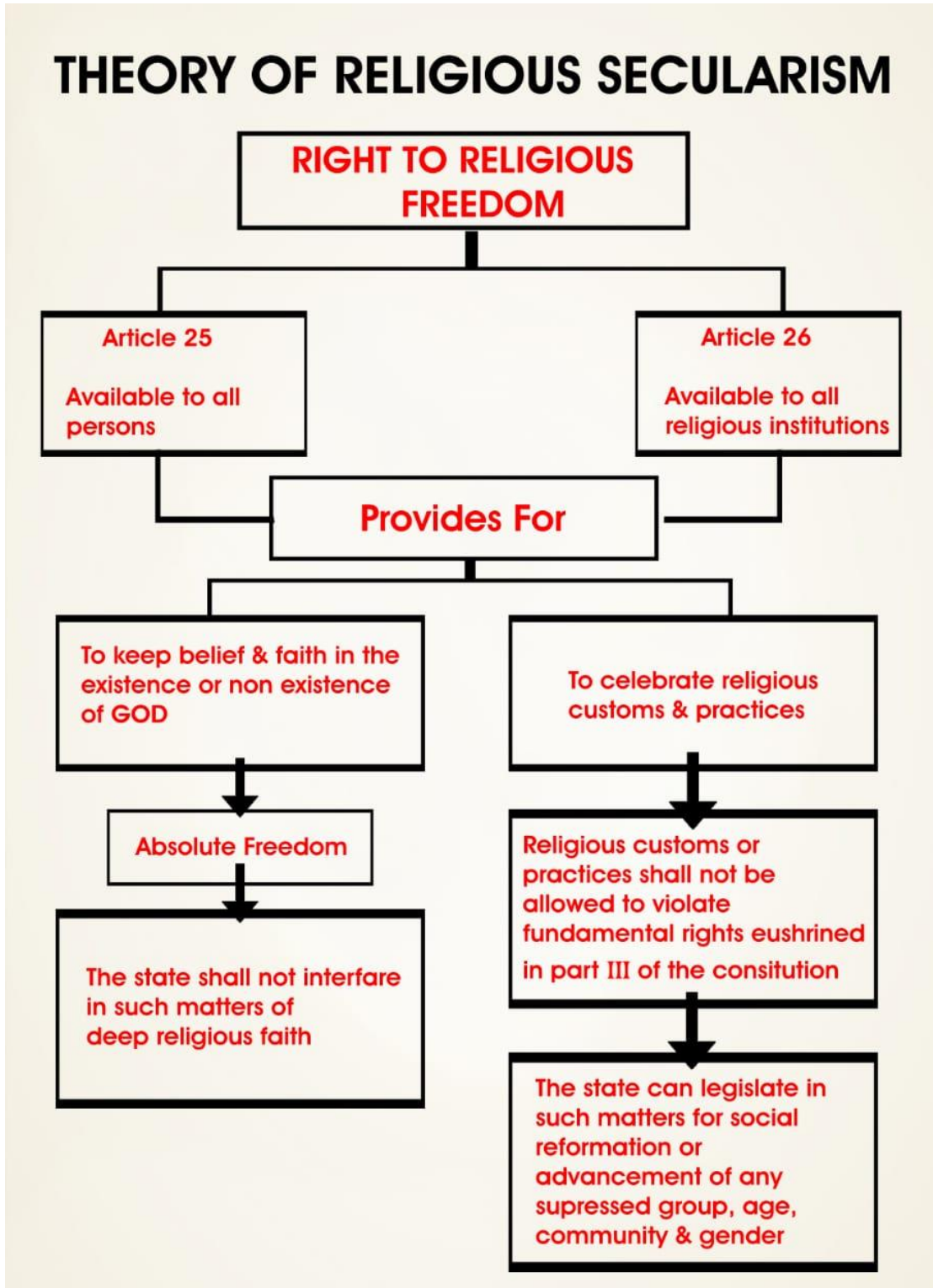


Figure 7.2 – Flow Chart representation of ‘Theory of Religious Secularism’.

Source: Author compilation



#### **7.1.1.11 Polygamy, Divorce outside judicial courts, Nikah-Halala, Female Genital Mutilation**

Monogamy is universally accepted by all countries and communities. No doubt, the practice of polygamy is derogatory to the status of women and humanity. Several women's rights are affected by the customs of polygamy, divorces outside judicial courts, nikah halala, female genital mutilation etc. And applying the theory of religious secularism & two-tail test will hold these practices unconstitutional without any hindrance which the Supreme Court remain unsuccessful to resolve till date.

#### **7.1.1.12 Entry of women into holy places**

The entry of women into holy places should be dealt with in a two-way approachable solution. From the State, there should be no restriction for women of any age to enter holy places like mosques or temples. If State puts any such restriction, it would amount to discrimination and violates Article 14 of the Constitution. In regards to the personal faith of a person following any particular religion or belief to enter or not in holy places due to menstruation period or for any other religious belief, the matter of consideration should be left with the persons themselves going into holy places as the matter of personal belief and faith is fully protected under Article 25 of the Constitution. *In conclusion, the entry of women into holy places should be open for all, irrespective of their gender or age or other physical constraints like the menstruation period, subject to their personal choice, beliefs and faith.*

#### **7.1.1.13 Wearing religious clothes and objects in public places or inside public institutions**

While dealing specifically with the kirpan issue, it is a device kept by Sikh persons for their self-protection. During the time it was allowed by Sikh Gurus, there was no law regulating arms and weapons, but it is now in existence in India. Being under the category of weapons and the effect of using kirpan, it is equal to other weapons like a gun or revolver and the scope of the Arms Act must be broader enough to cover and regulate the use of kirpan in a public place. Another reason behind this rational conclusion is that permitting carrying the kirpan in a public place is under the domain and control of the State to prevent uninvited accidents. There is always an

apprehension that a weapon like a kirpan may be misused in sudden and grave provocation or by evil elements. So, it is suggested to permit the use of any weapon for self-defence by providing a licence regulated under the Arms Act, or only a symbolic harmless object may be allowed to reduce the fear or apprehension of threatening other persons.

It is also complicated to identify a Sikh person from the general public. Only wearing a turban is not a true sign or identification of a Sikh person, as there are many more communities wearing the turban as their usual custom. For a truly baptized Sikh, Guru Ji directed their followers to wear all five Kakaar and wearing the only turban out of the five Kakaar is not sufficient for showing the true face of a baptized Sikh person. Moreover, these directions apply to a baptized Sikh person only, making a massive difference between a Sikh person and a baptized Sikh person. It is debatable whether the person not following the directions to wear all five Kakaar in the true sense wears only a turban or kirpan alone in public places as their religious right is constitutionally protected to do so or not.

Except for religious purposes, the turban is used to care for the hair only and performs the same function equal to hijab and dupatta used by the people of other communities. Earlier, almost all communities used to wear a turban, dastaar, parna, pagri or a piece of cloth in a different style to protect their hair from air, rain, sunlight, dust or other substances. It is not a unique dress code of Sikh persons, but obeying the guidelines of their Guru, they adopted it as mandatory for their life. "A religion may not only establish a set of moral or ethical guidelines for its adherents to follow, but it may also specify rituals, ceremonies and ways of worship that are seen as essential components of the religion itself. These forms and observances may even include rules regarding what to eat and wear".<sup>193</sup> Considering the only turban as an identity of a Sikh person is not the right approach and providing any religious right to any person considering only the turban, worn by him in a public place, is also wrong.

***It is suggested to distinguish the wearing of hijab by Muslim & Christian women, turban by Sikh people, Brahmins and other communities, dupatta by Hindu women and other religious objects like kirpan by baptized Sikhs or other religious marks***

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<sup>193</sup> *The Comm. Hindu religious endowments Madras v. Sh. Lakshmindra Thirtha Swamiar of Sri Shirur Math* 1954 SCR 1005.

*etc., in particular public places that are governed by specific and secular principles and in other general public and private places depending upon the rational findings of the doctrine of laïcité.*

#### **7.1.1.14 FGM, Khatna, Santhara etc.**

Law doesn't permit hurting anybody or the act of suicide, but the religion justifies the acts of FGM, Khatna, Santhara or other similar activities performed for the purpose of the salvation of the soul. Although reincarnation is a matter of deep religious belief and faith, it cannot go beyond the boundaries defined under the theory of religious secularism. Taking any bodies life, one's own life, hurting anybody etc., all these activities must not be allowed under the garb of religious customs as these activities are illegal under Indian criminal laws.

#### **7.1.1.15 The Ultimate purpose of religion**

The ultimate purpose of religion is to teach persons how to perform fundamental duties instead of claiming fundamental rights. The moral principles of every religion talk about fundamental duties and not fundamental rights. But, the followers of all religions have taken it in the wrong direction. It is not disputed that all persons have the right to profess their religion freely, but the interpretation of freedom of religion is taken in the wrong direction. *The right to profess religion doesn't mean the absolute right to do any religious activity without caring about the fundamental rights of other persons and rather it will be better to define this freedom as a right to get the implementation of fundamental duties of other persons. This approach of getting implementation of fundamental duties of other persons will bend the route of disputes and discussion toward the duties that we owe to society which we either forget or don't wish to perform.* If any person is not obeying the fundamental duties that he owes to society and that duty touches the issues of social morality, the other person should have the right to get it implemented as his right of religious freedom.

### **7.1.2 Dissenting opinions: A different approach to social reformation via 'Doctrine of Persisting & Constructive Positivism.'**

All judges of the Supreme Court are equal in power to deliver a judgment on any issue placed in front of that judge. In Constitutional benches, judges are allowed to write their separate judgments, which makes the judiciary an independent organ and this is the beauty of Indian democracy, which allows the judges to have a dissenting opinion from the majority judges. Due to the game of numbers, these dissenting opinions lack legal sanctity and do not form part of the judgment. The dissenting opinions are recorded just to save the opinion of judges and for debate among academicians and legal luminaries. However, sometimes, the majority opinion proves wrong after some time and the dissenting opinion is upheld by overruling the earlier judgments. It makes these noted dissenting opinions more significant in the annals of the judiciary.

The doctrine of "basic structure of the Constitution" is nowhere defined in the Constitution and it was the product of dissenting judgment given by Justice Mudholkar in the landmark case of *Sajjan Singh v. State of Rajasthan*, 1964. It is very much proved in the annals of the judiciary that the judgment of doctrine of basic structure in *Keshvanand Bharti's* case, a self-deduced ruling of the Supreme Court to protect the basic intent of the Constitution and to define the amending powers of legislation, gave certainty to various legal conflicts and social issues and became a part of the development of judicial activism in the legal framework. If Supreme Court missed this opportunity in *Keshvanand Bharti's* case to overrule the majority judgment of *Sajjan Singh's* case and uphold the dissenting opinion of Justice Mudholkar, then the weaved story of fundamental rights would be much different in India.

Now the question of consideration is, what is the scope of dissenting opinions in law and their role in social reformation?

Reply to this question may be found in the 'Doctrine of Persisting & Constructive Positivism'. In this study, the scope of dissenting opinions is taken both ways. As discussed earlier, it is conclusive that dissenting opinions have no legal sanctity unless it overrules the majority opinion later on and sometimes it becomes the rule. *Analyzing dissenting opinions by taking them as a base of persisting & constructive*

*positivism for social reformation makes these dissenting opinions more significant. Moreover, it is a different approach toward the dissenting opinion to consider the decided issues on academic benches rather than putting them into a dustbin of court records.*

#### **7.1.2.1 Persisting Positivism**

Since there is no legal sanctity of dissenting opinions in the eyes of laws until it overrules the majority opinion in later cases, it is considered persisting and still, it is always expected that one day it may convert into law in the future, it is a positive approach. Dissenting opinions are quoted as persuasive precedents and remain dormant in statutory books until overruling the majority opinion. The lack of legal sanctity of dissenting opinions made it ineffective, but due to some force of rational approach, it persists on academic benches. In the historical judgments and dissenting opinions, it is seen that either the approach of a dissenting judge was too conservative in bringing change in society or has a far-sighted approach to the issues for which the majority judge fails to accept the modern view and overlooks that issue.

#### **7.1.2.2 Constructive positivism**

While taking the dissenting opinions as constructive positivism, many direct and indirect benefits of dissenting opinions of courts feed the legal jurisprudence. It helps to keep a constructive approach while dealing with similar issues and dissenting opinions compel us to reconsider the decision and pending issues of similar nature or the same matters pending for consideration in several courts. The other benefit of dissenting opinions is that these opinions accommodate the academic debates at the national level as the approach defined in a dissenting opinion to deal with an issue is always different from the majority opinions and it keeps the voice of minority live in debates and discussions. Dissenting opinions also show that the judiciary is an independent organ, which is the beauty of Indian democracy.

### **7.1.2.3 Application of 'Doctrine of Persisting & Constructive Positivism'.**

The 'Doctrine of Persisting & Constructive Positivism' may prove helpful in testing the legality and constitutional validity of similar critical issues decided or lying pending in several courts with the wires of dissenting opinions. *If it is found that the reasoning behind the dissenting opinion has a sound base to make a debate on that similar critical issue, then a reference to dissenting opinion and its conclusion must be considered while deciding the pending issues in other courts.* It is nothing but just an extra check on the critical issues upon which the judges have divergent views and complex matters.

Applying this approach to social issues compels society to think alternatively on complex topics and this doctrine is not limited to just religious matters, it can be applied in other spheres also where the landmark dissenting opinions have been recorded by eminent judges.

**CHAPTER – 8**  
**ANALYSIS OF THE PUBLIC OPINION ON RELIGIOUS PRACTICES AND**  
**STATE INTRUSION**

Observations of Non-Doctrinal data:

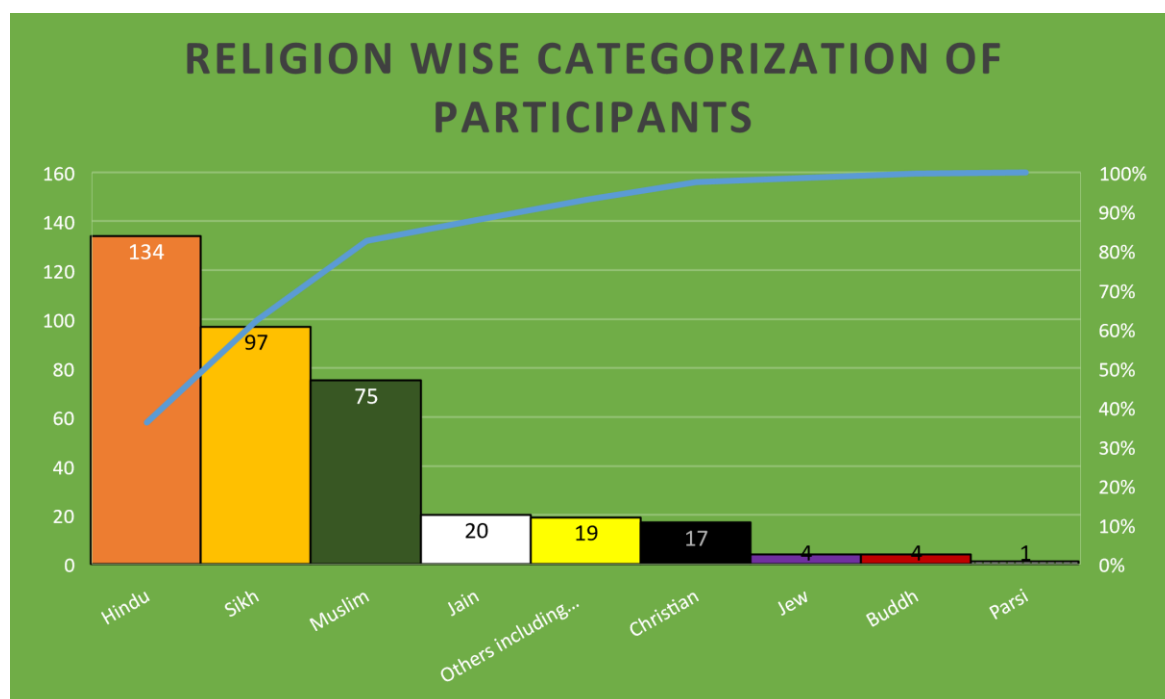
The practical applicability of any theology is a must, without which no theory has any significance. Applying the same golden rule here, a set of questions is spread in the public domain to collect their individual responses. The questionnaire is being prepared to spread awareness among people and also to check the acceptance of the public for social change. Responses were collected from the diverse population by making their different religious ideology as the main base of the study. The analysis is made by making religion, age, sex, education and locality as dependent variables. The data analysis of the research study is provided as follows.

The responses have been collected from 371 persons belonging to different religions. The collection of responses has been made from people related to different religions and the samples have been collected from different parts of the whole country. The data is analyzed and presented below in both tabular and chart forms.

### 8.1 Religion-wise categorization of participants

| Religion                             | No. of Persons | Percentage  |
|--------------------------------------|----------------|-------------|
| Hindu                                | 134            | 35.90       |
| Sikh                                 | 97             | 26.20       |
| Muslim                               | 75             | 20.30       |
| Jain                                 | 20             | 5.40        |
| Christian                            | 17             | 4.60        |
| Jew                                  | 4              | 1.10        |
| Buddh                                | 4              | 1.10        |
| Parsi                                | 1              | 0.30        |
| Others (including prefer not to say) | 19             | 5.30        |
| <b>Total Responses</b>               | <b>371</b>     | <b>100%</b> |

**Table 8.1 - Religion-wise categorization of participants. Source: Author Compilation**



**Figure 8.1 - Religion-wise categorization of participants. Source: Author Compilation**

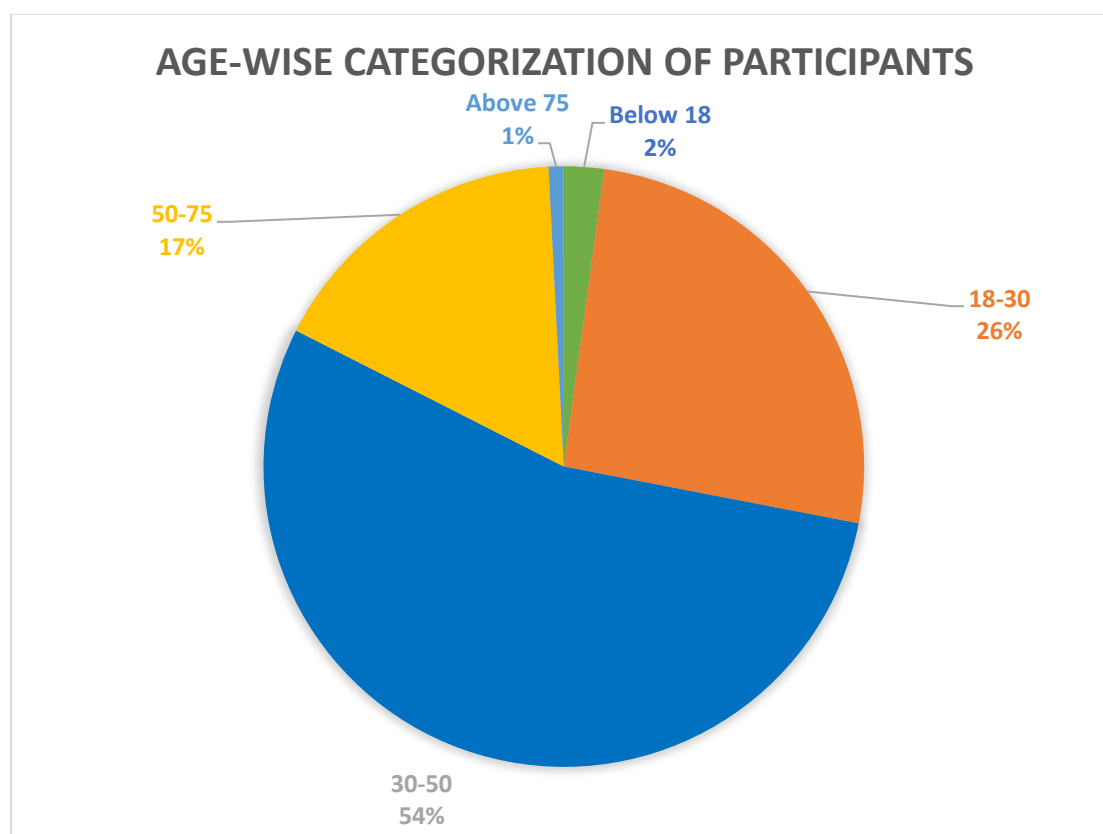


**Analysis of responses:** - Out of the 371 participants, 134 persons (35.90%) were Hindu, 97 persons (26.20%) were Sikh, 75 persons (20.30%) were Muslim, 20 persons (5.40%) were Jain, 117 persons (4.60%) were Christian, 4 persons (1.10%) were Jewish, 4 persons (1.10%) Buddhist, 1 person (0.30%) was Parsi and 19 persons (5.30%) were either related to other religions or prefer not to say about their religion.

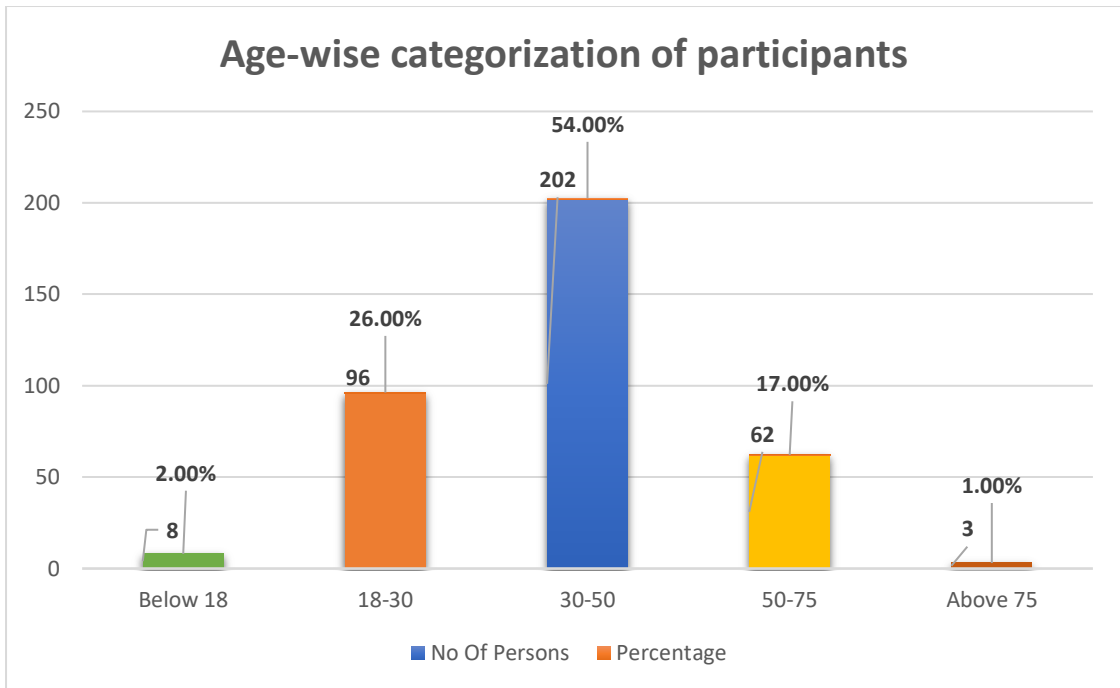
## 8.2 Age-wise categorization of participants

| Age      | No Of Persons | Percentage |
|----------|---------------|------------|
| Below 18 | 8             | 2.00%      |
| 18-30    | 96            | 26.00%     |
| 30-50    | 202           | 54.00%     |
| 50-75    | 62            | 17.00%     |
| Above 75 | 3             | 1.00%      |
| Total    | 371           | 100.00%    |

**Table 8.2 - Age-wise categorization of participants, Source: Author Compilation**



**Figure 8.2 (a) - Age-wise categorization of participants, Source: Author Compilation**



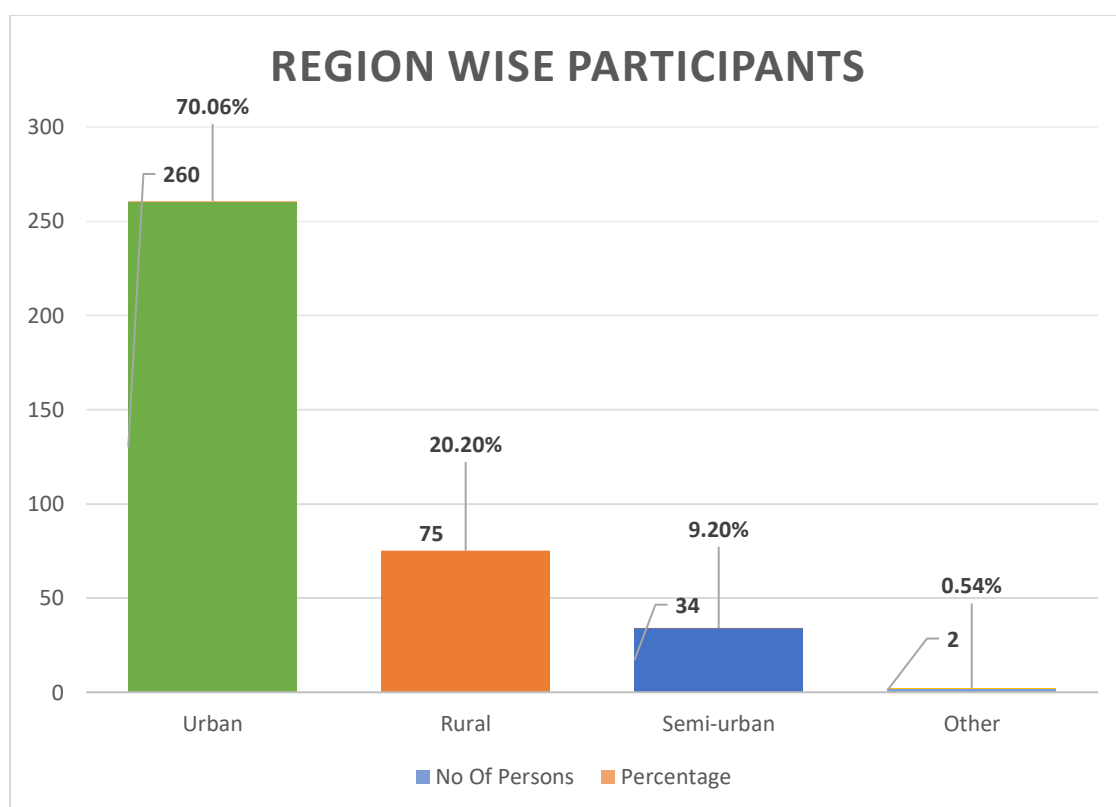
**Figure 8.2 (b) - Age-wise categorization of participants, Source: Author Compilation**

**Analysis of responses:** - Out of 371 participants, 8 persons (2.00%) were aged below 18 years, 96 persons (26.00%) were aged between 18 to 30 years, 202 persons (54.00%) were aged between 30 to 50 years, 62 persons (17.00%) have age between 50 to 75 years and 3 persons (1.00%) have age more than 75 years.

### 8.3 Region-wise participants

| Region     | No Of Persons | Percentage |
|------------|---------------|------------|
| Urban      | 260           | 70.06%     |
| Rural      | 75            | 20.20%     |
| Semi-urban | 34            | 9.20%      |
| Other      | 2             | 0.54%      |
| Total      | 371           | 100.00%    |

**Table 8.3 - Region-wise participants. Source: Author Compilation**



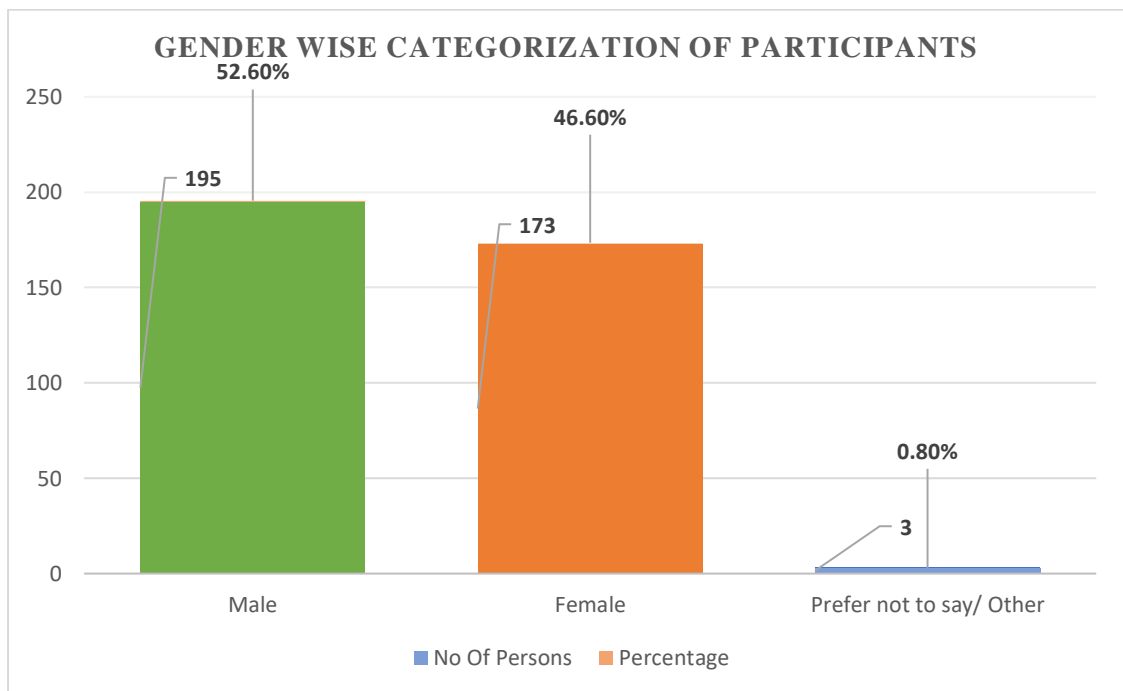
**Figure 8.3 - Region-wise participants. Source: Author Compilation**

**Analysis of responses:** - Out of 371 participants, 260 persons (70.06%) belong to an urban area, 75 persons (20.20%) belong to a rural area, 34 persons (9.20%) belong to a semi-urban area and 2 persons (0.54%) belong to other areas.

#### 8.4 Gender-wise categorization of participants

| Gender-wise categorization of participants | No of Persons | Percentage |
|--|---------------|------------|
| Male                                       | 195           | 52.60%     |
| Female                                     | 173           | 46.60%     |
| Third Gender/Prefer not to say/ Other      | 3             | 0.80%      |
| Total                                      | 371           | 100.00%    |

**Table 8.4 - Gender-wise categorization of participants. Source: Author Compilation**



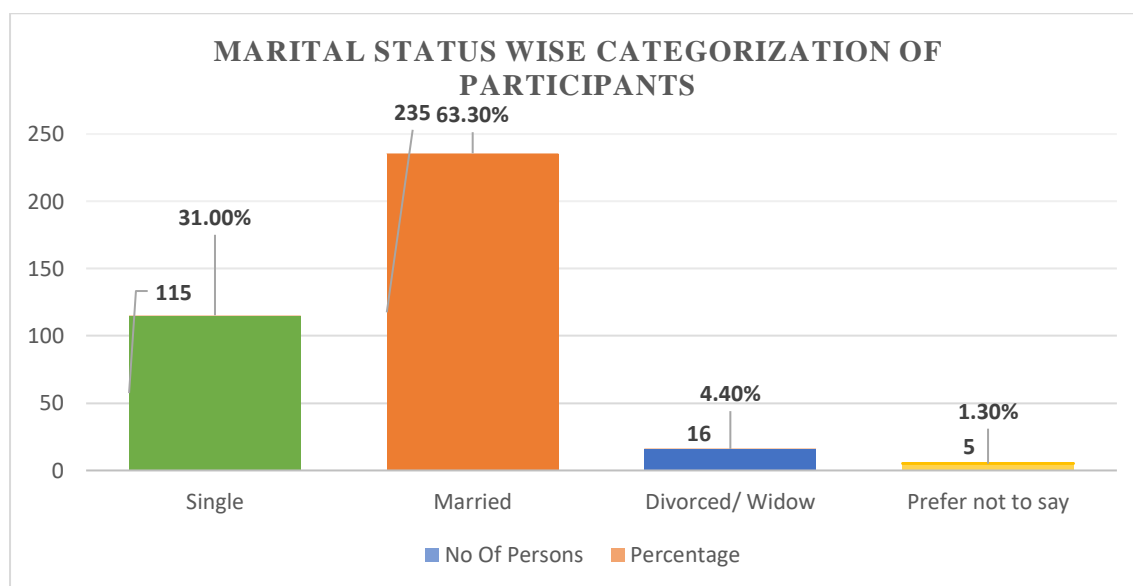
**Figure 8.4 - Gender-wise categorization of participants. Source: Author Compilation**

**Analysis of responses:** - Out of 371 participants, 195 persons (52.60%) were males, 173 persons (46.60%) were females and 3 persons (0.80%) either belonged to the third gender or prefer not to say about their gender.

### 8.5 Marital status-wise categorization of participants

| Marital status-wise categorization of participants | No Of Persons | Percentage |
|--|---------------|------------|
| Single   | 115           | 31.00%     |
| Married  | 235           | 63.30%     |
| Divorced/ Widow                                    | 16            | 4.40%      |
| Prefer not to say                                  | 5             | 1.30%      |
| Total  | 371           | 100.00%    |

**Table 8.5 - Marital status-wise categorization of participants. Source: Author Compilation**



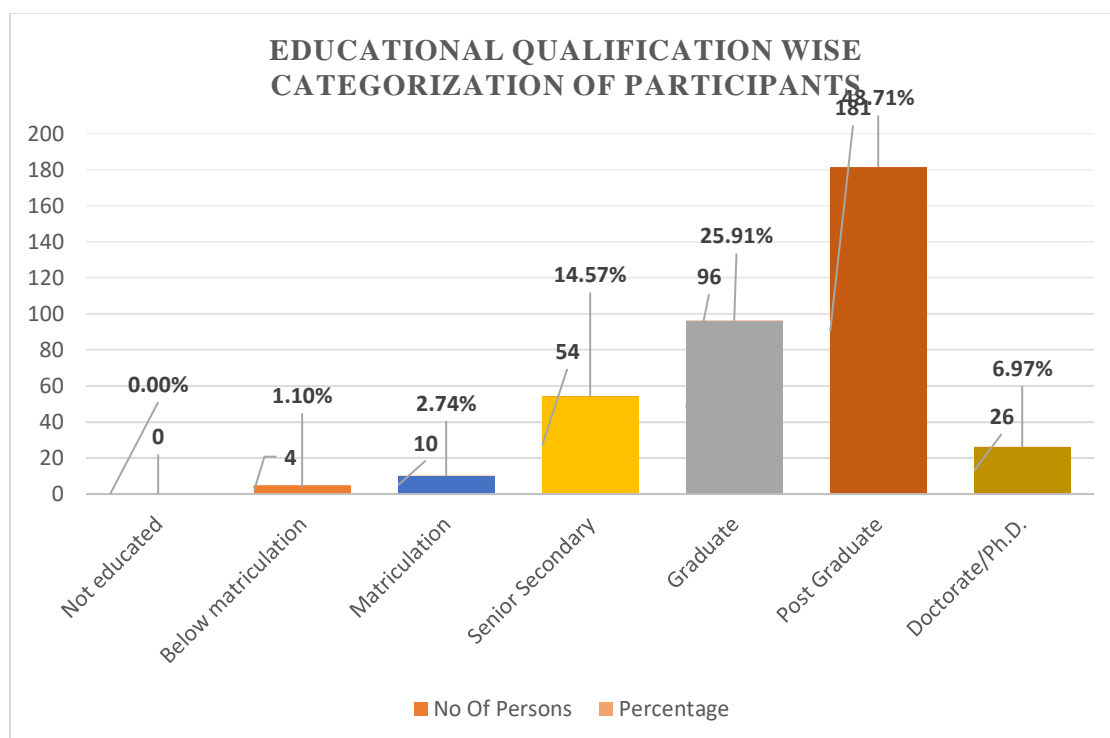
**Figure 8.5 - Marital status-wise categorization of participants. Source: Author Compilation**

**Analysis of responses:** - Out of 371 participants, 115 persons (31.00%) were single, 235 persons (63.30%) were married, 16 persons (4.40%) were either divorced or widow/ widower and 5 persons (1.30%) had chosen to prefer not to say about their marital status.

## 8.6 Educational qualification-wise categorization of participants

| Educational qualification-wise categorization of participants | No of Persons | Percentage |
|---|---------------|------------|
| Not educated  | 0             | 0.00%      |
| Below matriculation   | 4             | 1.10%      |
| Matriculation   | 10            | 2.74%      |
| Senior Secondary  | 54            | 14.57%     |
| Graduate  | 96            | 25.91%     |
| Post Graduate   | 181           | 48.71%     |
| Doctorate/Ph.D.   | 26            | 6.97%      |
| Total   | 371           | 100.00%    |

**Table 8.6 - Educational qualification-wise categorization of participants. Source: Author Compilation**



**Figure 8.6 - Educational qualification-wise categorization of participants. Source: Author Compilation**

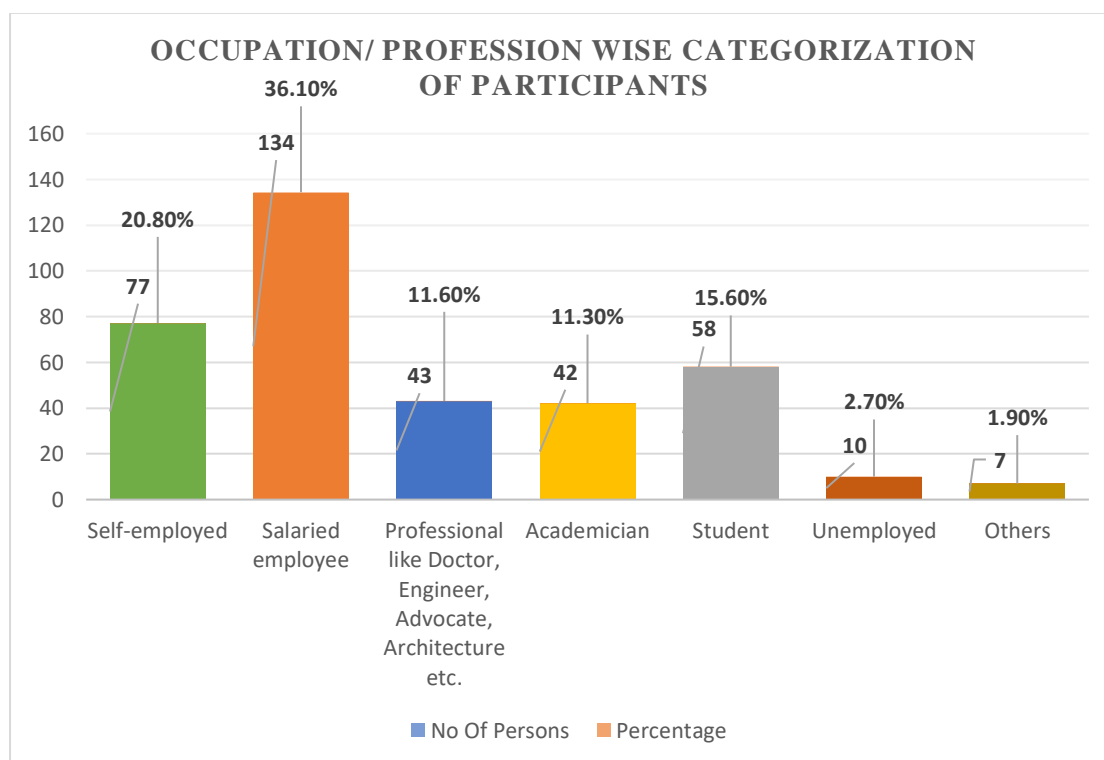
**Analysis of responses:** - Out of 371 participants, no person was uneducated, 4 persons (1.10%) were below matric educated, 10 persons (2.74%) were educated up to matric level, 54 persons (14.57%) were educated up to senior secondary level, 96 persons (25.91%) were educated up to graduation level, 181 persons (48.71%) were educated up to post-graduation level and 26 persons (6.97%) were educated up to Doctorate level.



## 8.7 Occupation/Profession-wise categorization of participants

| Occupation/Profession-wise categorization of participants           | No Of Persons | Percentage |
|---|---------------|------------|
| Self-employed   | 77            | 20.80%     |
| Salaried employee   | 134           | 36.10%     |
| Professionals like Doctors, Engineers, Advocates, Architecture etc. | 43            | 11.60%     |
| Academician   | 42            | 11.30%     |
| Student   | 58            | 15.60%     |
| Unemployed  | 10            | 2.70%      |
| Others  | 7             | 1.90%      |
| Total   | 371           | 100.00%    |

**Table 8.7 - Occupation/Profession-wise categorization of participants. Source: Author Compilation**



**Figure 8.7 - Occupation/Profession-wise categorization of participants. Source: Author Compilation**

**Analysis of responses:** - Out of 371 participants, 77 persons (20.80%) were self-employed, 134 persons (36.10%) were salaried employees, 43 persons (11.60%) were professionals, 42 persons (11.30%) were academicians, 58 persons (15.60%) were students, 10 persons (2.70%) were unemployed and 7 persons (1.90%) had chosen other occupation or profession.

### 8.8 Question No.-1

Religion and morality are two sides of the same coin. Do you agree that all customs and practices based upon religious principles must be moral also?

| Responses   | No. of Persons | Percentage    |
|---|----------------|---------------|
| <b>Yes, religion includes morality in itself and religion cannot be apart from morality.</b>      | <b>284</b>     | <b>76.55%</b> |
| <b>No, religion has nothing to do with moral principles. Religion and morality are different.</b> | <b>73</b>      | <b>19.68%</b> |
| <b>Not sure</b>   | <b>10</b>      | <b>2.70%</b>  |
| <b>other</b>  | <b>4</b>       | <b>1.08%</b>  |
| <b>Total Responses</b>  | <b>371</b>     | <b>100%</b>   |

Table 8.8 – Data showing response to question no. – 1. *Source: Author Compilation*

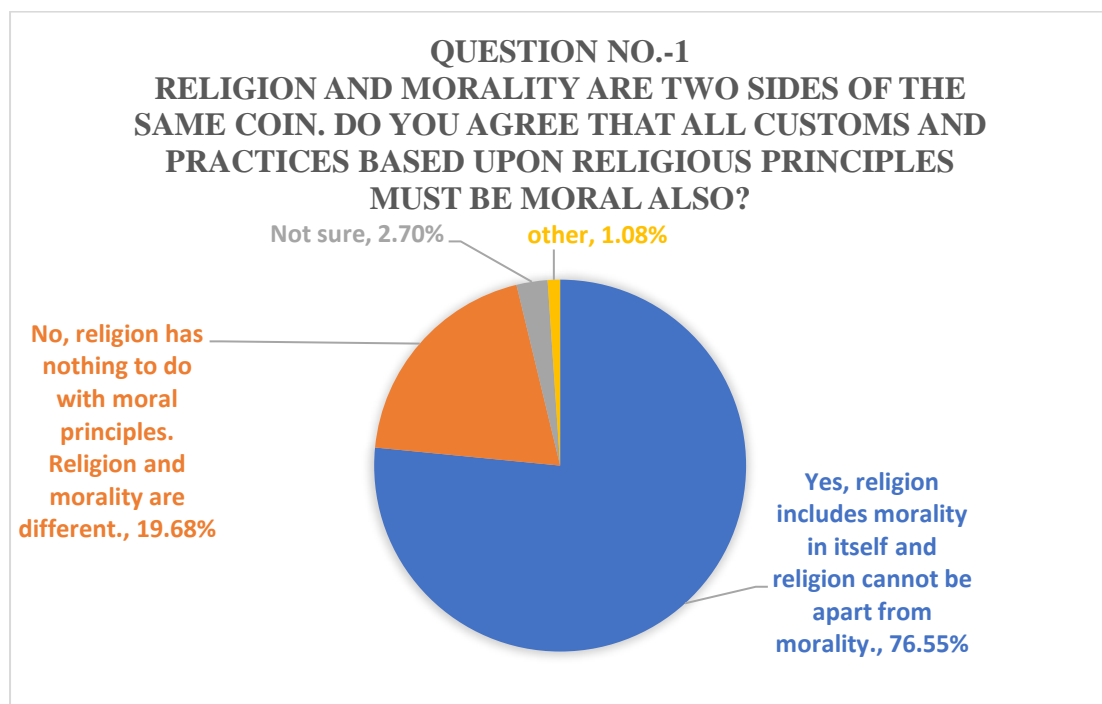


Figure 8.8 – Data showing response to question no. – 1. *Source: Author Compilation*

**Analysis of responses:** - Out of 371 participants, 284 persons (76.55%) agreed that religion includes morality in itself and that religion cannot be apart from morality. 73 persons (19.68%) agreed that religion has nothing to do with morality and both are different. 10 persons (2.70%) have told that they are not sure about this matter and 4 persons (1.08%) have different views.

One person said that following any religion is not necessary for performing moral acts. A person having high moral values may not follow any religion.

One another person said it is not disputable that morality emerged from religion, but in the light of modern liberalism, many progressive societies have adopted moral standards that don't have any religious basis. These societies have adopted more humanistic and secular approaches in determining the rights of individual persons. The rights of transgenders & LGBTQ are a good example in this context.

### 8.9 Question No.- 2

Can a personal law restrict the freedoms provided by the Constitution of India?

| Responses   | No. of Persons | Per centage   |
|---|----------------|---------------|
| <b>Yes, religions can impose reasonable restrictions over and above the Constitution.</b> | <b>74</b>      | <b>19.95%</b> |
| <b>No, Constitution provides for fundamental rights and duties and it must be upheld.</b> | <b>283</b>     | <b>76.28%</b> |
| <b>Not sure</b>   | <b>13</b>      | <b>3.50%</b>  |
| <b>other</b>  | <b>1</b>       | <b>0.27%</b>  |
| <b>Total Responses</b>  | <b>371</b>     | <b>100%</b>   |

Table 8.9 – Data showing response to question no. – 2. *Source:* Author Compilation

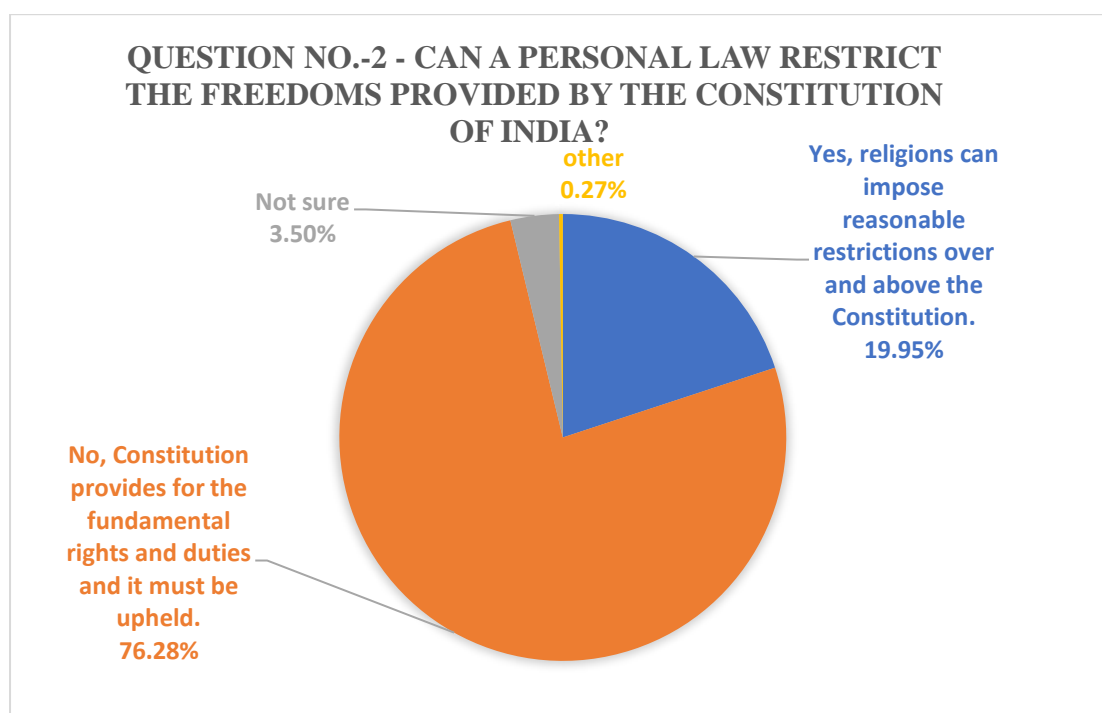


Figure 8.9 – Data showing response to question no. – 2. *Source:* Author Compilation

**Analysis of responses:** - Out of 371 participants, 283 persons (76.28%) agreed that the Indian Constitution provides for fundamental rights and duties which must be upheld. Whereas 74 persons (19.95%) agreed that religion is supreme and it can impose restrictions over and above the Constitution. Other 14 persons (3.87%) were either not sure or had a different view on this issue.

### 8.10 Question No.- 3

Is it the obligation of the State (legislation & Judiciary) to contribute to the protection of human rights while making intrusion into personal laws?

| Responses  | No. of Persons | Percentage  |
|--|----------------|-------------|
| Yes, the State is the caretaker of fundamental rights and can enact laws for social reformation and empowerment of any suppressed community. | 311            | 83.83%      |
| No, personal laws are covered under religious freedom.   | 33             | 8.89%       |
| Not sure   | 25             | 6.74%       |
| other  | 2              | 0.54%       |
| <b>Total Responses</b>   | <b>371</b>     | <b>100%</b> |

Table 8.10 – Data showing response to question no. – 3. *Source:* Author Compilation

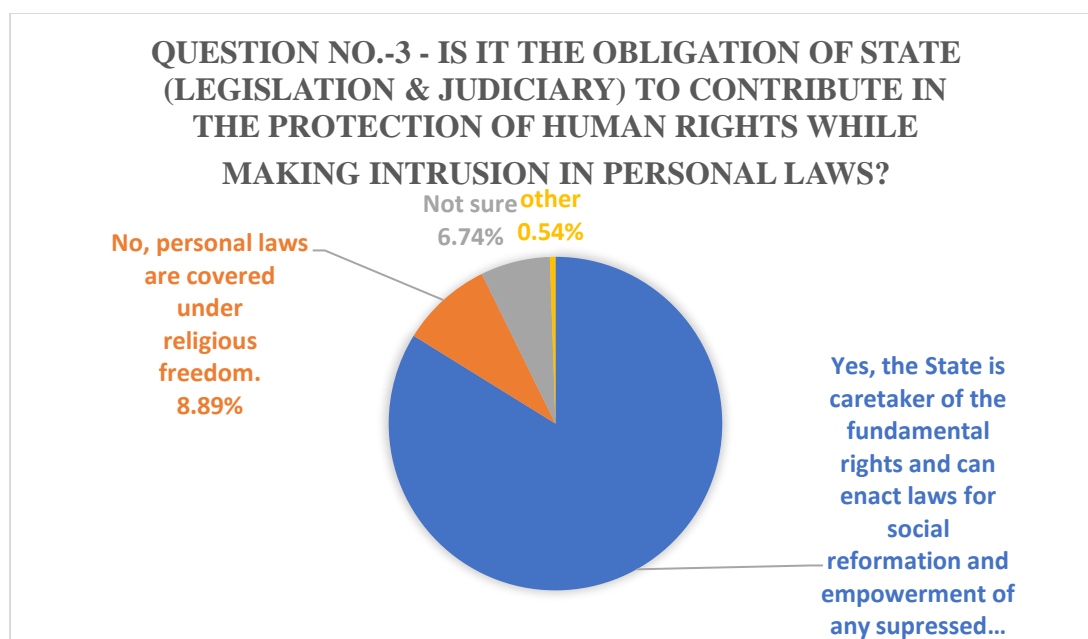


Figure 8.10 – Data showing response to question no. – 3. *Source:* Author Compilation

**Analysis of responses:** - Out of 371 participants, 311 persons (83.83%) agreed that the State is the caretaker of fundamental rights and can enact laws for social reformation and empowerment of any suppressed community. Whereas 33 persons (8.89%) have told that personal laws are covered under religious freedom and the State should not interfere in personal laws. 27 persons (7.28%) were either not sure or had a different view on this issue.



### 8.11 Question No.- 4

Whatever is declared as illegal or sin/ immoral in religious scriptures, cannot be held valid in religious customs or practices. Do you agree with this statement?

| Responses   | No. of Persons | Per centage |
|---|----------------|-------------|
| Yes, religious scriptures are the main source of personal laws. Therefore, religious customs and practices cannot run contrary to the religious scriptures. | 281            | 75.74%      |
| No, religious customs or practices, being followed by immemorable times, should be held valid.  | 40             | 10.78%      |
| Not sure  | 40             | 10.78%      |
| other   | 10             | 2.70%       |
| <b>Total Responses</b>  | <b>371</b>     | <b>100%</b> |

Table 8.11 – Data showing response to question no. – 4. *Source: Author Compilation*

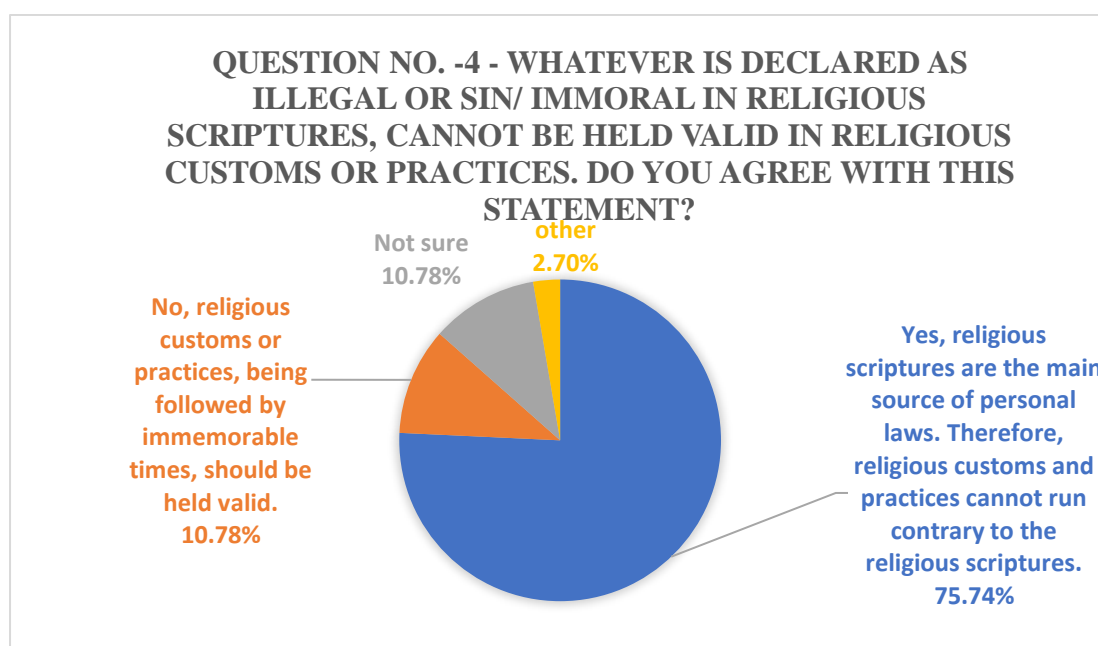


Figure 8.11 – Data showing response to question no. – 4. *Source: Author Compilation*

**Analysis of responses:** - Out of 371 participants, 281 persons (75.74%) agreed that religious scriptures are the main source of personal laws, therefore religious customs and practices cannot run contrary to the religious scriptures. Whereas 40 persons (10.78%) have a view that religious customs and practices are celebrated and followed by immemorable times, hence these practices and customs get implied the sanctity of the society, so these customs and practices should be protected under religious freedom. Other 50 persons (13.48%) were either not sure or had a different view on this issue.

One person said that while legislating and intruding into personal laws, the State should adopt a balanced approach and must not override another personal law.

One person said that religious scriptures may be logical for practising any traditional custom, but due to advancement in technology and change in the standard of living, some of these customs and practices become orthodox and needs to be updated from time to time.

### 8.12 Question No. – 5

The Bengal Sati Regulation Act banned the Sati practice in British India.

Do you agree that the Act restricted the practice of Sati afterwards and improved the social status of women?

| Responses  | No. of Persons | Percentage |
|--|----------------|------------|
| Yes, State enacted Bengal Sati Regulation Act improved the social status of women. | 331            | 89.22%     |
| No, this Act has no contribution in improving the social status of women.          | 19             | 5.12%      |
| Not sure   | 19             | 5.12%      |
| other  | 2              | 0.54%      |
| Total Responses  | 371            | 100%       |

Table 8.12 (a) – Data showing response to question no. – 5. *Source: Author Compilation*

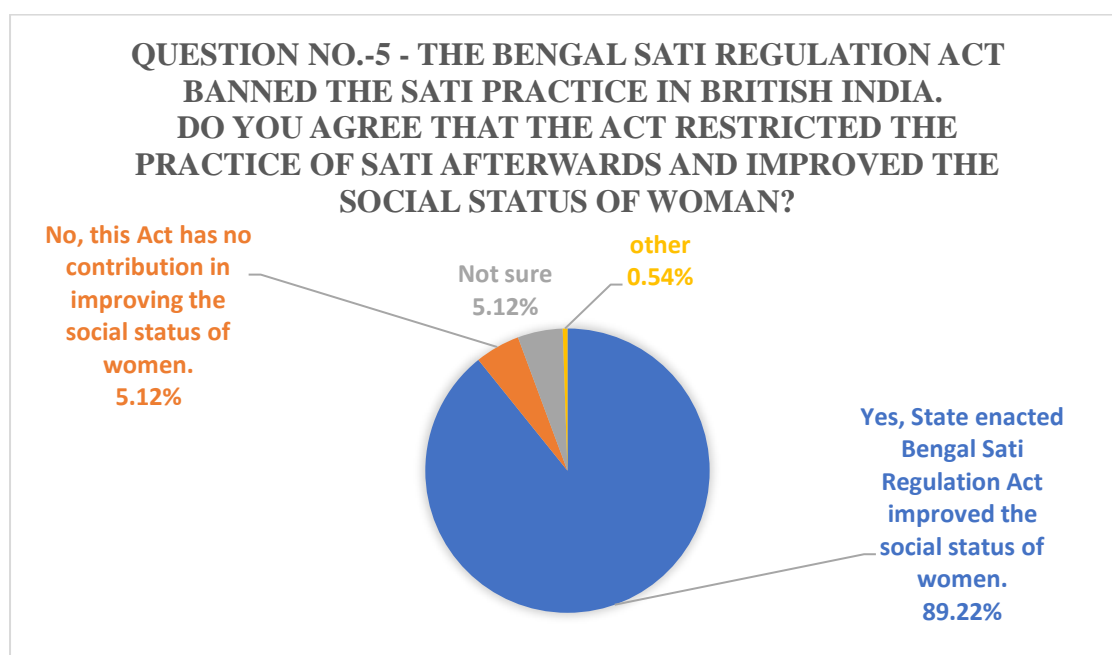


Figure 8.12 (a) – Data showing response to question no. – 5. *Source: Author Compilation*

| Gender      | Sum of Yes, State enacted the Bengal Sati Regulation Act to improve the social status of women. | Sum of No, this Act has no contribution to improving the social status of women. | Sum of Not Sure | Sum of Other | Total |
|-------------|---|--|-----------------|--------------|-------|
| Female      | 152   | 7  | 14              | 1            | 174   |
| Male        | 177   | 12   | 4               | 1            | 194   |
| Other       | 2   | 0  | 1               | 0            | 3     |
| Grand Total | 330   | 19   | 19              | 2            | 371   |

Table 8.12 (b) – Gender-wise data (in numbers) showing response to question no.-5. *Source: Author Compilation*

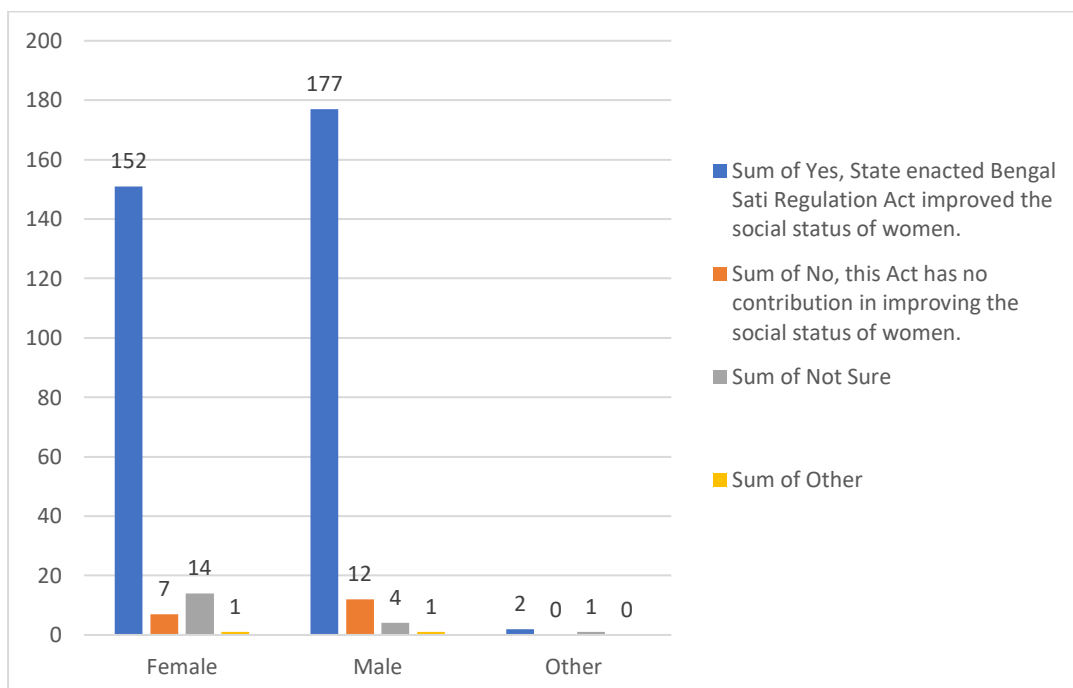


Figure 8.12 (b) – Gender-wise data (in numbers) showing response to question no. – 5. *Source: Author Compilation*

**Analysis of responses:** - Out of 371 participants, 331 persons (89.22%) agreed that State enacted Bengal Sati Regulation Act contributes to the improvement of the social status of women, whereas 19 persons (5.12%) have told that this Act has no contribution in improving the social status of women. Other 21 persons (5.66%) were either not sure or had a different view on this issue.

One person said that the enactment of the Bengal Sati Regulation Act was just an initiative on the path of social advancement of women's status, it alone is not sufficient for the social reformation of women's status in society.

On the same issue, another person said that "a law on paper cannot entirely change the mindset of the people. It can prohibit something and initiates a gradual change, but it needs some other corrective measures to accomplish the main objective and change in one's conception and ideology is the subjective matter".

Out of 371 participants, 174 persons were female and 194 persons were male. Out of which, 152 female participants and 177 male participants agreed that State enacted Bengal Sati Regulation Act improved the social status of women.

### 8.13 Question No. – 6

Do you agree that the ban on instant triple talaq will be helpful to improve the social status of women?

| Responses   | No. of Persons | Percentage  |
|---|----------------|-------------|
| Yes, State intervention in abolishing instant triple talaq will be helpful to improve the social status of women. | 321            | 86.52%      |
| No, State intervention in such matters violates religious freedom.  | 31             | 8.36%       |
| Not sure  | 17             | 4.58%       |
| other   | 2              | 0.54%       |
| <b>Total Responses</b>  | <b>371</b>     | <b>100%</b> |

Table 8.13 (a) – Data showing response to question no. – 6. *Source: Author Compilation*

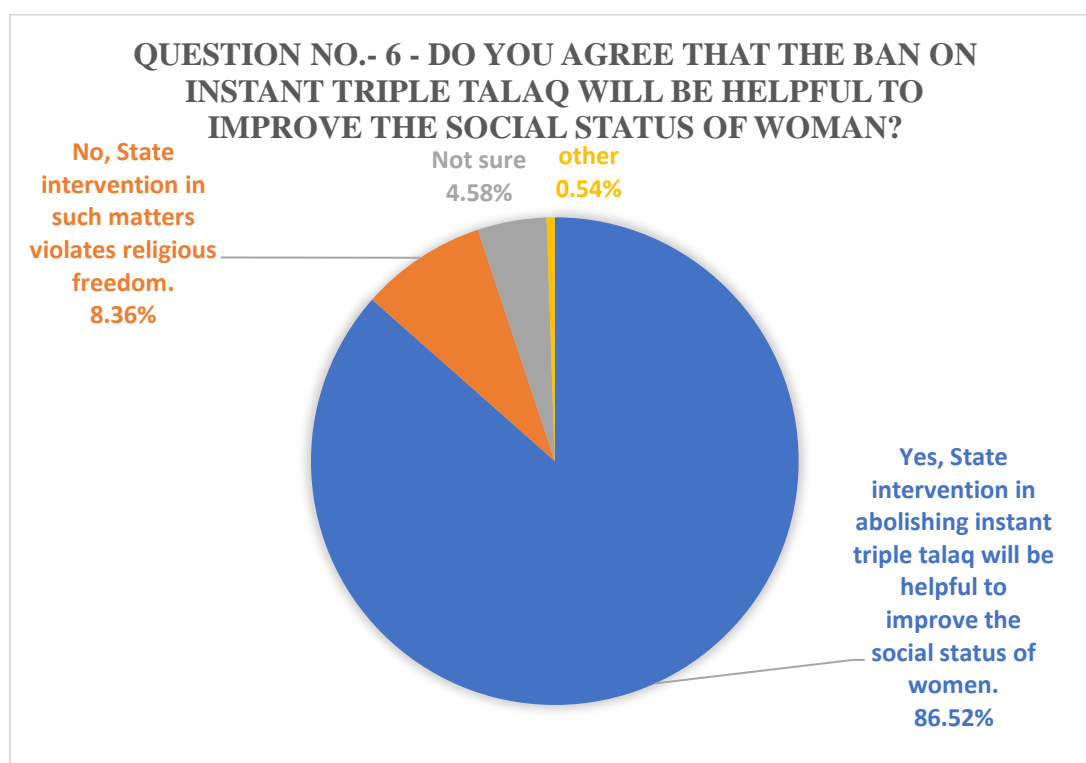


Figure 8.13 (a) – Data showing response to question no. – 6. *Source: Author Compilation*

| Religion     | Yes, State intervention in abolishing instant triple talaq will be helpful to improve the social status of women. | No, State intervention in such matters violates religious freedom. | Not Sure  | Others   | Total      |
|--------------|---|--|-----------|----------|------------|
| Buddhist     | 3   | 1  | 0         | 0        | 4          |
| Christian    | 13  | 4  | 0         | 0        | 17         |
| Hindu        | 121   | 3  | 10        | 0        | 134        |
| others       | 17  | 2  | 0         | 0        | 19         |
| Jain         | 18  | 1  | 1         | 0        | 20         |
| Jew          | 4   | 0  | 0         | 0        | 4          |
| Muslim       | 58  | 16   | 0         | 1        | 75         |
| Parsi        | 1   | 0  | 0         | 0        | 1          |
| Sikh         | 86  | 4  | 6         | 1        | 97         |
| <b>Total</b> | <b>321</b>  | <b>31</b>  | <b>17</b> | <b>2</b> | <b>371</b> |

Table 8.13 (b) – Religion-wise data (in numbers) showing response to question no. – 6. Source: Author Compilation

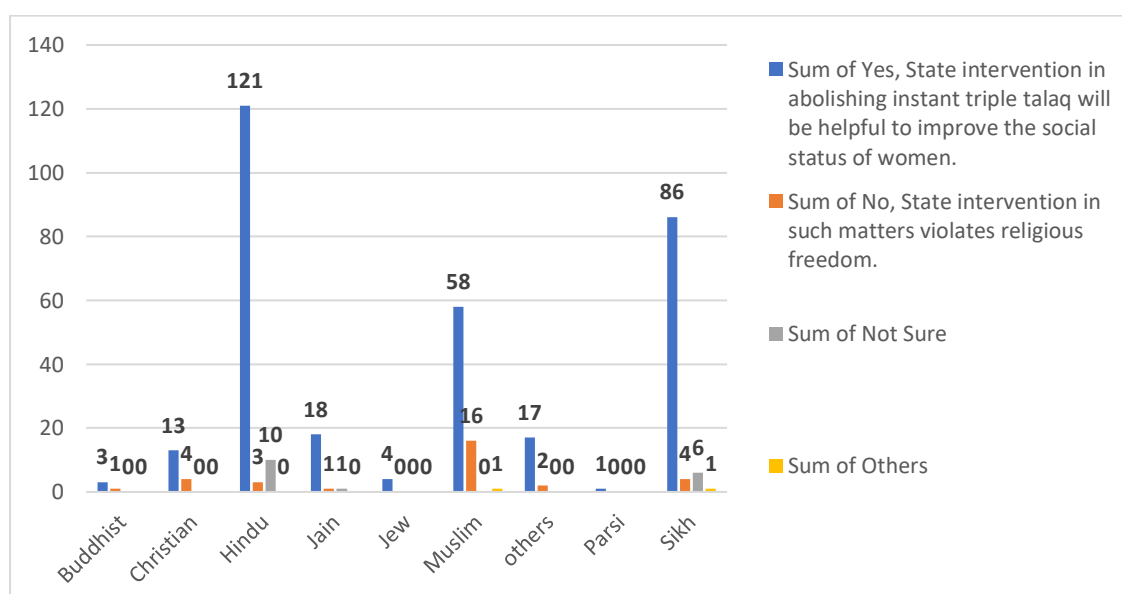
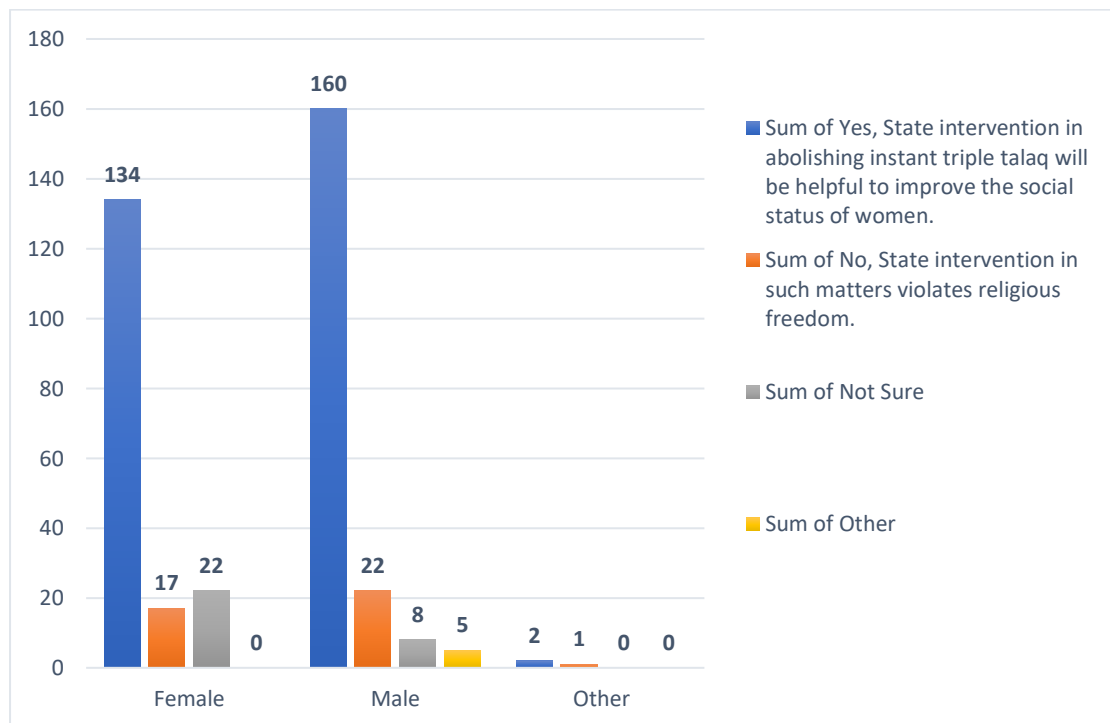


Figure 8.13 (b) – Religion-wise data (in numbers) showing response to question no. – 6. Source: Author Compilation

| Gender       | Yes, State intervention in abolishing instant triple talaq will be helpful to improve the social status of women. | No, State intervention in such matters violates religious freedom. | Not Sure  | Other    | Total      |
|--------------|---|--|-----------|----------|------------|
| Male         | 160   | 22   | 8         | 5        | 195        |
| Female       | 134   | 17   | 22        | 0        | 173        |
| Other        | 2   | 1  | 0         | 0        | 3          |
| <b>Total</b> | <b>296</b>  | <b>40</b>  | <b>30</b> | <b>5</b> | <b>371</b> |

**Table 8.13 (c) – Gender-wise data (in numbers) showing response to question no. – 6. Source: Author Compilation**



**Figure 8.13 (c) – Gender-wise data (in numbers) showing response to question no. – 6. Source: Author Compilation**



**Analysis of responses:** - Out of 371 participants, 321 persons (86.52%) agreed that State intervention in abolishing triple talaq will be helpful to improve the social status of women, whereas 31 persons (8.36%) have told that State intervention in such matters violates religious freedom and the State should not interfere in such matters. Other 19 persons (5.12%) were either not sure or had a different view on this issue. It has been observed that 16 persons out of 31 persons, who were holding the view that the State should not interfere in such matters, were Muslims and the total number of Muslim participants was 75 in the survey. On the contrary side, 134 Hindu persons took participated in the survey and only 3 persons hold the view that the State should not interfere in such matters and 121 persons agreed that abolishing triple talaq by State Act will contribute to the improvement of the social status of women.

On the issue of triple talaq, one person said that only time will prove the significance of the Supreme Court judgement & State legislation that has abolished triple talaq. One another person said that instant triple talaq is nowhere mentioned in the Holy Quran. He believes that the Holy Quran is the only authentic Islamic scripture and in Islam, nothing is against the moral values of the society. People have misinterpreted and misunderstood the texts of the Holy Quran and blended the traditional customs for their personal benefit only. The customs or traditions followed by the people but not mentioned in the Holy Quran have no sanctity or authenticity from the Holy Quran and if these customs or practices contravene the provisions of the Constitution, then these customs or practices shall be held unconstitutional.

### 8.14 Question No. – 7

NIKAH HALALA\* is a recommended practice in Islam. Do you agree that the State should impose a ban on the practice of NIKAH HALALA? (\* NIKAH HALALA is a practice in which a woman, after being divorced by triple talaq, marries another man, consummates the marriage and gets divorced again in order to be able to remarry her former husband).

| Responses   | No. of Persons | Percentage |
|---|----------------|------------|
| Yes, the practice of Nikah Halala is derogatory for women and the State should impose a ban on this practice. | 295            | 79.51%     |
| No, State intervention in such matters violates religious freedom.  | 39             | 10.51%     |
| Not sure  | 31             | 8.36%      |
| other   | 6              | 1.62%      |
| Total Responses   | 371            | 100%       |

Table 8.14 (a) – Data showing response to Question no. – 7. Source: Author Compilation

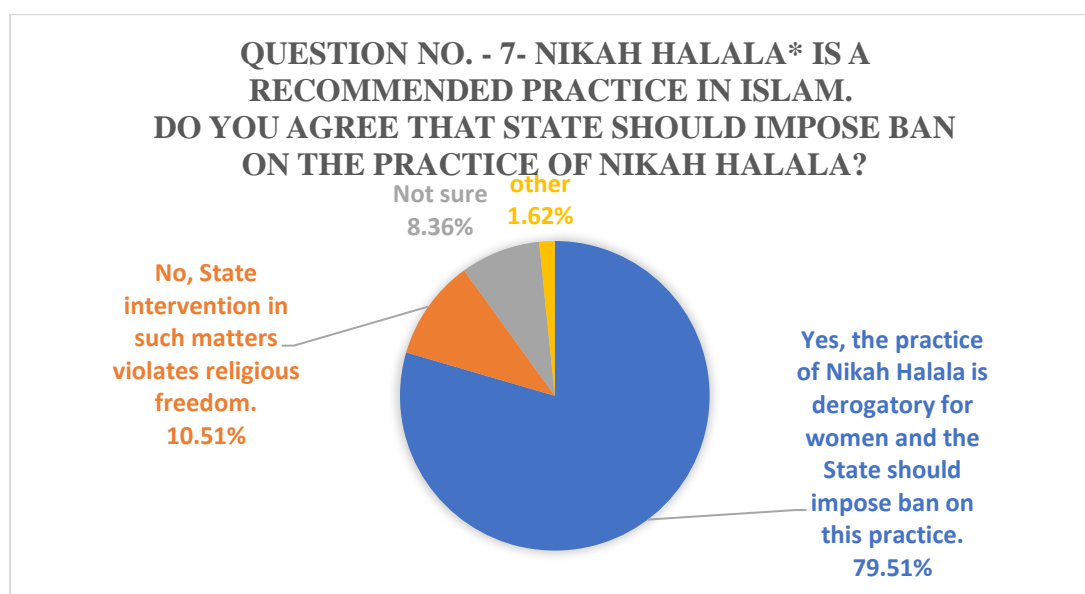
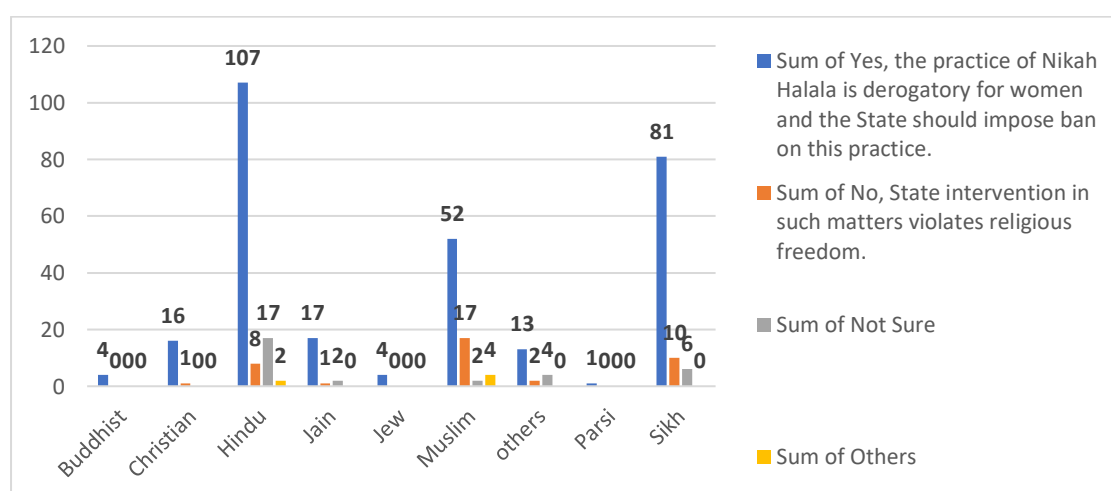


Figure 8.14 (a) – Data showing response to Question no. – 7. Source: Author Compilation

| Religion     | Yes, the practice of Nikah Halala is derogatory for women and the State should impose a ban on this practice. | No, State intervention in such matters violates religious freedom. | Not Sure  | Others   | Total      |
|--------------|---|--|-----------|----------|------------|
| Buddhist     | 4   | 0  | 0         | 0        | 4          |
| Christian    | 16  | 1  | 0         | 0        | 17         |
| Hindu        | 107   | 8  | 17        | 2        | 134        |
| others       | 13  | 2  | 4         | 0        | 19         |
| Jain         | 17  | 1  | 2         | 0        | 20         |
| Jew          | 4   | 0  | 0         | 0        | 4          |
| Muslim       | 52  | 17   | 2         | 4        | 75         |
| Parsi        | 1   | 0  | 0         | 0        | 1          |
| Sikh         | 81  | 10   | 6         | 0        | 97         |
| <b>Total</b> | <b>295</b>  | <b>39</b>  | <b>31</b> | <b>6</b> | <b>371</b> |

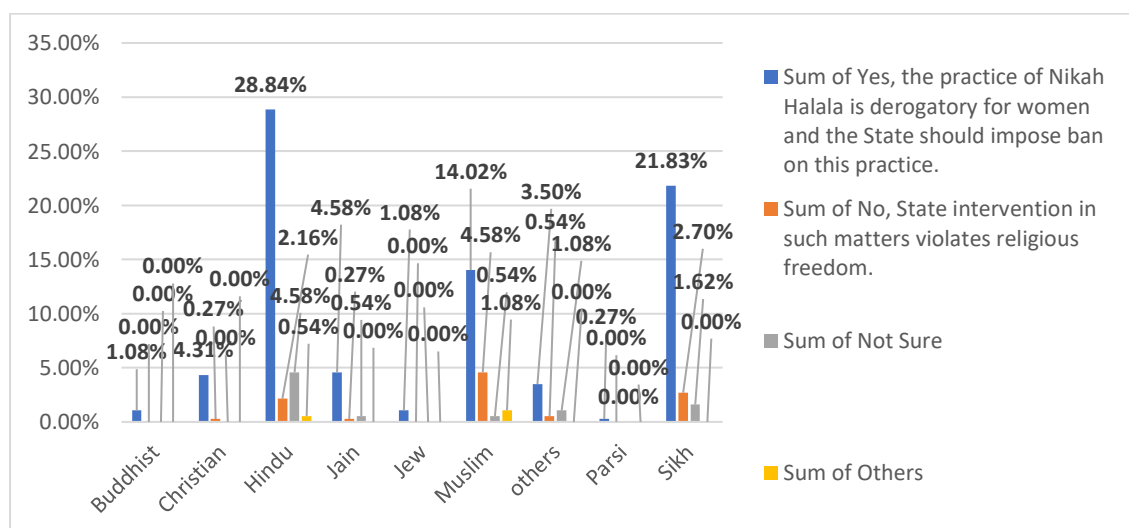
**Table 8.14 (b) – Religion-wise data (in numbers) showing response to Question no.-7. Source: Author Compilation**



**Figure 8.14 (b) – Religion-wise data (in numbers) showing response to Question no. – 7. Source: Author Compilation**

| Religion     | Yes, the practice of Nikah Halala is derogatory for women and the State should impose a ban on this practice. | No, State intervention in such matters violates religious freedom. | Not Sure     | Others       | Total          |
|--------------|---|--|--------------|--------------|----------------|
| Buddhist     | 1.08%   | 0.00%  | 0.00%        | 0.00%        | 1.08%          |
| Christian    | 4.31%   | 0.27%  | 0.00%        | 0.00%        | 4.58%          |
| Hindu        | 28.84%  | 2.16%  | 4.58%        | 0.54%        | 36.12%         |
| others       | 3.50%   | 0.54%  | 1.08%        | 0.00%        | 5.12%          |
| Jain         | 4.58%   | 0.27%  | 0.54%        | 0.00%        | 5.39%          |
| Jew          | 1.08%   | 0.00%  | 0.00%        | 0.00%        | 1.08%          |
| Muslim       | 14.02%  | 4.58%  | 0.54%        | 1.08%        | 20.22%         |
| Parsi        | 0.27%   | 0.00%  | 0.00%        | 0.00%        | 0.27%          |
| Sikh         | 21.83%  | 2.70%  | 1.62%        | 0.00%        | 26.15%         |
| <b>Total</b> | <b>79.51%</b>   | <b>10.51%</b>  | <b>8.36%</b> | <b>1.62%</b> | <b>100.00%</b> |

**Table 8.14 (c) – Religion-wise data (in percentile) showing response to Question no. – 7. Source: Author Compilation**



**Figure 8.14 (c) – Religion-wise data (in percentile) showing response to Question no. – 7. Source: Author Compilation**

**Analysis of responses:** - Out of 371 participants, 295 persons (79.51%) agreed that the practice of Nikah Halala is derogatory for women and the State should impose a ban on this practice, whereas 39 persons (10.51%) have told that the State intervention in such matters violates religious freedom. Other 37 persons (9.98%) were either not sure or had a different view on this issue. In this survey, the total number of Muslim participants was 75 persons (20.22%), out of which 52 persons (14.02%) were in favour of abolishing Nikah Halala, whereas 17 persons (4.58%) hold the view that the State should not interfere in such matters and other 6 persons (1.62%) were either not sure or had a different view on this issue. On the Contrary side, 134 (36.12%) persons were Hindu participants, out of which 107 (28.84%) persons were in favour of abolishing of the practice of Nikah Halala, 8 (2.16%) persons were holding the view that the State should not interfere in such matters and the other 19 (5.12%) persons were either not sure or had a different view on this issue.

On the issue of Nikah halala, this survey collects the mix responses from the people. One person said that there is no such concept written in the Holy Quran and one person said that Nikah-Halala is the only way for a woman that is recommended by Allah to reconcile with her former husband. Some persons said that instant triple talaq and nikah halala is the most controversial customs in Islam and these customs are largely disapproved by Muslim research scholars also.

One person explained the purpose of Nikah-Halala in his own words. He said that in Islam, Nikah is a contract and doesn't put any limitation or condition upon the contracting parties. If the couple does not agree to live together, they can apart by themselves, the man has the right to give talaq in three stages in three lunar months which is manipulated as 'INSTANT TRIPLE TALAQ' and the woman has the right to give talaq to her husband which is called as 'KHULA'. The man has to wait for 3 stages; 1<sup>st</sup> stage is separating the bed, 2<sup>nd</sup> stage sending her to her father's house and even if no motion of settlement is initiated or remain unsuccessful after the efforts of both families, he has the right to give her talaq and this is the 3<sup>rd</sup> stage where the pronouncement of talaq becomes irrecoverable. But the woman has the right to give the talaq to her husband in one go. The concept of Halala was initiated to reconcile the former husband and wife in those cases where even after taking divorced from

their first marriage they were not happy in their second marriage also that has happened with another person. Thus, the concept of Halala comes into the picture after the failure of the second marriage as a better option for reconciliation with the former husband rather than marrying a third person. The person further explains that this custom is also manipulated by some persons for their lust or wrong intentions or some illiterate persons take this custom in the wrong direction. After the failure of 1<sup>st</sup> marriage, if the couple repents upon their actions and wants to reconcile, they can do so freely and there is no such concept of Nikah Halala as a limitation in marrying again with each other. This person believes that in Islam, nothing is against the woman, man and society, but the followers are not following it in the right way.

One person said that the custom of Halala was started in ancient Arab culture after the establishment of the Islamic Riyasat of 4<sup>th</sup> Khalifa Islam Hajrat Moula Ali. Truly, Halala is not related to Islam and it is sinful. Some ill-intention people used this term to defame the Islamic culture.

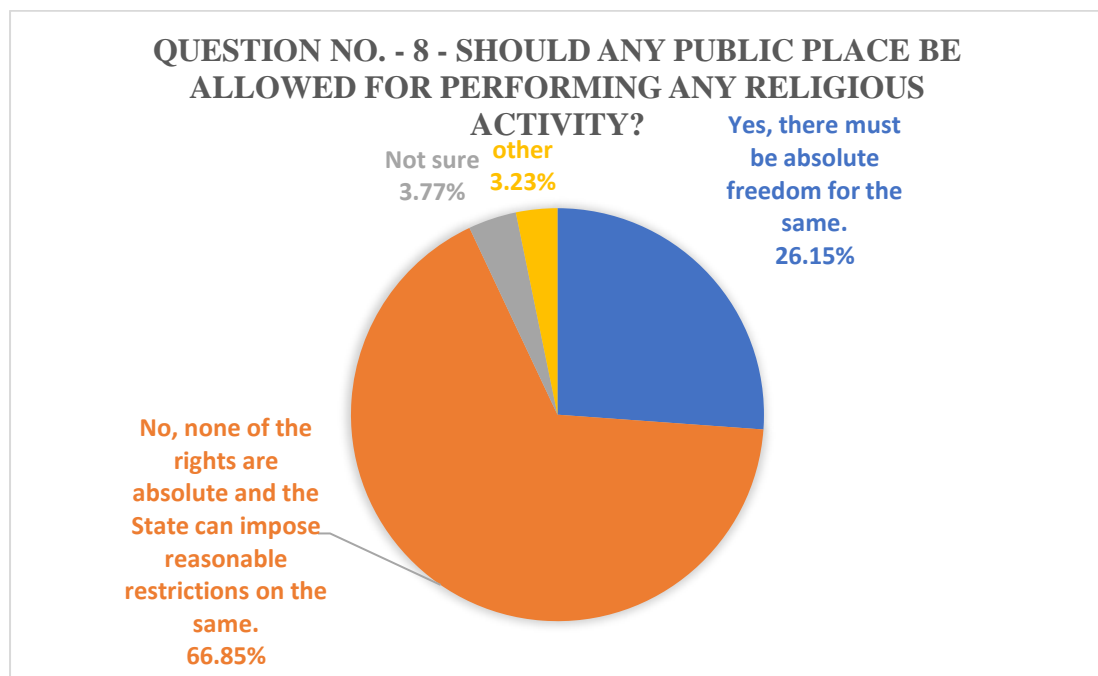
One person said that providing education, a better economy and liberalization are the best tools for liberating from these sinful practices.

**8.15 Question No. – 8**

Should any public place be allowed for performing any religious activity?

| Responses  | No. of Persons | Per centage   |
|--|----------------|---------------|
| <b>Yes, there must be absolute freedom for the same.</b>   | <b>97</b>      | <b>26.15%</b> |
| <b>No, none of the rights are absolute and the State can impose reasonable restrictions on the same.</b> | <b>248</b>     | <b>66.85%</b> |
| <b>Not sure</b>  | <b>14</b>      | <b>3.77%</b>  |
| <b>other</b>   | <b>12</b>      | <b>3.23%</b>  |
| <b>Total Responses</b>   | <b>371</b>     | <b>100%</b>   |

**Table 8.15 – Data showing responses to Question no. – 8. Source: Author Compilation**



**Figure 8.15 – Data showing responses to Question no. – 8. Source: Author Compilation**

**Analysis of responses:** - Out of 371 participants, 248 persons (66.85%) agreed that none of the rights is absolute and the State can impose reasonable restrictions on the same, whereas 97 persons (26.15%) hold the view that there must be absolute freedom for the same. Other 26 persons (7.00%) were either not sure or had a different view on this issue.

On the issue of the performance of religious activities in public places, one person said that he believes religious activities may be performed in public places nobody is authorized to obstruct other persons or violate the fundamental rights of other persons. A balanced approach should be adopted and the State may allot a particular area for the performance of such activities or the religious institutions may limit to their holy places for the performance of such activities upon which the persons of other religions should have no objection.

One person said that if the religious practice is hurting somebody's sentiments, then the State may put a ban on it. Another person said that Constitutional morality and the spirit of secularism must be kept in mind while allowing religious activities in public places.

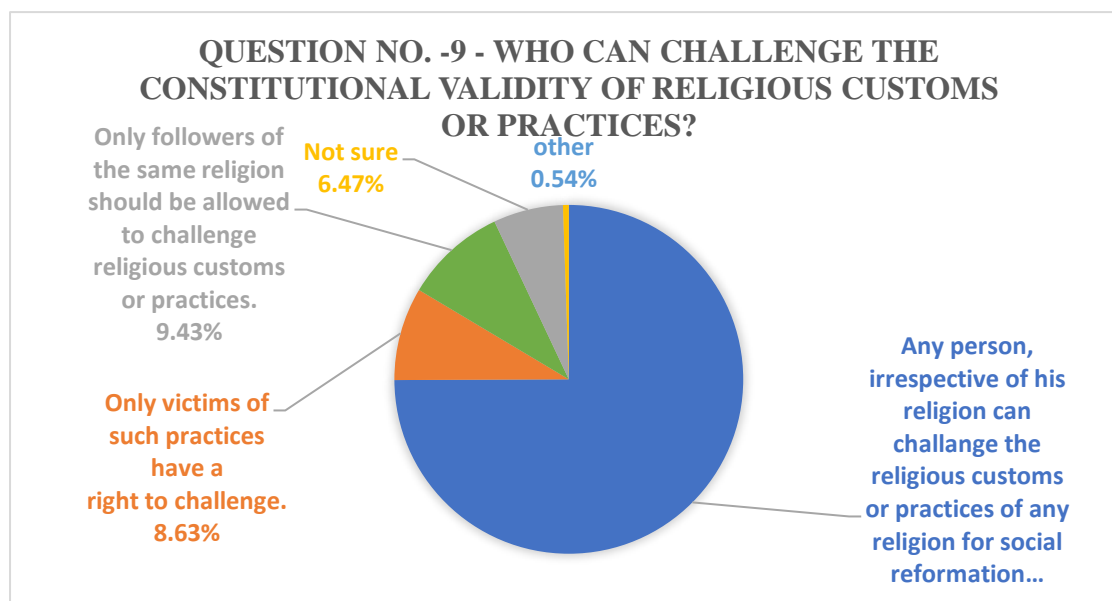


### 8.16 Question No. – 9

Who can challenge the constitutional validity of religious customs or practices?

| Responses  | No. of Persons | Per centage |
|--|----------------|-------------|
| Any person, irrespective of his religion can challenge the religious customs or practices of any religion for social reformation purposes. | 278            | 74.93%      |
| Only victims of such practices have a right to challenge.  | 32             | 8.63%       |
| Only followers of the same religion should be allowed to challenge religious customs or practices.   | 35             | 9.43%       |
| Not sure   | 24             | 6.47%       |
| other  | 2              | 0.54%       |
| <b>Total Responses</b>   | <b>371</b>     | <b>100%</b> |

**Table 8.16 – Data showing responses to Question no. – 9. Source: Author Compilation**



**Figure 8.16 – Data showing responses to Question no. – 9. Source: Author Compilation**

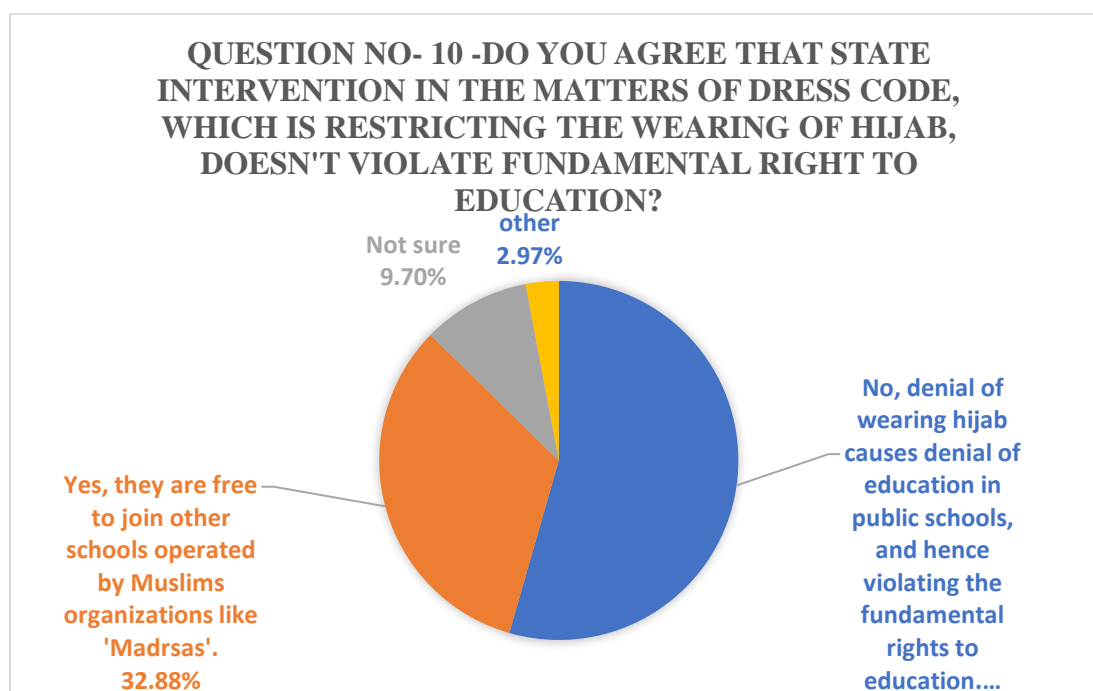
**Analysis of responses:** - Out of 371 participants, 278 persons (74.93%) hold the view that any person irrespective of his religion can challenge the religious customs or practices of any religion for social reformation purposes. 32 persons (8.63%) hold the view that only victims have such a right to challenge any religious customs and 35 persons (9.43%) hold the view that only followers of the same religion should be allowed to challenge the religious customs or practices of their religion. Other 26 persons (7.01%) were either not sure or had a different view on this issue.

**8.17 Question No. – 10**

Do you agree that State intervention in the matters of dress code, which is restricting the wearing of the hijab, doesn't violate the fundamental right to education?

| Responses   | No. of Persons | Per centage |
|---|----------------|-------------|
| No, the denial of wearing hijab causes the denial of education in public schools, hence violating the fundamental right to education. | 202            | 54.45%      |
| Yes, they are free to join other schools operated by Muslim organizations like 'Madrsas'.   | 122            | 32.88%      |
| Not sure  | 36             | 9.70%       |
| other   | 11             | 2.97%       |
| <b>Total Responses</b>  | <b>371</b>     | <b>100%</b> |

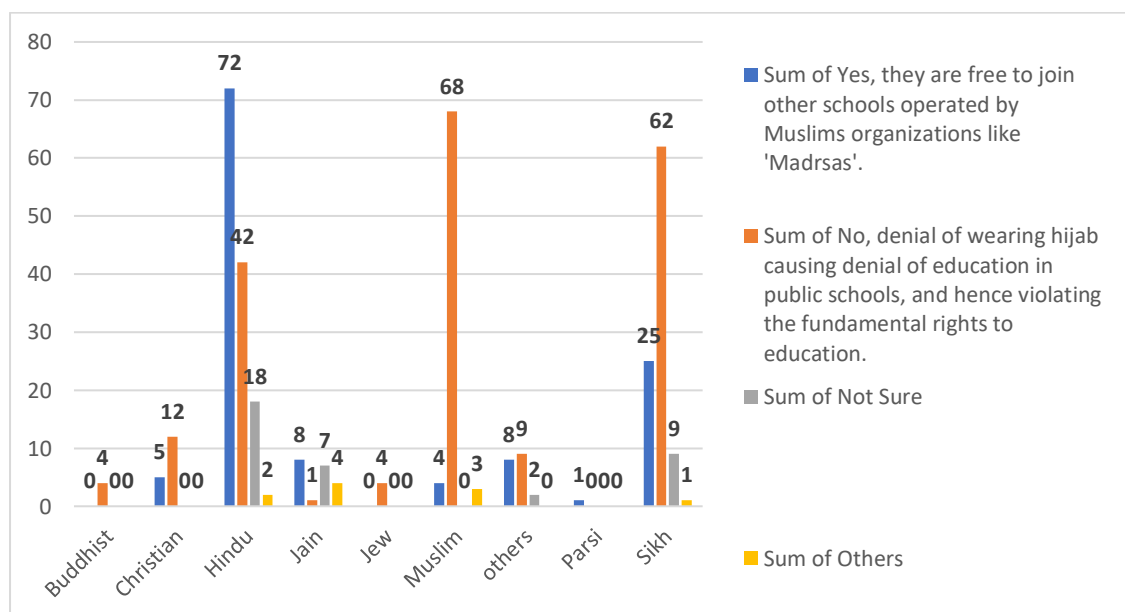
**Table 8.17 (a)– Data showing responses to Question no. – 10. Source: Author Compilation**



**Figure 8.17 (a)– Data showing responses to Question no. – 10. Source: Author Compilation**

| Religion     | Yes, they are free to join other schools operated by Muslim organizations like 'Madrasas'. | No, the denial of wearing hijab causes a denial of education in public schools, hence violating the fundamental right to education. | Not Sure | Others | Total      |
|--------------|--|---|----------|--------|------------|
| Buddhist     | 0  | 4   | 0        | 0      | 4          |
| Christian    | 5  | 12  | 0        | 0      | 17         |
| Hindu        | 72   | 42  | 18       | 2      | 134        |
| others       | 8  | 9   | 2        | 0      | 19         |
| Jain         | 8  | 1   | 7        | 4      | 20         |
| Jew          | 0  | 4   | 0        | 0      | 4          |
| Muslim       | 4  | 68  | 0        | 3      | 75         |
| Parsi        | 1  | 0   | 0        | 0      | 1          |
| Sikh         | 25   | 62  | 9        | 1      | 97         |
| <b>Total</b> |  |   |          |        | <b>371</b> |

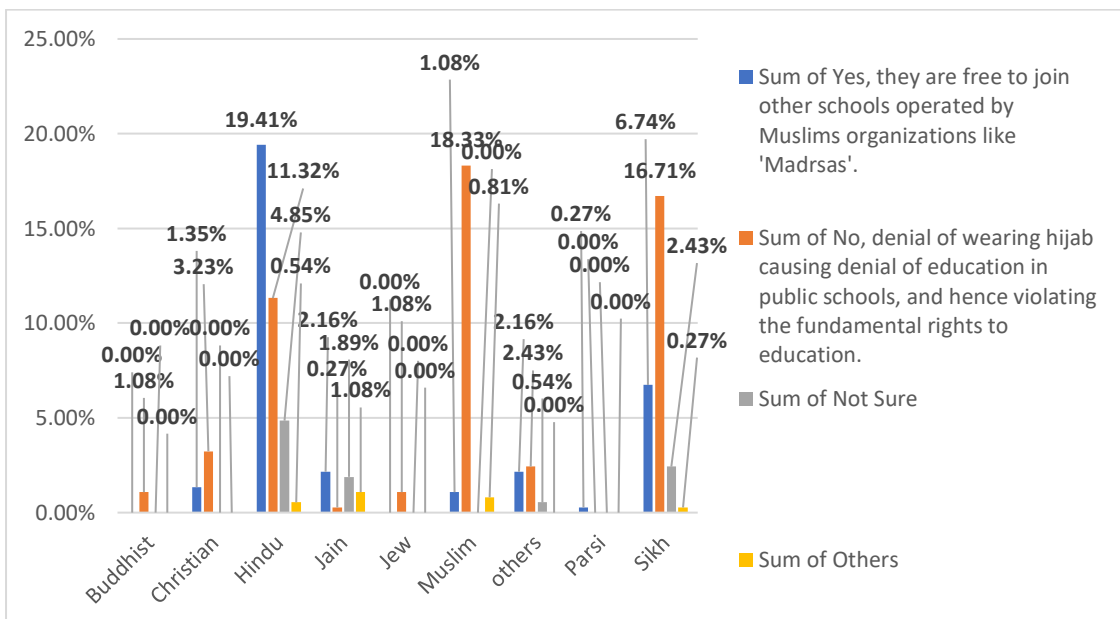
**Table 8.17 (b) – Religion-wise data (in numbers) showing responses to Question no. – 10. Source: Author Compilation**



**Figure 8.17 (b) – Religion-wise data (in numbers) showing responses to Question no. – 10. Source: Author Compilation**

| Religion     | Yes, they are free to join other schools operated by Muslim organizations like 'Madrasas'. | No, the denial of wearing hijab causes a denial of education in public schools, hence violating the fundamental right to education. | Not Sure     | Others       | Total          |
|--------------|--|---|--------------|--------------|----------------|
| Buddhist     | 0.00%  | 1.08%   | 0.00%        | 0.00%        | 1.08%          |
| Christian    | 1.35%  | 3.23%   | 0.00%        | 0.00%        | 4.58%          |
| Hindu        | 19.41%   | 11.32%  | 4.85%        | 0.54%        | 36.12%         |
| others       | 2.16%  | 2.43%   | 0.54%        | 0.00%        | 5.12%          |
| Jain         | 2.16%  | 0.27%   | 1.89%        | 1.08%        | 5.39%          |
| Jew          | 0.00%  | 1.08%   | 0.00%        | 0.00%        | 1.08%          |
| Muslim       | 1.08%  | 18.33%  | 0.00%        | 0.81%        | 20.22%         |
| Parsi        | 0.27%  | 0.00%   | 0.00%        | 0.00%        | 0.27%          |
| Sikh         | 6.74%  | 16.71%  | 2.43%        | 0.27%        | 26.15%         |
| <b>Total</b> | <b>33.15%</b>  | <b>54.45%</b>   | <b>9.70%</b> | <b>2.70%</b> | <b>100.00%</b> |

**Table 8.17 (c) – Religion-wise data (in percentile) showing responses to Question no. – 10. Source: Author Compilation**



**Figure 8.17 (c) – Religion-wise data (in percentile) showing responses to Question no. – 10. Source: Author Compilation**

**Analysis of responses:** - This question receives mixed responses from all the participants; hence it needs to be analyzed in deep. Out of 371 participants, 202 persons (54.45%) agreed that denial of wearing the Hijab causes denial of education in public schools and hence violates the fundamental right to education, whereas 122 persons (32.88%) hold the view that it doesn't violate the right to education and the students who wants to wear Hijab are free to join other schools operated by their community like 'Madrasas'. Other 47 persons (12.67%) were either not sure or had a different view on this issue.

In this issue, opponents are in good numbers and their views cannot be ignored. Some persons hold the view that public schools or institutions are not compelling to get admission to their institute, it is their own wish to join those institutes and it is not possible that they want to join a secular institute or school and also want to celebrate their religious customs or practices inside the institutions. The conclusion is that if one wants to join any secular institute or school for education or any other purpose, their secular/religion-neutral rules must subsist and no one can compel that institute for allowing religious freedom as their fundamental right.

On the issue of the Hijab, one person said that it should be left to the girls/ women themselves for their choice of what to wear or what not to wear and the State should not interfere. One person gave very significant remarks and said that a Hijab or any such kind of religious wearing should not be allowed for kids having age below 18 years in public institutions or schools. The person gives the logic behind this reasoning that kids below the age of 18 years have no rational power to decide such matters. They were born into a particularly religious family accidentally and they have no choice but to decide otherwise. Putting religious objects on kids by compulsion or under any influence is not the right thing. Due to their age, their consent doesn't matter to choose to wear a particular religious wearing.

One person said that the very purpose of religion and religious institutions should be maintaining peace in society and they should not create any such kind of nuisance. The rules of uniforms in public schools are made for creating equality for all children.

One person said that the purpose of the Hijab is to save hairs from dust, air, rain etc. Different people wear different styles of clothes like turban, chunni, hijab, dastaar, parna etc. This is not a big issue.

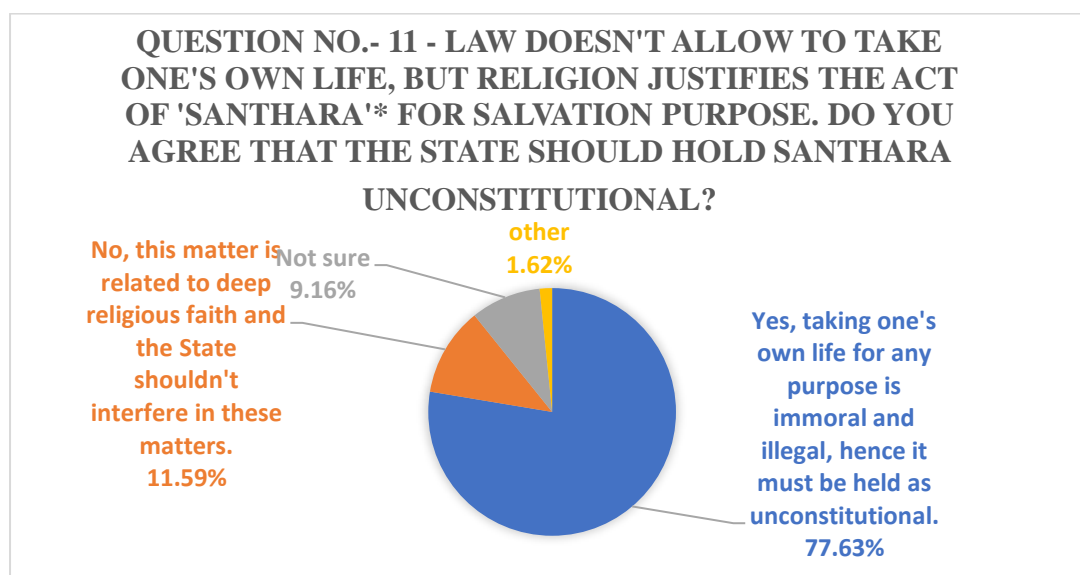
One person said that wearing Hijab makes you feel secure from ill-intended or mischievous persons. It is the protection provided by the Almighty. In all religions, people do different things to make their Lords happy. This one is our culture to cover and protect ourselves and for men, it is the same to lower their gaze while they walk. I don't feel burdened by wearing hijab and feel secure from the rest of the world. Also, it helps us to protect ourselves from pollution, so it is not a bad thing.

### 8.18 Question No. – 11

Law doesn't allow to take one's own life, but religion justifies the act of 'SANTHARA'\* for salvation purposes. Do you agree that the State should hold Santhara unconstitutional? (\*SANTHARA - It is a religious practice of voluntarily fasting to death by gradually reducing the intake of food and liquids. It is viewed in Jainism as the thinning of human passions and the body and another means of destroying rebirth-influencing karma by withdrawing all physical and mental activities).

| Responses  | No. of Persons | Per centage   |
|--|----------------|---------------|
| <b>Yes, taking one's own life for any purpose is immoral and illegal, hence it must be held as unconstitutional.</b> | <b>288</b>     | <b>77.63%</b> |
| <b>No, this matter is related to deep religious faith and the State shouldn't interfere in these matters.</b>        | <b>43</b>      | <b>11.59%</b> |
| <b>Not sure</b>  | <b>34</b>      | <b>9.16%</b>  |
| <b>other</b>   | <b>6</b>       | <b>1.62%</b>  |
| <b>Total Responses</b>   | <b>371</b>     | <b>100%</b>   |

**Table 8.18 (a)– Data showing responses to Question no. – 11. Source: Author Compilation**

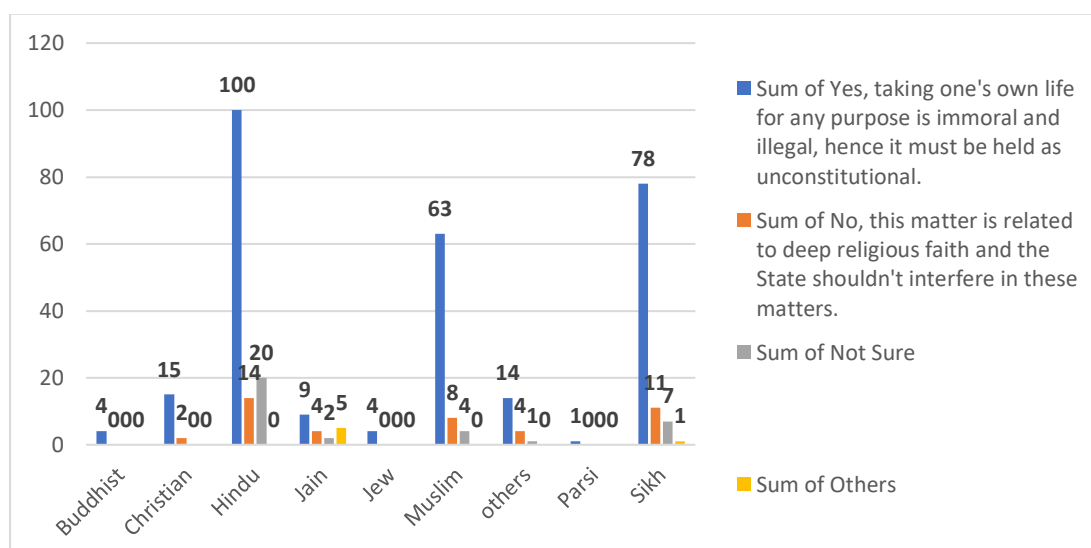


**Figure 8.18 (a)– Data showing responses to Question no. – 11. Source: Author Compilation**



| Religion           | Sum of Yes, taking one's own life for any purpose is immoral and illegal, hence it must be held as unconstitutional. | Sum of No, this matter is related to deep religious faith and the State shouldn't interfere in these matters. | Sum of Not Sure | Sum of Others | Total      |
|--------------------|--|---|-----------------|---------------|------------|
| Buddhist           | 4  | 0   | 0               | 0             | 4          |
| Christian          | 15   | 2   | 0               | 0             | 17         |
| Hindu              | 100  | 14  | 20              | 0             | 134        |
| Jain               | 9  | 4   | 2               | 5             | 20         |
| Jew                | 4  | 0   | 0               | 0             | 4          |
| Muslim             | 63   | 8   | 4               | 0             | 75         |
| others             | 14   | 4   | 1               | 0             | 19         |
| Parsi              | 1  | 0   | 0               | 0             | 1          |
| Sikh               | 78   | 11  | 7               | 1             | 97         |
| <b>Grand Total</b> | <b>288</b>   | <b>43</b>   | <b>34</b>       | <b>6</b>      | <b>371</b> |

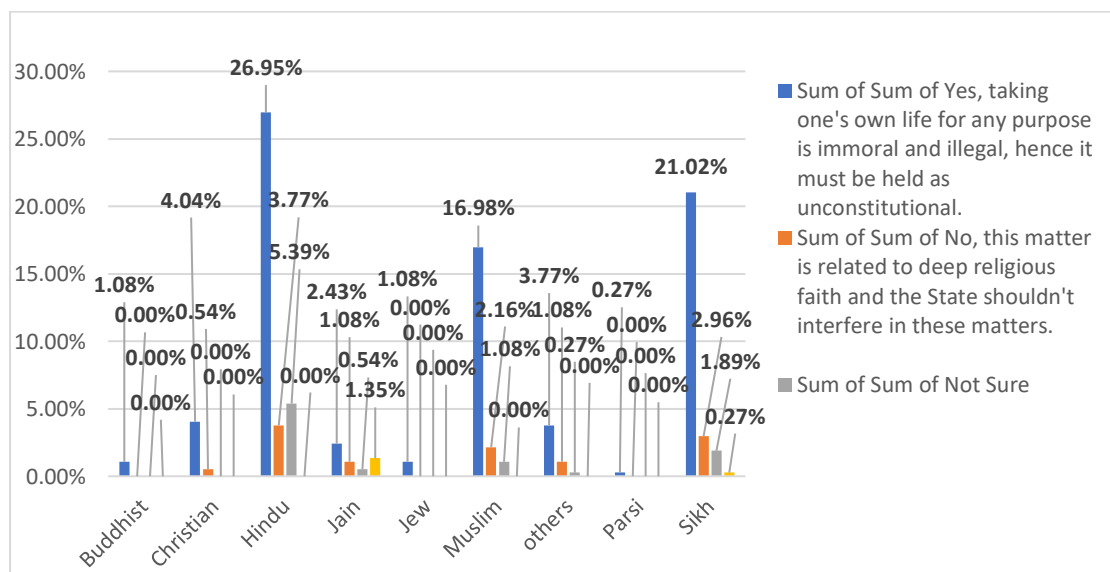
**Table 8.18 (b) – Religion-wise data (in numbers) showing responses to Question no. – 11. Source: Author Compilation**



**Figure 8.18 (b) – Religion-wise data (in numbers) showing responses to Question no. – 11. Source: Author Compilation**

| Religion           | Sum of Yes, taking one's own life for any purpose is immoral and illegal, hence it must be held as unconstitutional. | Sum of No, this matter is related to deep religious faith and the State shouldn't interfere in these matters. | Sum of Not Sure | Sum of Others | Total          |
|--------------------|--|---|-----------------|---------------|----------------|
| Buddhist           | 1.08%  | 0.00%   | 0.00%           | 0.00%         | 1.08%          |
| Christian          | 4.04%  | 0.54%   | 0.00%           | 0.00%         | 4.58%          |
| Hindu              | 26.95%   | 3.77%   | 5.39%           | 0.00%         | 36.12%         |
| Jain               | 2.43%  | 1.08%   | 0.54%           | 1.35%         | 5.39%          |
| Jew                | 1.08%  | 0.00%   | 0.00%           | 0.00%         | 1.08%          |
| Muslim             | 16.98%   | 2.16%   | 1.08%           | 0.00%         | 20.22%         |
| others             | 3.77%  | 1.08%   | 0.27%           | 0.00%         | 5.12%          |
| Parsi              | 0.27%  | 0.00%   | 0.00%           | 0.00%         | 0.27%          |
| Sikh               | 21.02%   | 2.96%   | 1.89%           | 0.27%         | 26.15%         |
| <b>Grand Total</b> | <b>77.63%</b>  | <b>11.59%</b>   | <b>9.16%</b>    | <b>1.62%</b>  | <b>100.00%</b> |

**Table 8.18 (c) – Religion-wise data (in percentile) showing responses to Question no. – 11. Source: Author Compilation**



**Figure 8.18 (c) – Religion-wise data (in percentile) showing responses to Question no. – 11. Source: Author Compilation**

**Analysis of responses:** - Out of 371 participants, 288 persons (77.63%) agreed that taking one's own life for any purpose is immoral and illegal, hence it must be held as unconstitutional. 43 persons (11.59%) hold the view that this matter is related to deep religious faith and the State shouldn't interfere in these matters. Other 40 persons (10.78%) were either not sure or had a different view on this issue.

This practice relates to a particular Jain community. There were 20 (5.39%) persons related to the Jain religion who took participated in this survey. 9 (2.43%) persons out of those 20 persons agreed that this practice should be banned, 4 (1.08%) persons hold the view that the State shouldn't interfere in such matters, the other 7 (1.89%) persons were either not sure or had a different view on this issue.

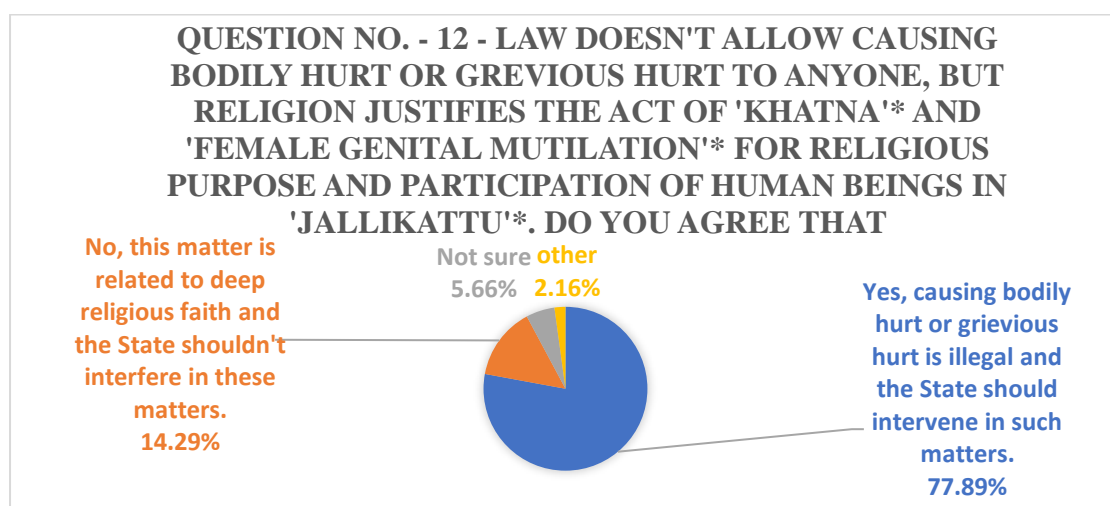
One person said that Santhara is not illegal, because prior permission is a must from the head of religion for taking Santhara and mostly Santhara is permitted to those persons who have no hope of recovery from illness. It is equal to passive euthanasia. But allowing such practices spread the wrong message the society and promote superstitious customs that have no ends or limits. Moreover, a religious leader is not an authority to allow somebody for sacrificing one's own life.

### 8.19 Question No. – 12

Law doesn't allow causing bodily hurt or grievous hurt to anyone, but religion justifies the act of 'KHATNA'\* and 'FEMALE GENITAL MUTILATION'\* for religious purposes and participation of human beings in 'JALLIKATTU'\*. Do you agree that the State should ban the practice of Khatna, Female Genital Mutilation and Jallikattu? (\*KHATNA is the recommended practice of male circumcision in Islamic culture; FEMALE GENITAL MUTILATION involves the partial or total removal of the external female genitalia; JALLIKATTU is a traditional event in which a bull is released into a crowd of people and the participants try to hold the hump for as long as possible to show the bravery).

| Responses  | No. of Persons | Per centage |
|--|----------------|-------------|
| Yes, causing bodily hurt or grievous hurt is illegal and the State should intervene in such matters.   | 289            | 77.89%      |
| No, this matter is related to deep religious faith and the State shouldn't interfere in these matters. | 53             | 14.29%      |
| Not sure   | 21             | 5.66%       |
| other  | 8              | 2.16%       |
| <b>Total Responses</b>   | <b>371</b>     | <b>100%</b> |

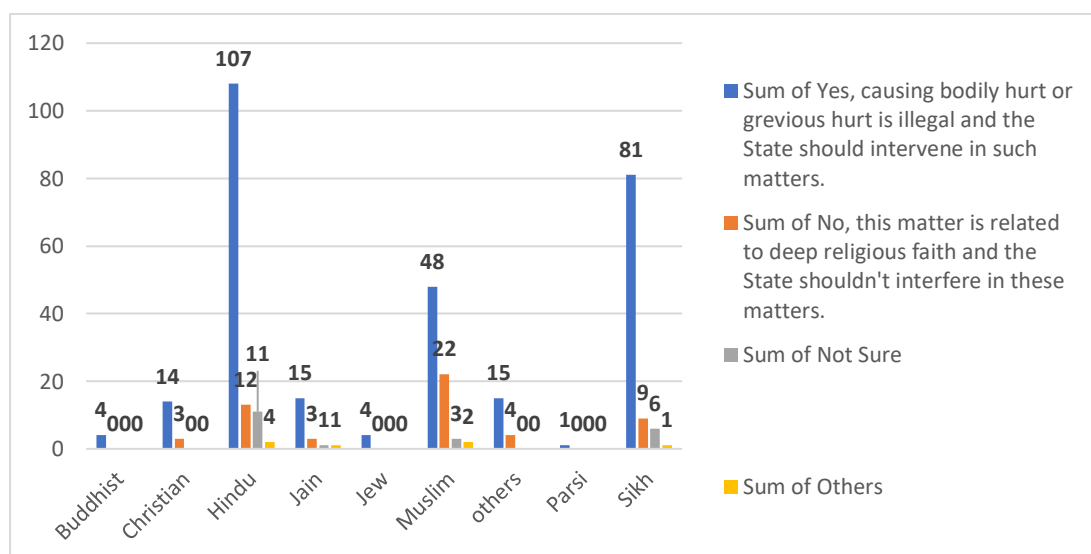
**Table 8.19 (a) – Data showing responses to Question no. – 12. Source: Author Compilation**



**Figure 8.19 (a) – Data showing responses to Question no. – 12. Source: Author Compilation**

| Religion           | Sum of Yes, causing bodily hurt or grievous hurt is illegal and the State should intervene in such matters. | Sum of No, this matter is related to deep religious faith and the State shouldn't interfere in these matters. | Sum of Not Sure | Sum of Others | Total      |
|--------------------|---|---|-----------------|---------------|------------|
| Buddhist           | 4   | 0   | 0               | 0             | 4          |
| Christian          | 14  | 3   | 0               | 0             | 17         |
| Hindu              | 107   | 12  | 11              | 4             | 134        |
| Jain               | 15  | 3   | 1               | 1             | 20         |
| Jew                | 4   | 0   | 0               | 0             | 4          |
| Muslim             | 48  | 22  | 3               | 2             | 75         |
| others             | 15  | 4   | 0               | 0             | 19         |
| Parsi              | 1   | 0   | 0               | 0             | 1          |
| Sikh               | 81  | 9   | 6               | 1             | 97         |
| <b>Grand Total</b> | <b>289</b>  | <b>53</b>   | <b>21</b>       | <b>8</b>      | <b>371</b> |

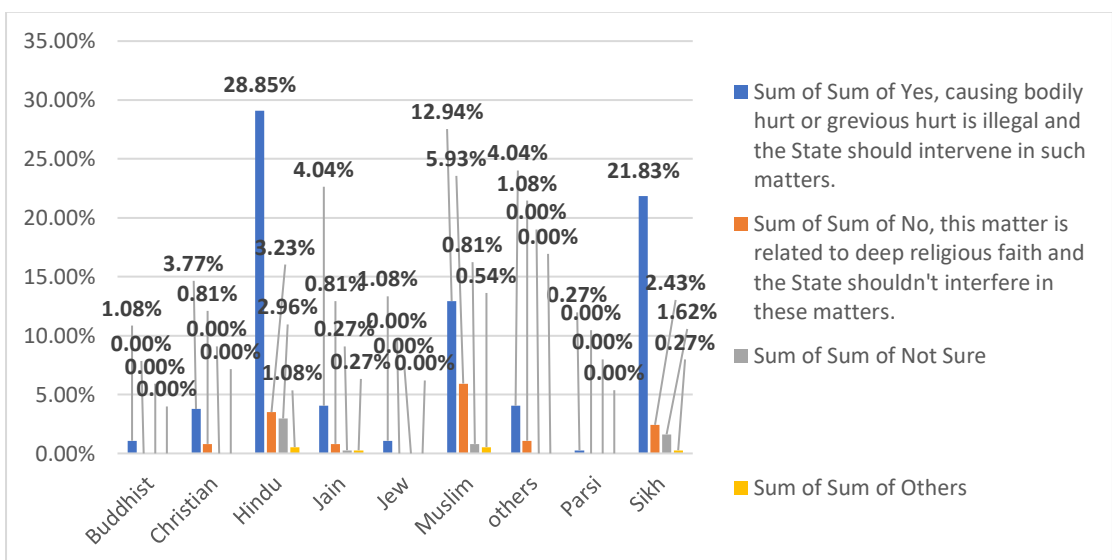
**Table 8.19 (b) – Religion-wise data (in numbers) showing responses to Question no. – 12. Source: Author Compilation**



**Figure 8.19 (b) – Religion-wise data (in numbers) showing responses to Question no. – 12. Source: Author Compilation**

| Religion           | Sum of Yes, causing bodily hurt or grievous hurt is illegal and the State should intervene in such matters. | Sum of No, this matter is related to deep religious faith and the State shouldn't interfere in these matters. | Sum of Not Sure | Sum of Others | Total          |
|--------------------|---|---|-----------------|---------------|----------------|
| Buddhist           | 1.08%   | 0.00%   | 0.00%           | 0.00%         | 1.08%          |
| Christian          | 3.77%   | 0.81%   | 0.00%           | 0.00%         | 4.58%          |
| Hindu              | 28.85%  | 3.23%   | 2.96%           | 1.08%         | 36.12%         |
| Jain               | 4.04%   | 0.81%   | 0.27%           | 0.27%         | 5.39%          |
| Jew                | 1.08%   | 0.00%   | 0.00%           | 0.00%         | 1.08%          |
| Muslim             | 12.94%  | 5.93%   | 0.81%           | 0.54%         | 20.22%         |
| others             | 4.04%   | 1.08%   | 0.00%           | 0.00%         | 5.12%          |
| Parsi              | 0.27%   | 0.00%   | 0.00%           | 0.00%         | 0.27%          |
| Sikh               | 21.83%  | 2.43%   | 1.62%           | 0.27%         | 26.15%         |
| <b>Grand Total</b> | <b>77.90%</b>   | <b>14.29%</b>   | <b>5.66%</b>    | <b>2.16%</b>  | <b>100.00%</b> |

**Table 8.19 (c) – Religion-wise data (in percentile) showing responses to Question no. – 12. Source: Author Compilation**



**Figure 8.19 (c) – Religion-wise data (in percentile) showing responses to Question no. – 12. Source: Author Compilation**

**Analysis of responses:** - Out of 371 participants, 289 persons (77.89%) agreed that causing bodily hurt or grievous hurt is illegal and the State should intervene in such matters. 53 persons (14.00%) hold the view that this matter is related to deep religious faith and the State shouldn't interfere in such matters. Other 29 persons (7.82%) were either not sure or had a different view on this issue. This practice relates to the Muslim community. There were 75 Muslim persons (20.22%), out of which 22 persons (5.93%) held the view that the State shouldn't interfere in such matters and 48 persons (12.94%) agreed that the State should intervene and hold illegal such practices. On the issue of 'KHATNA', one person said that this practice has scientific validity and also has a vaccination process, the rest of the practices like FGM (i.e., Female Genital Mutilation) are illegal and not related to Islam. FGM is like Sati Pratha which is nowhere mentioned in religious scriptures and is manipulated and followed by ill-intended mind people. One person said that these types of practices should be banned as there is no consent from the child going through the process of Khatna and without consent, it is illegal to hurt or grievously hurt someone and even if the child consented, it doesn't matter.

### 8.20 Question No. – 13

Do you agree that the State should intervene in personal laws and ban polygamy allowed by some personal laws or customs?

| Responses  | No. of Persons | Percentage  |
|--|----------------|-------------|
| Yes, polygamy is derogatory for women's status in society. | 319            | 85.98%      |
| No, religion justifies marrying with more than one wife.   | 25             | 6.74%       |
| Not sure   | 22             | 5.93%       |
| other  | 5              | 1.35%       |
| <b>Total Responses</b>                                     | <b>371</b>     | <b>100%</b> |

Table 8.20 (a)– Data showing responses to Question no. – 13. *Source: Author Compilation*

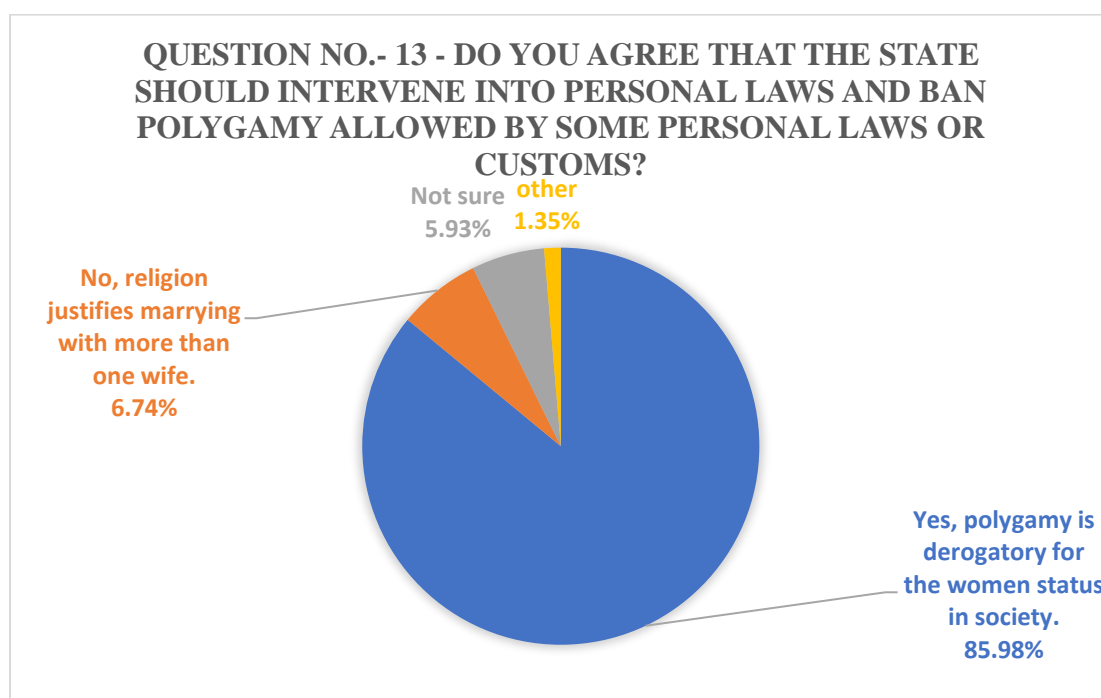
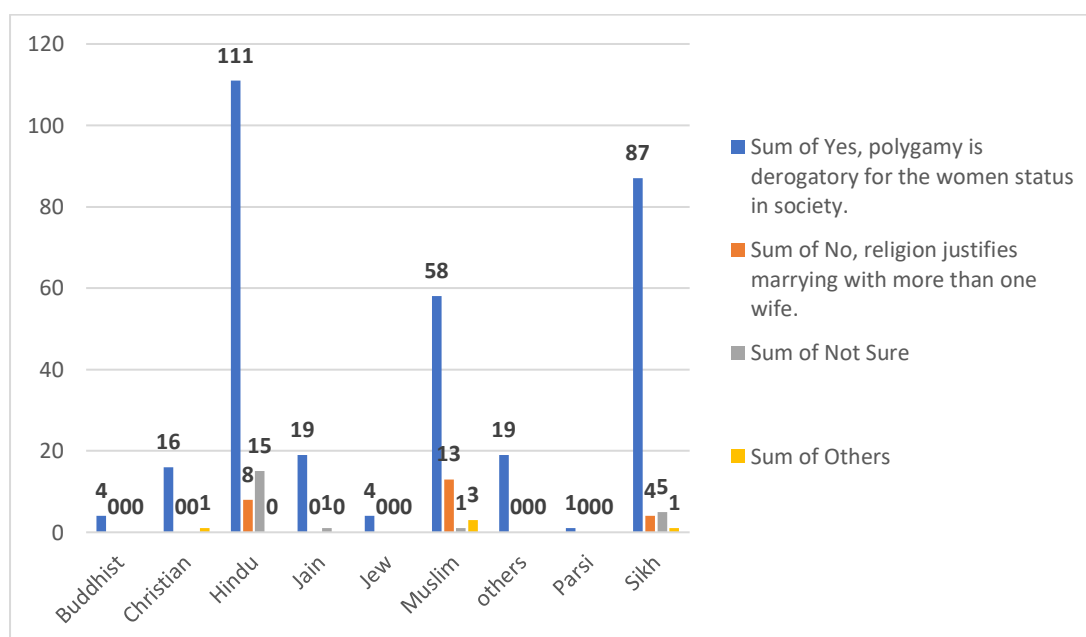


Figure 8.20 (a)– Data showing responses to Question no. – 13. *Source: Author Compilation*



| Religion           | Sum of Yes, polygamy is derogatory for women's status in society. | Sum of No, religion justifies marrying more than one wife. | Sum of Not Sure | Sum of Others | Total      |
|--------------------|---|--|-----------------|---------------|------------|
| Buddhist           | 4   | 0  | 0               | 0             | 4          |
| Christian          | 16  | 0  | 0               | 1             | 17         |
| Hindu              | 111   | 8  | 15              | 0             | 134        |
| Jain               | 19  | 0  | 1               | 0             | 20         |
| Jew                | 4   | 0  | 0               | 0             | 4          |
| Muslim             | 58  | 13   | 1               | 3             | 75         |
| others             | 19  | 0  | 0               | 0             | 19         |
| Parsi              | 1   | 0  | 0               | 0             | 1          |
| Sikh               | 87  | 4  | 5               | 1             | 97         |
| <b>Grand Total</b> | <b>319</b>  | <b>25</b>  | <b>22</b>       | <b>5</b>      | <b>371</b> |

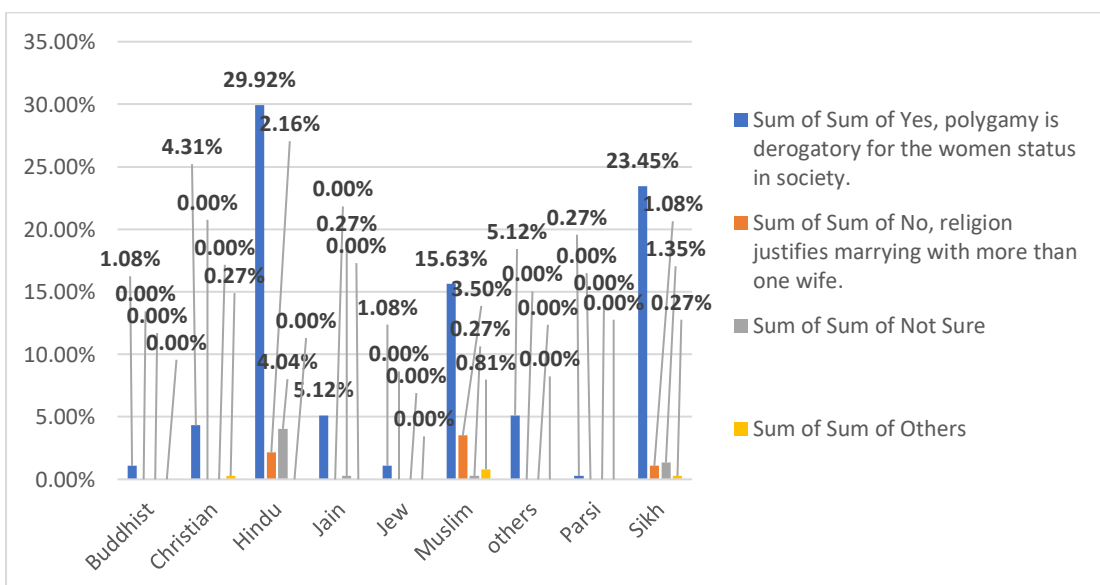
**Table 8.20 (b) – Religion-wise data (in numbers) showing responses to Question no. – 13. Source: Author Compilation**



**Figure 8.20 (b) – Religion-wise data (in numbers) showing responses to Question no. – 13. Source: Author Compilation**

| Religion    | Sum of Yes, polygamy is derogatory for the women's status in society. | Sum of No, religion justifies marrying more than one wife. | Sum of Not Sure | Sum of Others | Total   |
|-------------|---|--|-----------------|---------------|---------|
| Buddhist    | 1.08%   | 0.00%  | 0.00%           | 0.00%         | 1.08%   |
| Christian   | 4.31%   | 0.00%  | 0.00%           | 0.27%         | 4.58%   |
| Hindu       | 29.92%  | 2.16%  | 4.04%           | 0.00%         | 36.12%  |
| Jain        | 5.12%   | 0.00%  | 0.27%           | 0.00%         | 5.39%   |
| Jew         | 1.08%   | 0.00%  | 0.00%           | 0.00%         | 1.08%   |
| Muslim      | 15.63%  | 3.50%  | 0.27%           | 0.81%         | 20.22%  |
| others      | 5.12%   | 0.00%  | 0.00%           | 0.00%         | 5.12%   |
| Parsi       | 0.27%   | 0.00%  | 0.00%           | 0.00%         | 0.27%   |
| Sikh        | 23.45%  | 1.08%  | 1.35%           | 0.27%         | 26.15%  |
| Grand Total | 85.98%  | 6.74%  | 5.93%           | 1.35%         | 100.00% |

**Table 8.20 (c) – Religion-wise data (in percentile) showing responses to Question no. – 13. Source: Author Compilation**



**Figure 8.20 (c) – Religion-wise data (in percentile) showing responses to Question no. – 13. Source: Author Compilation**

**Analysis of responses:** - Out of 371 participants, 319 persons (85.98%) agreed that polygamy is derogatory for women's status in society. 25 persons held the view that religion justifies marrying with more than one wife and the State shouldn't interfere in such matters. Other 27 persons (7.28%) were not sure or had a different view on this issue.

In Muslim laws, marrying with up to 4 wives is allowed. There were 75 Muslim participants (20.22%), out of which 58 persons (15.63%) agreed that this practice should be banned and 13 persons (3.50%) held the view that the State should not interfere in such matters and any such interference would amount to the violation of their religious freedom.

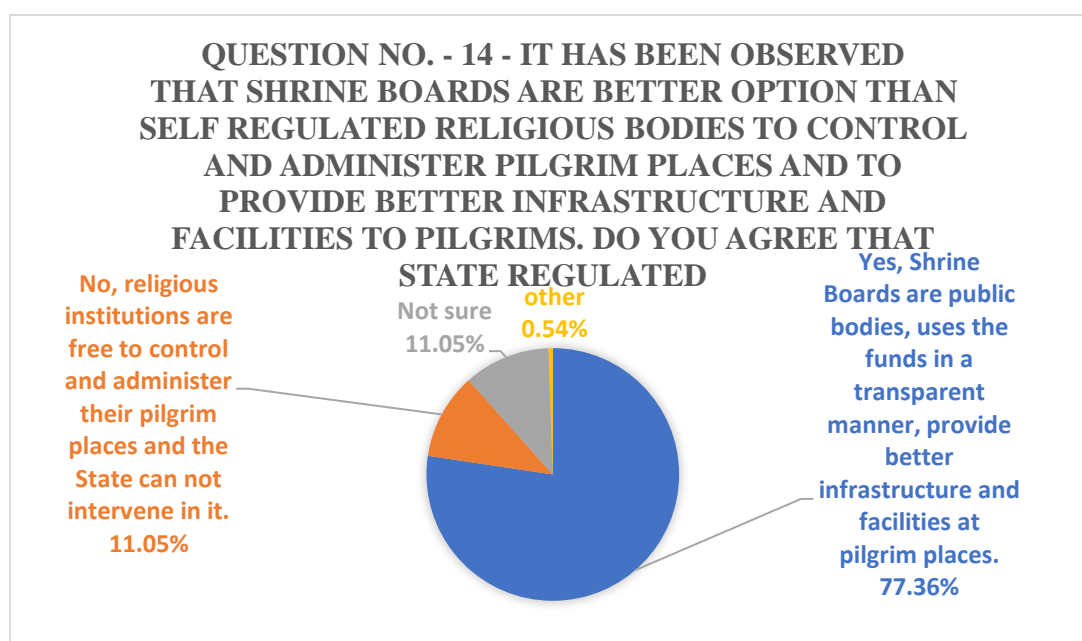
On the issue of polygamy, one person said that the purpose of polygamy was to give protection and shelter to widow women and unmarried girls at that time. But as things have changed over time, monogamy is the rule of society now and is almost approved by all religions. The concept of re-marriage after taking a divorce from 1<sup>st</sup> marriage has changed many things. It is good if the State interferes or religious institutions themselves decided to put a ban on polygamy. Bringing social reformation for good cause should always be welcome. In current times, there is no reason to defend the polygamy that the Almighty has permitted in Holy Quran and in no sense, any religion may allow for the derogation of women's status in society.

### 8.21 Question No.– 14

It has been observed that Shrine Boards are a better option than self-regulated religious bodies to control and administer pilgrim places and to provide better infrastructure and facilities to pilgrims. Do you agree that State regulated Shrine Boards should be constituted at all pilgrim places?

| Responses  | No. of Persons | Per centage   |
|--|----------------|---------------|
| <b>Yes, Shrine Boards are public bodies, that uses the funds in a transparent manner and provide better infrastructure and facilities at pilgrim places.</b> | <b>287</b>     | <b>77.36%</b> |
| <b>No, religious institutions are free to control and administer their pilgrim places and the State cannot intervene in it.</b>                              | <b>41</b>      | <b>11.05%</b> |
| <b>Not sure</b>  | <b>41</b>      | <b>11.05%</b> |
| <b>other</b>   | <b>2</b>       | <b>0.54%</b>  |
| <b>Total Responses</b>   | <b>371</b>     | <b>100%</b>   |

**Table 8.21 – Data showing responses to Question no. – 14. Source: Author Compilation**



**Figure 8.21 – Data showing responses to Question no. – 14. Source: Author Compilation**

**Analysis of responses:** - Out of 371 participants, 287 persons (77.36%) agreed that Shrine Boards which are public bodies uses the funds in a transparent manner and provide better infrastructure and facilities at pilgrim places. 41 persons (11.05%) held the view that religious institutions should be free to control and administer their pilgrim places and the State shouldn't intervene in these matters. Other 43 persons (11.59%) were either not sure or had a different view on this issue.

### 8.22 Question No. - 15

Due to matters of deep religious beliefs and faith, women are not allowed to enter many pilgrim places like temples or mosques. Do you agree that it amounts to gender discrimination and the State should intervene in such matters?

| Responses  | No. of Persons | Percentage  |
|--|----------------|-------------|
| Yes, it will improve the social status and dignity of women and protect their fundamental rights.      | 310            | 83.56%      |
| No, this matter is related to deep religious faith and the State shouldn't interfere in these matters. | 38             | 10.24%      |
| Not sure   | 20             | 5.39%       |
| other  | 3              | 0.81%       |
| <b>Total Responses</b>   | <b>371</b>     | <b>100%</b> |

Table 8.22 (a) – Data showing responses to Question no. – 15. *Source: Author Compilation*

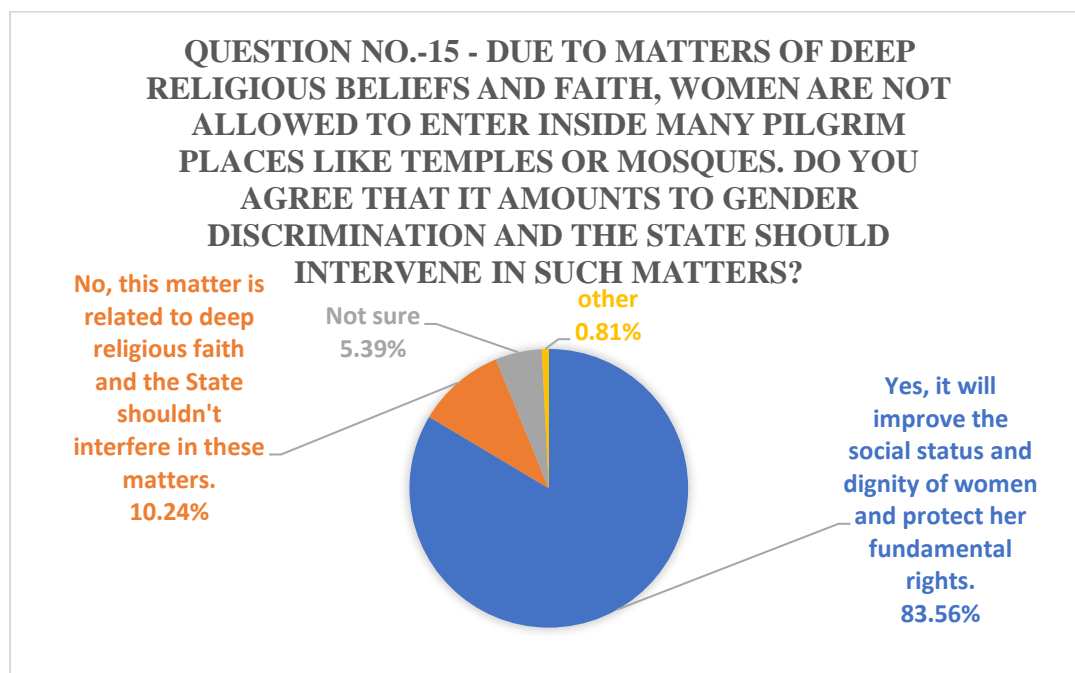
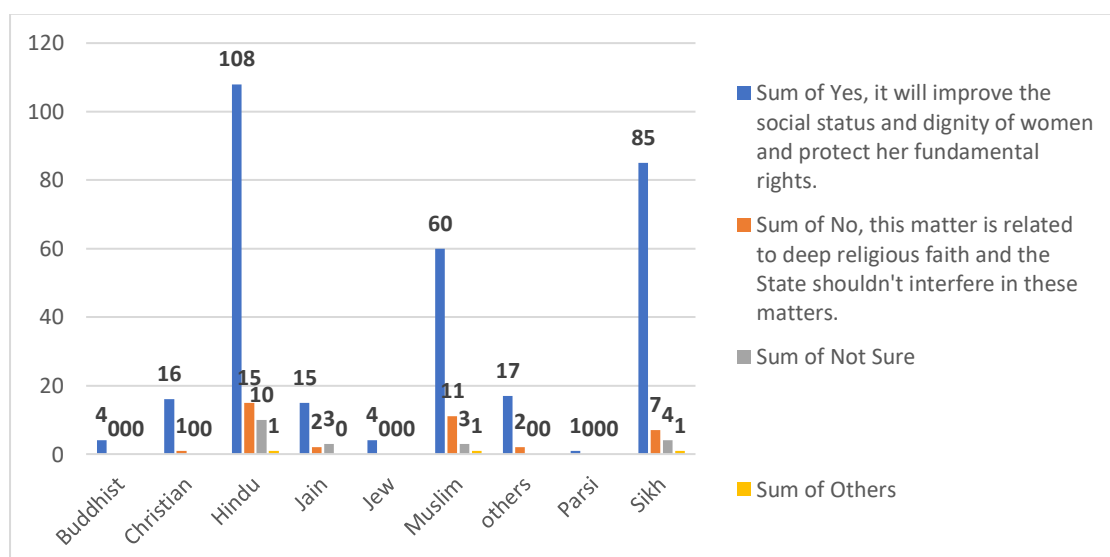


Figure 8.22 (a) – Data showing responses to Question no. – 15. *Source: Author Compilation*

| Religion           | Sum of Yes, it will improve the social status and dignity of women and protect her fundamental rights. | Sum of No, this matter is related to deep religious faith and the State shouldn't interfere in these matters. | Sum of Not Sure | Sum of Others | Total      |
|--------------------|--|---|-----------------|---------------|------------|
| Buddhist           | 4  | 0   | 0               | 0             | 4          |
| Christian          | 16   | 1   | 0               | 0             | 17         |
| Hindu              | 108  | 15  | 10              | 1             | 134        |
| Jain               | 15   | 2   | 3               | 0             | 20         |
| Jew                | 4  | 0   | 0               | 0             | 4          |
| Muslim             | 60   | 11  | 3               | 1             | 75         |
| others             | 17   | 2   | 0               | 0             | 19         |
| Parsi              | 1  | 0   | 0               | 0             | 1          |
| Sikh               | 85   | 7   | 4               | 1             | 97         |
| <b>Grand Total</b> | <b>310</b>   | <b>38</b>   | <b>20</b>       | <b>3</b>      | <b>100</b> |

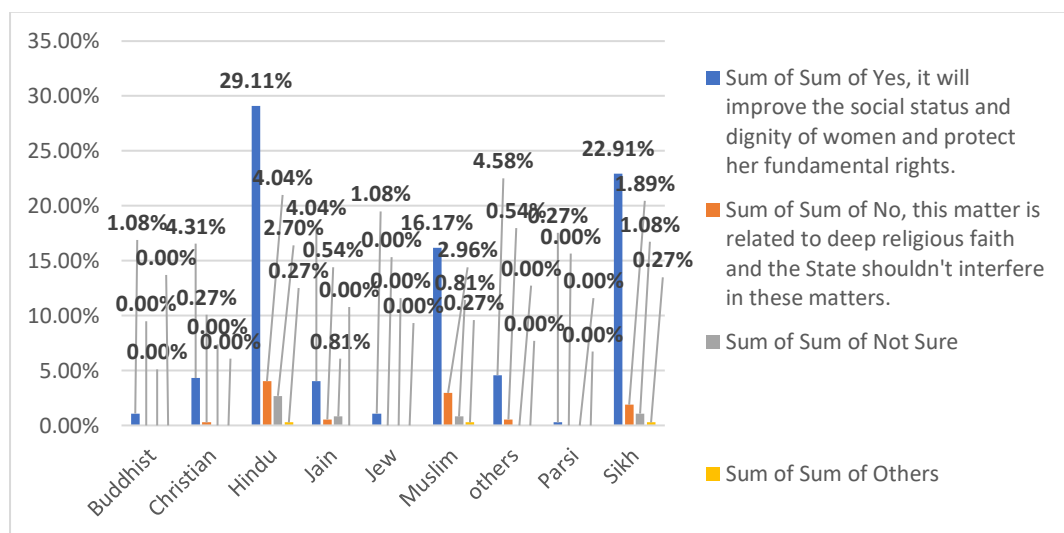
**Table 8.22 (b) – Religion-wise data (in numbers) showing responses to Question no. – 15. Source: Author Compilation**



**Figure 8.22 (b) – Religion-wise data (in numbers) showing responses to Question no. – 15. Source: Author Compilation**

| Religion    | Sum of Yes, it will improve the social status and dignity of women and protect their fundamental rights. | Sum of No, this matter is related to deep religious faith and the State shouldn't interfere in these matters. | Sum of Not Sure | Sum of Others | Total   |
|-------------|--|---|-----------------|---------------|---------|
| Buddhist    | 1.08%  | 0.00%   | 0.00%           | 0.00%         | 1.08%   |
| Christian   | 4.31%  | 0.27%   | 0.00%           | 0.00%         | 4.58%   |
| Hindu       | 29.11%   | 4.04%   | 2.70%           | 0.27%         | 36.12%  |
| Jain        | 4.04%  | 0.54%   | 0.81%           | 0.00%         | 5.39%   |
| Jew         | 1.08%  | 0.00%   | 0.00%           | 0.00%         | 1.08%   |
| Muslim      | 16.17%   | 2.96%   | 0.81%           | 0.27%         | 20.22%  |
| others      | 4.58%  | 0.54%   | 0.00%           | 0.00%         | 5.12%   |
| Parsi       | 0.27%  | 0.00%   | 0.00%           | 0.00%         | 0.27%   |
| Sikh        | 22.91%   | 1.89%   | 1.08%           | 0.27%         | 26.15%  |
| Grand Total | 83.56%   | 10.24%  | 5.39%           | 0.81%         | 100.00% |

**Table 8.22 (c) – Religion-wise data (in percentile) showing responses to Question no. – 15. Source: Author Compilation**

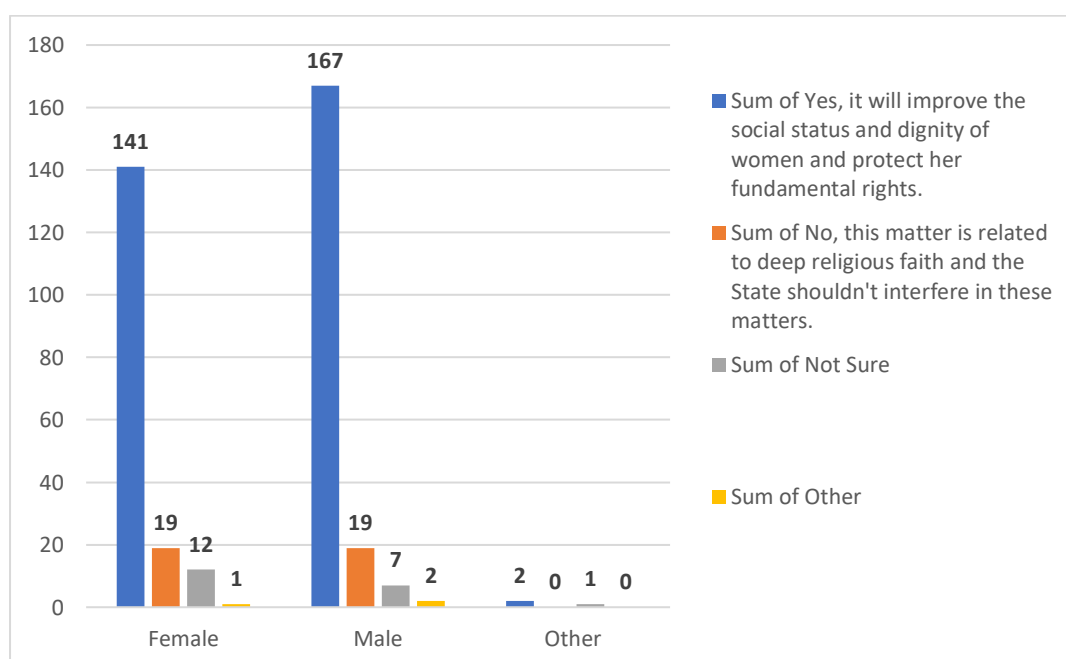


**Figure 8.22 (c) – Religion-wise data (in percentile) showing responses to Question no. – 15. Source: Author Compilation**



| Gender      | Sum of Yes, it will improve the social status and dignity of women and protect their fundamental rights. | Sum of No, this matter is related to deep religious faith and the State shouldn't interfere in these matters. | Sum of Not Sure | Sum of Other | Total |
|-------------|--|---|-----------------|--------------|-------|
| Female      | 141  | 19  | 12              | 1            | 173   |
| Male        | 167  | 19  | 7               | 2            | 195   |
| Other       | 2  | 0   | 1               | 0            | 3     |
| Grand Total | 310  | 38  | 20              | 3            | 371   |

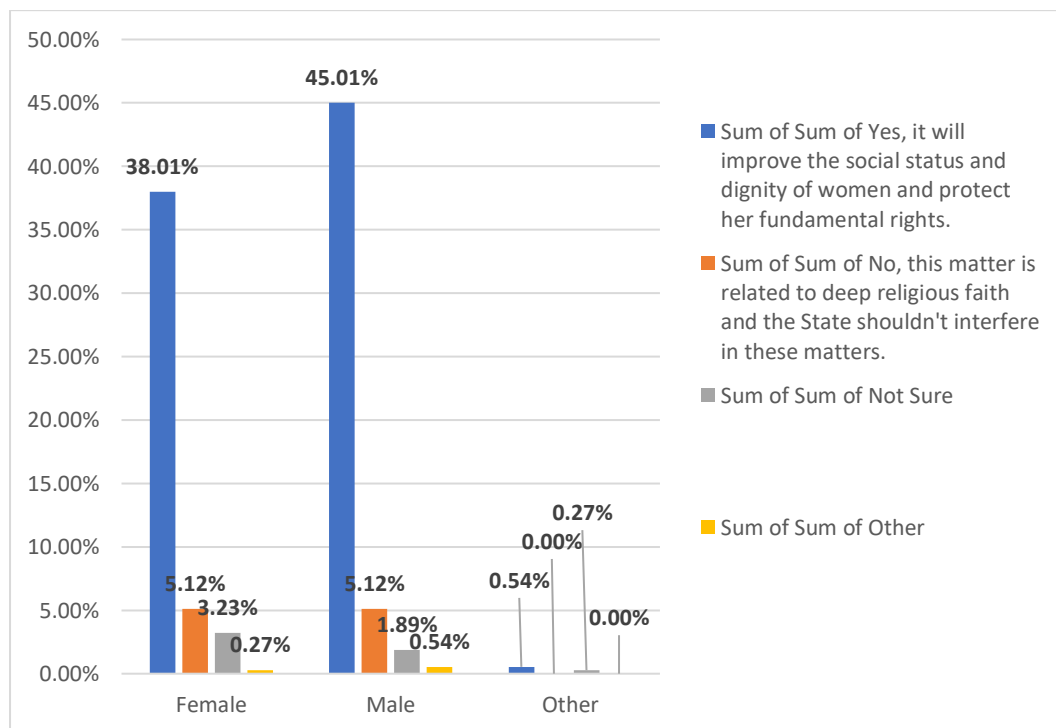
**Table 8.22 (d) – Gender-wise data (in numbers) showing responses to Question no. – 15. Source: Author Compilation**



**Figure 8.22 (d) – Gender-wise data (in numbers) showing responses to Question no. – 15. Source: Author Compilation**

| Gender      | Sum of Yes, it will improve the social status and dignity of women and protect their fundamental rights. | Sum of No, this matter is related to deep religious faith and the State shouldn't interfere in these matters. | Sum of Not Sure | Sum of Other | Total   |
|-------------|--|---|-----------------|--------------|---------|
| Female      | 38.01%   | 5.12%   | 3.23%           | 0.27%        | 46.63%  |
| Male        | 45.01%   | 5.12%   | 1.89%           | 0.54%        | 52.56%  |
| Other       | 0.54%  | 0.00%   | 0.27%           | 0.00%        | 0.81%   |
| Grand Total | 83.56%   | 10.24%  | 5.39%           | 0.81%        | 100.00% |

**Table 8.22 (e) – Gender-wise data (in percentile) showing responses to Question no. – 15. Source: Author Compilation**



**Figure 8.22 (e) – Gender-wise data (in percentile) showing responses to Question no. – 15. Source: Author Compilation**

**Analysis of responses:** - Out of 371 participants, 310 persons (83.56%) agreed that allowing all women into holy places will improve their social status and dignity and protect their fundamental rights. 38 persons (10.24%) held the view that this matter relates to deep religious faith and the State shouldn't interfere in such matters. Other 23 persons (6.20%) persons were either not sure or had a different view on this issue. In this survey 173 persons (46.63%) were females and 195 persons (52.56%) were males. 141 (38.01%) females and 167 males (45.01%) agreed to allow the entry of all women inside all holy places.

On the issue of entry of women inside the temples and mosques, one person said that in Islam, women are not prohibited to enter any mosques, whereas she is not allowed to go on the spot of the graveyard or inside the Dargah. Talking particularly to the case of Hazrat Ali Dargah, the person said that the particular Dargah is related to a male Sufi saint, due to which the entry of women inside the Dargah is prohibited.

### 8.23 Question No. – 16

As per provisions of the Arms Act 1959, carrying the Kirpan (having the size of 6" blade and 9" in total length) in a public place is allowed for baptised Sikh persons only, but it is not so easy to identify a true baptised Sikh person. Do you agree that baptised Sikh persons must be registered by a regulatory body and these persons should carry their identity card with them?

| Responses   | No. of Persons | Per centage |
|---|----------------|-------------|
| Yes, State should enact a law for the registration of baptised Sikh persons to carry kirpan with them.        | 270            | 72.78%      |
| No, carrying religious wearing are covered under freedom of religion, hence no such registration is required. | 62             | 16.71%      |
| Not sure  | 34             | 9.16%       |
| other   | 5              | 1.35%       |
| Total Responses   | 371            | 100%        |

Table 8.23 (a) – Data showing responses to Question no. – 16. Source: Author Compilation

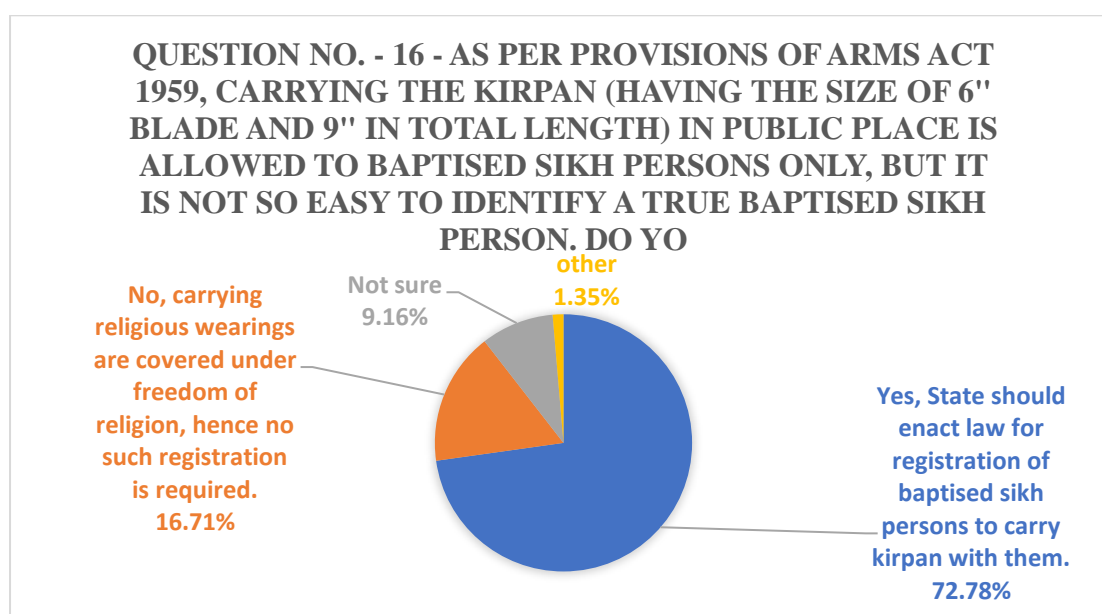
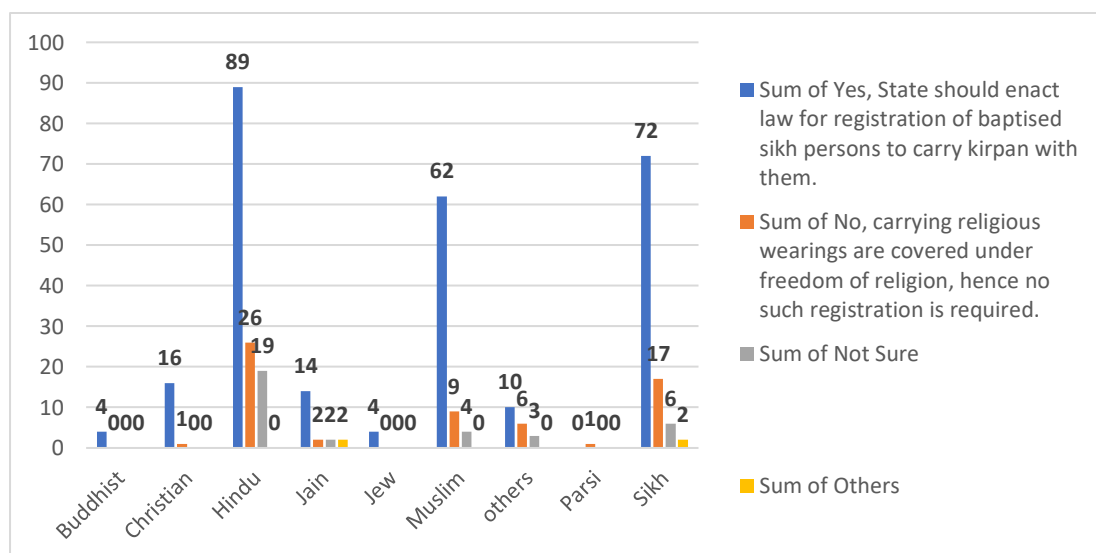


Figure 8.23 (a) – Data showing responses to Question no. – 16. Source: Author Compilation

| Religion           | Sum of Yes, the State should enact a law for the registration of baptised Sikh persons to carry kirpan with them. | Sum of No, carrying religious wearing are covered under freedom of religion, hence no such registration is required. | Sum of Not Sure | Sum of Others | Total      |
|--------------------|---|--|-----------------|---------------|------------|
| Buddhist           | 4   | 0  | 0               | 0             | 4          |
| Christian          | 16  | 1  | 0               | 0             | 17         |
| Hindu              | 89  | 26   | 19              | 0             | 134        |
| Jain               | 14  | 2  | 2               | 2             | 20         |
| Jew                | 4   | 0  | 0               | 0             | 4          |
| Muslim             | 62  | 9  | 4               | 0             | 75         |
| others             | 10  | 6  | 3               | 0             | 19         |
| Parsi              | 0   | 1  | 0               | 0             | 1          |
| Sikh               | 72  | 17   | 6               | 2             | 97         |
| <b>Grand Total</b> | <b>271</b>  | <b>62</b>  | <b>34</b>       | <b>4</b>      | <b>371</b> |

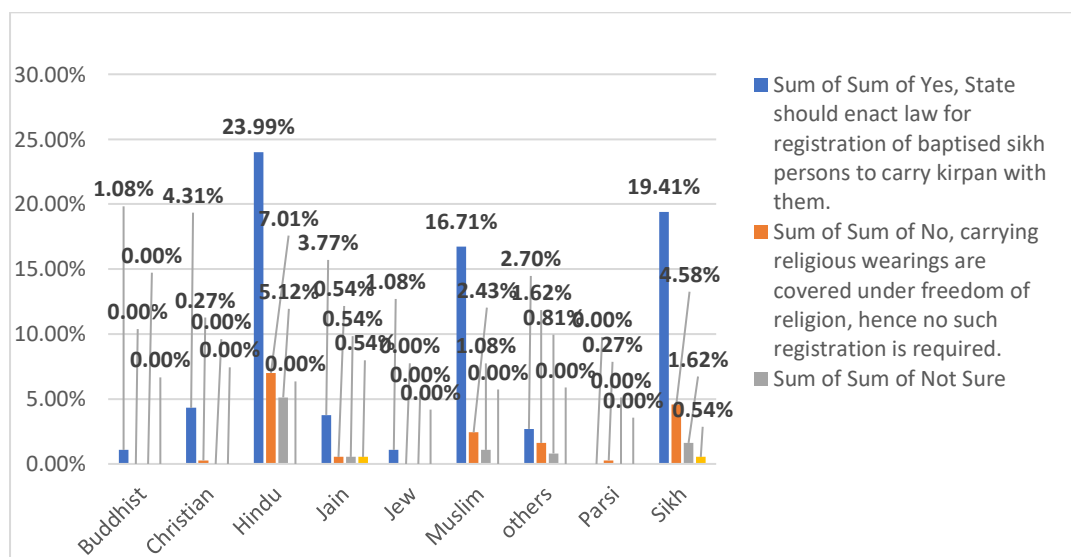
**Table 8.23 (b) – Religion-wise data (in numbers) showing responses to Question no. – 16. Source: Author Compilation**



**Figure 8.23 (b) – Religion-wise data (in numbers) showing responses to Question no. – 16. Source: Author Compilation**

| Religion    | Sum of Yes, State should enact law for registration of baptised Sikh persons to carry kirpan with them. | Sum of No, carrying religious wearing are covered under freedom of religion, hence no such registration is required. | Sum of Not Sure | Sum of Others | Total   |
|-------------|---|--|-----------------|---------------|---------|
| Buddhist    | 1.08%   | 0.00%  | 0.00%           | 0.00%         | 1.08%   |
| Christian   | 4.31%   | 0.27%  | 0.00%           | 0.00%         | 4.58%   |
| Hindu       | 23.99%  | 7.01%  | 5.12%           | 0.00%         | 36.12%  |
| Jain        | 3.77%   | 0.54%  | 0.54%           | 0.54%         | 5.39%   |
| Jew         | 1.08%   | 0.00%  | 0.00%           | 0.00%         | 1.08%   |
| Muslim      | 16.71%  | 2.43%  | 1.08%           | 0.00%         | 20.22%  |
| others      | 2.70%   | 1.62%  | 0.81%           | 0.00%         | 5.12%   |
| Parsi       | 0.00%   | 0.27%  | 0.00%           | 0.00%         | 0.27%   |
| Sikh        | 19.41%  | 4.58%  | 1.62%           | 0.54%         | 26.15%  |
| Grand Total | 73.05%  | 16.71%   | 9.16%           | 1.08%         | 100.00% |

**Table 8.23 (c) – Religion-wise data (in percentile) showing responses to Question no. – 16. Source: Author Compilation**



**Figure 8.23 (c) – Religion-wise data (in percentile) showing responses to Question no. – 16. Source: Author Compilation**

**Analysis of responses:** - Out of 371 participants, 270 persons agreed that the State should enact a law for the registration of baptized Sikh persons to carry kirpan with them. 62 persons (16.71%) held the view that carrying religious wearing is covered under freedom of religion, hence no such registration is required. Other 39 persons (10.51%) were either not sure or had a different view on this issue.

This question relates to the Sikh religion. There were 97 Sikh persons (26.15%) who participated in this survey. Out of those 97 persons, 72 persons (19.41%) agreed that the State should enact a law, 17 persons (4.58%) held the view that it would amount to the violation of religious freedom and the other 8 persons (2.16%) were either not sure or had a different view.

On the issue of registration of Sikh persons, one person said that the State should enact the laws to carry kirpan in public places, but the same should be enacted after consultation with Sikh leaders.

One person said that carrying a kirpan or other objects like a kirpan in public schools or institutions is dangerous. Secular institutions should be governed by secular laws and it is not good to allow someone, specifically kids, to carry any weapon-type object in public places.

One person said that Sikh Gurus told us to protect ourselves from the enemies and during that time there was no Constitution. But now the people of India have adopted the Constitution as supreme law and authority and people cannot overrule the Constitution by any means. The country should be governed through the secular principles of the Constitution.

### 8.24 Question No. – 17

Is it justified to apply the Uniform Civil Code as like Criminal Code in a secular nation India having diverse religious communities?

| Responses   | No. of Persons | Per centage   |
|---|----------------|---------------|
| <b>Yes, personal laws leads to gender discrimination and encourage disparity among persons belonging to different communities, sexes and ages, so Uniform Civil Code must be applied.</b> | <b>276</b>     | <b>74.40%</b> |
| <b>No, religion is inherently embedded in civil life of persons. State cannot apply Uniform laws.</b>   | <b>55</b>      | <b>14.82%</b> |
| <b>Not sure</b>   | <b>35</b>      | <b>9.43%</b>  |
| <b>other</b>  | <b>5</b>       | <b>1.35%</b>  |
| <b>Total Responses</b>  | <b>371</b>     | <b>100%</b>   |

Table 8.24 (a) – Data showing responses to Question no. – 17. *Source:* Author Compilation

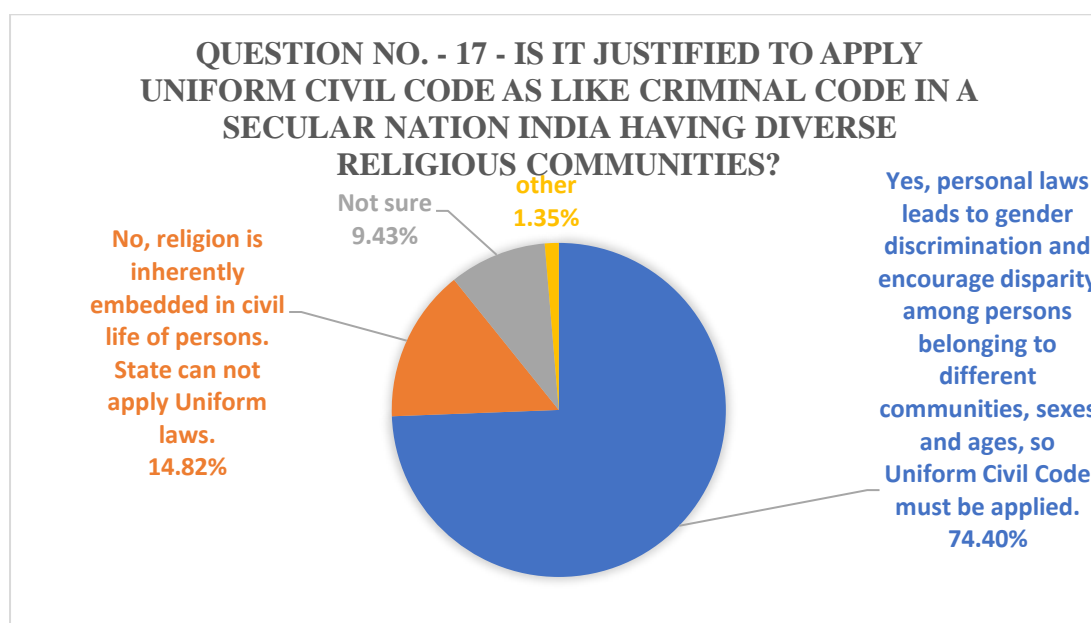
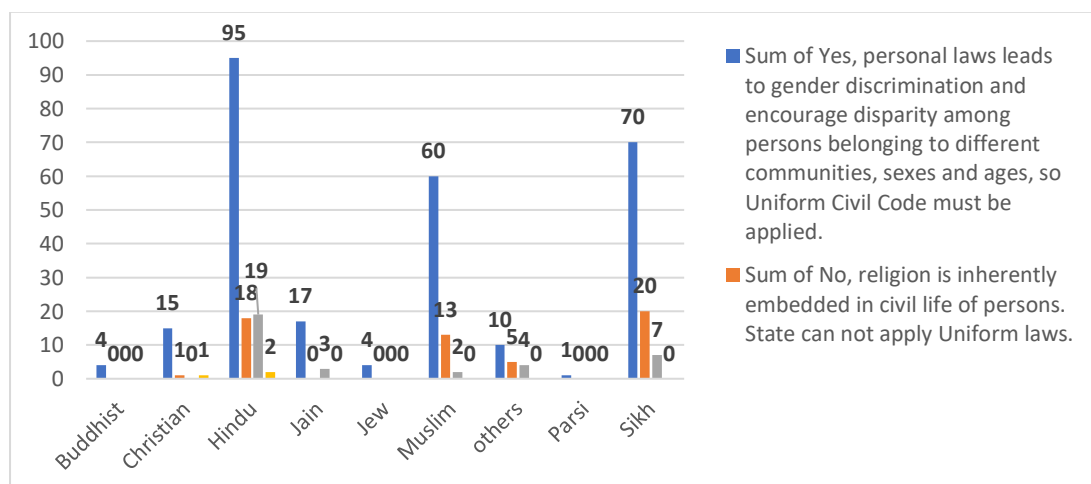


Figure 8.24 (a)– Data showing responses to Question no. – 17. *Source:* Author Compilation



| Religion           | Sum of Yes, personal laws lead to gender discrimination and encourage disparity among persons belonging to different communities, sexes and ages, so Uniform Civil Code must be applied. | Sum of No, religion is inherently embedded in civil life of persons. State cannot apply Uniform laws. | Sum of Sure | Sum of Others | Total      |
|--------------------|--|---|-------------|---------------|------------|
| Buddhist           | 4  | 0   | 0           | 0             | 4          |
| Christian          | 15   | 1   | 0           | 1             | 17         |
| Hindu              | 95   | 18  | 19          | 2             | 134        |
| Jain               | 17   | 0   | 3           | 0             | 20         |
| Jew                | 4  | 0   | 0           | 0             | 4          |
| Muslim             | 60   | 13  | 2           | 0             | 75         |
| others             | 10   | 5   | 4           | 0             | 19         |
| Parsi              | 1  | 0   | 0           | 0             | 1          |
| Sikh               | 70   | 20  | 7           | 0             | 97         |
| <b>Grand Total</b> | <b>276</b>   | <b>57</b>   | <b>35</b>   | <b>3</b>      | <b>371</b> |

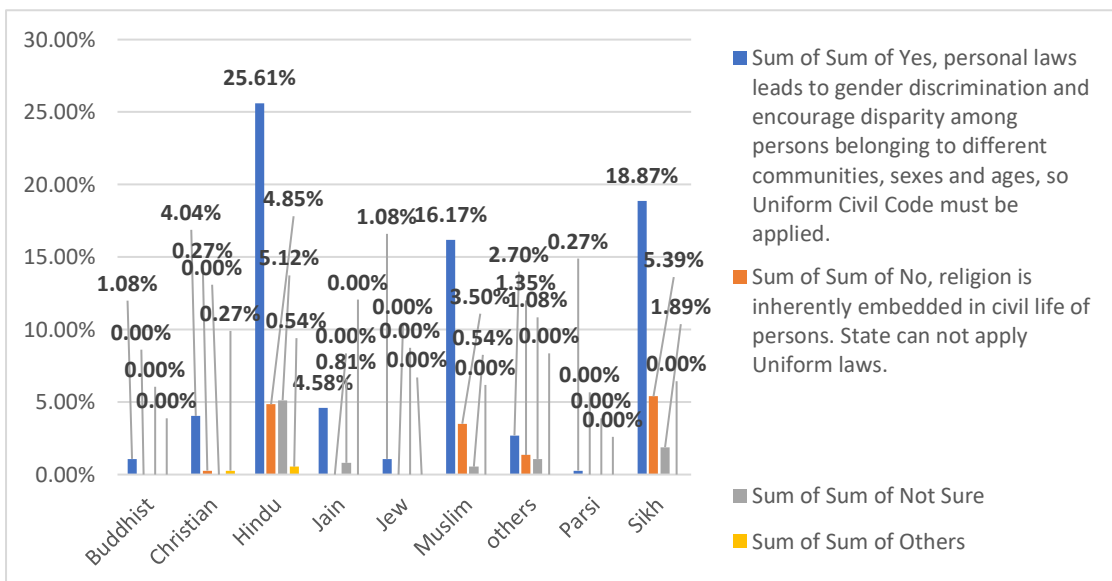
**Table 8.24 (b) – Religion-wise data (in numbers) showing responses to Question no. – 17. Source: Author Compilation**



**Figure 8.24 (b) – Religion-wise data (in numbers) showing responses to Question no. – 17. Source: Author Compilation**

| Religion    | Sum of Yes, personal laws leads to gender discrimination and encourage disparity among persons belonging to different communities, sexes and ages, so Uniform Civil Code must be applied. | Sum of No, religion is inherently embedded in civil life of persons. State cannot apply Uniform laws. | Sum of Not Sure | Sum of Others | Total   |
|-------------|---|---|-----------------|---------------|---------|
| Buddhist    | 1.08%   | 0.00%   | 0.00%           | 0.00%         | 1.08%   |
| Christian   | 4.04%   | 0.27%   | 0.00%           | 0.27%         | 4.58%   |
| Hindu       | 25.61%  | 4.85%   | 5.12%           | 0.54%         | 36.12%  |
| Jain        | 4.58%   | 0.00%   | 0.81%           | 0.00%         | 5.39%   |
| Jew         | 1.08%   | 0.00%   | 0.00%           | 0.00%         | 1.08%   |
| Muslim      | 16.17%  | 3.50%   | 0.54%           | 0.00%         | 20.22%  |
| others      | 2.70%   | 1.35%   | 1.08%           | 0.00%         | 5.12%   |
| Parsi       | 0.27%   | 0.00%   | 0.00%           | 0.00%         | 0.27%   |
| Sikh        | 18.87%  | 5.39%   | 1.89%           | 0.00%         | 26.15%  |
| Grand Total | 74.39%  | 15.36%  | 9.43%           | 0.81%         | 100.00% |

**Table 8.24 (c) – Religion-wise data (in percentile) showing responses to Question no. – 17. Source: Author Compilation**



**Figure 8.24 (c) – Religion-wise data (in percentile) showing responses to Question no. – 17. Source: Author Compilation**

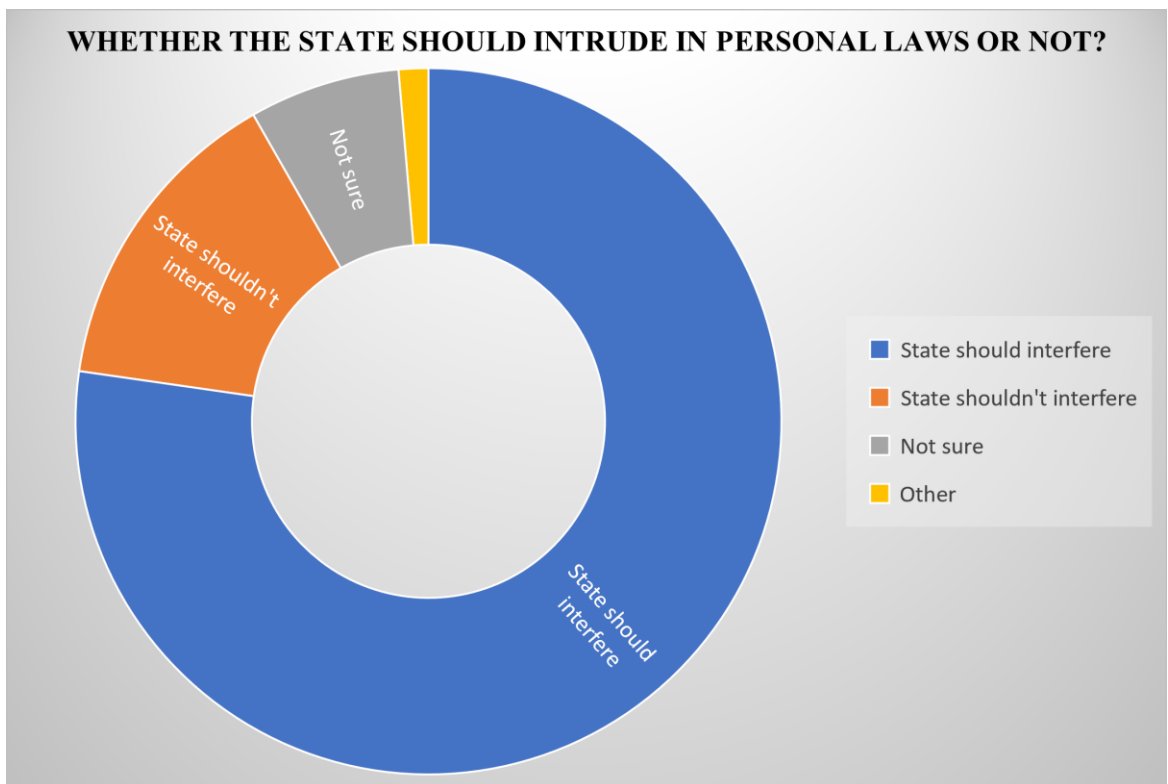
**Analysis of responses:** - Out of 371 participants, 276 persons (74.40%) agreed that personal laws lead to gender discrimination and encourage disparity among persons belonging to different communities, ages and sexes, they agreed that it would be better to apply uniform civil code in a secular country like India. 55 persons (14.82%) held the view that religion is inherently embedded in the civil life of persons and the State cannot apply a uniform civil code. Other 40 persons (10.78%) were either not sure or had a different view on this issue.

On the issue of the application of a uniform civil code, one person said that it is impossible to enforce uniform laws upon diverse communities living in India. People of different communities have deep beliefs and faith in their religions. The State must try to make personal laws relevant to modern society by imposing bans on derogatory customs like triple talaq etc.

### 8.25 Compiled Analysis of public opinion

| Responses                 | 1   | 2   | 3   | 4   | 5   | 6   | 7   | 8   | 9   | 10  | 11  | 12  | 13  | 14  | 15  | 16  | 17  | Total | Total in% |
|---------------------------|-----|-----|-----|-----|-----|-----|-----|-----|-----|-----|-----|-----|-----|-----|-----|-----|-----|-------|-----------|
| State should interfere    | 284 | 283 | 311 | 281 | 331 | 321 | 295 | 248 | 278 | 202 | 288 | 289 | 319 | 287 | 310 | 270 | 276 | 4873  | 77.27%    |
| State shouldn't interfere | 73  | 74  | 33  | 40  | 19  | 31  | 39  | 97  | 67  | 122 | 43  | 53  | 25  | 41  | 38  | 62  | 55  | 912   | 14.46%    |
| Not sure                  | 10  | 13  | 25  | 40  | 19  | 17  | 31  | 14  | 24  | 36  | 34  | 21  | 22  | 41  | 20  | 34  | 35  | 436   | 6.91%     |
| Other                     | 4   | 1   | 2   | 10  | 2   | 2   | 6   | 12  | 2   | 11  | 6   | 8   | 5   | 2   | 3   | 5   | 5   | 86    | 1.36%     |
| Total                     | 371 | 371 | 371 | 371 | 371 | 371 | 371 | 371 | 371 | 371 | 371 | 371 | 371 | 371 | 371 | 371 | 371 | 6307  | 100.00%   |

**Table 8.25 – Compiled data showing the complete analysis. Source: Author compilation**



**Figure 8.25 – Compiled data showing the complete analysis. Source: Author compilation**

**Compiled Analysis of public opinion:** - The whole questions were designed to get the responses that whether the State should intrude into personal laws and enact legislation for the purposes of social reform and empowerment of any suppressed community, age group or sex group. The compiled analysis of the responses shows that 77.27% of persons agreed that the State should intrude and legislate such laws and 14.46% of persons hold the view that the State shouldn't interfere in personal laws and any such intrusion would amount to a violation of their religious freedom provided under Indian Constitution. 6.91% of persons were not sure about the issues in front of them and 1.36% of persons gave their separate comments.

Analyzing the whole data, it has been observed that the '**Theory of Religious Secularism**' deduced in this study will be the best option to resolve all conflicts. Most of the people agreed that the State should intrude into personal laws and enact legislation for the empowerment of women, children and suppressed communities or groups. It has also been observed that the conclusion drawn in the theory is also acceptable to the common people. Most of the persons agreed that the State should protect fundamental rights and that no religion or religious institutions have any authority to violate the fundamental rights of other persons under the shadow of freedom of religion. The '**Two-Tail Test**' seems very significant to decide the pending matters in court as it gives a definite direction to check the Constitutional validity first before going to find the essential nature of religious customs or practices which have the least importance in front of fundamental rights.

### **8.3 Justification of Hypothesis**

#### **8.3.1 Religious practices are violating the fundamental rights of the citizens.**

On the basis of the findings of this research study and analyzing the landmark judgments of various courts, it has been observed that religious practices like FGM or khatna, Santhara, the sacrifice of animals, burning of crackers and effigies, Jallikattu, loudspeakers in holy places, bigamy or polygamy, extra-judicial divorce system and other gender-discriminatory customs followed by personal laws are violative of Articles 14, 15 and 21. *Being contrary to the Constitution's provisions*, these

practices or customs cannot be protected under Articles 25 & 26. The State may bring social reformatory laws and intrude into these matters and this intrusion will be accounted for under the scope of Articles 25(2)(b). Hence, this study justifies the hypothesis that religious practices are violating the fundamental rights enshrined in part III of the Indian Constitution.

### **8.3.2 Dissenting opinions of the courts are important in the reformation of laws for curbing social evils.**

On the basis of findings in this study, it has been noticed that dissenting opinions of courts are very much essential to give shape to the right to life and the right to religion. In many landmark cases, the Court had upheld the dissenting opinions of Constitutional benches that were delivered many decades earlier and some landmark dissenting opinions, critically discussed at academic tables many times, are in the queue to overturn the pages of the Indian judiciary. The most important fundamental right, i.e., the right to life, was violated for many decades, but it was the dissenting opinion of Justice H. R. Khanna which became law after 40 years in India and included the right to privacy as a part of the right to life. Dissenting opinions keeps the voice of minority alive. Several notable comments from landmark dissenting opinions are discussed in this study. The path directed by these dissenting opinions seems most accurate to convert the status of this nation from an orthodox nation to a progressive State. The dissenting opinion of Justice Sinha rightly defended the issue raised in the Bombay ex-communication case and held the practice of ex-communication unconstitutional. He further held in the same case that the right to religion must be limited to thought process only and the religious customs or practices must be confined to part III of the Constitution. The comments given by Justice Lakshmanan in another landmark case are also notable as he had stated that, “the constraints that a State may impose under Article 25 (2)(b) are absolutely obvious and include social welfare and reform in it.” He further stated that “any activity carried out in promotion of a religious conviction or act of faith must be in compliance with the nation's penal code and constitution. It must be remembered that just because a certain segment deems something to be religious, it does not make it any less

disgusting.” The viewpoint taken by Justice Indu Malhotra is also in consonance with Justice Sinha’s that, “...it was not for the courts to meddle into issues of deep religious beliefs and it must be left to individuals practising the religion, in a secular society like India.” Whereas the viewpoint by Chief Justice J. S. Khehar and Justice Abdul Nazeer in Shayara Bano case stood on different footings and they held that, “personal laws are beyond the sphere of part III of the Constitution and hence, cannot be struck down by the courts.” Besides, having a different opinion of Justice Khehar and Nazeer in Shayara Bano case regarding interference of judiciary in personal laws, they themselves agreed for protecting the women rights, their dignity and social reformation laws and they directed the State legislation to bring laws in this behalf for social advancement and social reformation.

Concluding remarks of all dissenting opinions, it has been observed that these dissenting opinions are very important to shape and protect fundamental rights and in reformation of laws for curbing social evils.

## Chapter -9

### CONCLUSION & SUGGESTIONS

“यदा-यदा हि धर्मस्य ग्लानिर्भवति भारत।  
अभ्युत्थानमधर्मस्य तदात्मानं सृजाम्यहम् ॥४-७॥

परित्राणाय साधूनां विनाशाय च दुष्कृताम् ।  
धर्मसंस्थापनार्थाय सम्भवामि युगे-युगे ॥४-८॥”

“Yada-yada hi dharmasya glanirbhavati bharata |  
Abhythanamadharma-sya tadatmanam srijamyaham ||  
Paritranaya sadhunang vinashay cha dushkritam |  
Dharmasangsthapanarthay sambhabami yuge-yuge ||”<sup>194</sup>

#### 9.1 Conclusion

Religion is a subject of belief & faith and a person has absolute freedom to keep belief and faith in the existence or non-existence of God, whereas religious practices and customs must adhere to the Constitutional provisions. Religion is an important aspect embedded in all persons' lifestyles and cannot be separated from their lives. India is a secular country and the provisions of freedom of religion are well enshrined in Articles 25 & 26 of the Indian Constitution. Religion is as old as a society and the persons are following their religion from ancient times. With the flow of religious freedom provided in the Indian Constitution, persons are following a number of religious customs and practices, out of which, some practices were challenged in different courts from time to time. ***The Constitution of India is a supreme governing body and the religious customs and practices must be confined to the provisions of the Indian Constitution.*** The constitutional validity of these religious customs and practices must be checked through the provisions of the Constitution of India only and not otherwise.

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<sup>194</sup> Srimad Bhagavad Gita, verses 7 & 8, Chapter 4, *Meaning: I am coming, I am coming, when there is a loss of religion, then I am coming, when the iniquity increases, then I am coming to protect the gentlemen, to destroy the wicked I am coming in to establish religion and I am born in the age of era.* available at: <https://www.thedivineindia.com/yada-yada-hi-dharmasya/6041> (visited on December 24, 2022).



After analysis of all religions, it has been observed that all religions have the same viewpoint on the issue of moral standards that a person should follow. No religion or religious text supports unethical practices and religion doesn't promote a sense of hatred feelings among the persons of the community. ***All religions have a common view of protecting humanity, helping the poor, maintaining the dignity of women, not stealing and not killing anybody.***

The people of India are following a number of religions having diverse cultures and traditions. A number of religious Gurus and spiritual leaders had contributed a lot in framing religious customs. People have followed their lifestyle as their standard way of living. As the whole society started transforming into a civilized one, people felt the need for civil laws to regulate the whole society in a justified way. The basis of all these personal laws was ethics and morality. Moral principles guide all religions that set the standard for 'what is the right thing to do' and 'what should be prohibited'. More or less, all religions are based upon these ethical principles. However, their preachers may agree or not with another religion and may their style of living life be diverse from another religion; ***the destination of all religions is almost the same, i.e., 'to live a peaceful life in a justified manner without disturbing anybody else'. The five major and oldest world religions (Hinduism, Islam, Christianity, Buddhism and Judaism) have a common objective to uphold humanity.*** Even the purpose of the law is to regulate human behaviour while ensuring human rights or fundamental rights and imposing fundamental duties. As per Indian Constitution, Articles 25 & 26 provides freedom of religion. Article 13 of the Indian Constitution saves the customary laws which are not inconsistent with the Constitutional provisions. Personal laws are also enforceable in Indian courts and there are different personal laws for different religions, and not uniform civil laws.

In worldwide countries, all democratic countries are providing freedom of religion to all persons as their fundamental right. Even though some countries have declared a particular religion as their official State religion, they are also providing religious freedom as a personal right. In the United States, the sphere of the State and Church is clearly distinguished. There are a number of Covenants and Declarations upon freedom of religion given by the United Nations, European Union and other international bodies that were signed & ratified by different countries. The Universal

Declaration of Human Rights, the European Convention for the Protection of Human Rights and Fundamental Freedoms, and the International Covenant on Civil and Political Rights are some significant Conventions and Declarations that have contributed a lot in shaping religious freedom as a significant fundamental right in all world. India is also a member country, which has recognized these Conventions and incorporated the objectives of these Conventions in the laws of the country. ***But the position in India in regards to the distinction between the sphere of State and religion is different from other countries. India is still fixed in orthodox mechanisms and lacks a clear distinction between the sphere of the State and religion.***

India is a secular country and the State cannot promote any particular religion. The people of India are free to profess or not to profess any religion, propagate their religion and celebrate religious activities. But these religious activities must be confined to the Constitutional spirit and theme, which means that no religious activity should be allowed, which violates the fundamental rights of any person.

Article 25 of the Indian Constitution provides freedom to profess any religion to all persons and Article 26 of the Indian Constitution provides freedom of managing religious affairs and administration of their properties to all religious denominations. The same Articles also put limitations on freedom of religion. Under Article 25, it is provided that freedom of religion is subject to public order, health, morality and part III of the Indian Constitution (i.e., Fundamental rights) and Article 26 is also subject to public order, health and morality. ***It clearly shows that freedom of religion is not an absolute right and the State can intrude in religious matters to bring social reformation. The analysis of the texts of Articles 25 & 26 describes that freedom of religion is subject to other fundamental rights and while celebrating religious customs or practices, the most significant fundamental rights enshrined in Articles 14, 15 & 21 must not be overlooked.***

It has been observed that the Right to life is the most important fundamental right securing the health and life of all human beings and being a social State, the legislation and the judiciary, both state organs, have a responsibility to care for all fundamental rights. Maintaining the balance among all fundamental rights is also within the scope of State organs. In the case of *Nikhil Soni V. Union of India & Ors.*,

the opinion delivered by the Rajasthan High Court seems optimistic in its approach that neglects the orthodox view of religious institutions. In conclusion, the Rajasthan High Court held that *“neither the right to life can be ignored, nor it may be sacrificed in anyhow situation”*.<sup>195</sup> In another case, the Apex Court ruled that *“no one shall be deprived of his life without due process of law”*, which is a basic right guaranteed by Article 21 of the Indian Constitution.<sup>196</sup> The Supreme Court ruled in the case of *Kharak Singh v. State of U.P.* that *“When the word 'life' is used in this sense, it is inferred that there is more to life than just animal existence”*.<sup>197</sup> The Court broadened the application of Article 21 in the case of *Maneka Gandhi v. Union of India*. It was stated that “the right to life includes the right to live with human dignity and all that goes with it, namely the necessities of life such as adequate nutrition, cloth and shelter over one's head and facilities for reading, writing and expressing one's self in a variety of forms, freely moving about, mixing and mingling with fellow human beings and must include the right to necessities of life as well as the right to carry on functions and activities as constituting the basic human needs”.<sup>198</sup> In this research, it has been observed that religious practices like FGM or khatna, Santhara, the sacrifice of animals, burning of crackers and effigies, Jallikattu, loudspeakers in holy places, bigamy or polygamy and other gender-discriminatory customs followed by personal laws are violative of Articles 14, 15 and 21. ***Contrary to the Constitution's provisions***, these practices or customs cannot be protected under Articles 25 & 26. For social reform, the State may bring legislation and intrude into these matters and this intrusion will be accounted for under the scope of Articles 25(2)(b).

In India, different personal laws are applicable to people of different religions. These laws are not uniform and the provisions of these personal laws are different on specific issues of marriage, divorce, death, succession, adoption etc. For instance, Hindu Marriage Act does not allow polygamy, whereas it is allowed up to 4 wives in Islamic laws. Indian Penal Code provides certain provisions to maintain peace and harmony in society and made certain acts punishable. The State had also enacted a

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<sup>195</sup> 2015 Raj HC.

<sup>196</sup> *Murli S. Deora V. Union of India*, AIR 2002 SC 40.

<sup>197</sup> 1963 AIR 1295, 1964 SCR (1) 332.

<sup>198</sup> AIR 1978 SC 597; (1978) 1 SCC 248.

number of other statutory provisions that are directly or indirectly connected with religion. *Under the shadow of religious freedom, persons are celebrating a number of ceremonies, customs and practices, out of which, some practices are violating these statutory provisions.*

A detailed analysis of the judgments of the Supreme Court of India, various High Courts, District Courts and various Foreign Courts are made for resolving the various critical & social issues. For deep analysis of all issues confronted in many landmark cases, the viewpoints of dissenting judges and majority judges sitting in Constitutional benches, are analyzed in isolation.

It is significant to discuss “the dissenting opinion of Justice Sinha delivered in the Bohra Community ex-communication case here”.<sup>199</sup> Justice Sinha favours all social reformation laws that outlaws Sati, remove caste disabilities, allow widow remarriage and many others. Excommunication is “against the theme of individual liberty of conscience protected by Article 25(1) of the Constitution of India and not in derogation of it”, according to Justice Sinha, who compared the practice to untouchability. “An expelled person is prohibited from exercising rights in connection with places of worship, as well as other rights to community property, which are all disputed of a civil nature and are not solely religious matters, such as the right to bury the deceased in the community burial ground”, he continued.<sup>200</sup> Justice Sinha's position was well-reasoned and convincing and it is also evident from his reasoned dissenting opinion that some activities may have had some influence on religious organisations but were not fundamentally religious. “Religious ceremonies, customs and practices connected with the particular form of worship that is the religion's tenet must be distinguished from customs or practices in other areas that may occasionally affect religious institutions but are less closely related to the ceremonies and rites whose performance is a necessary component of the religion.”,<sup>201</sup> suggested Justice Sinha.

Another significant dissent opinion is delivered by Justice Lakshmanan in a landmark case.<sup>202</sup> “The constraints that a State may impose under Article 25 (2)(b) are

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<sup>199</sup> *Sardar Syedna Taher Saifuddin Saheb v. St. of Bombay*, AIR 1962 SC 853.

<sup>200</sup> *Ibid.*

<sup>201</sup> *Ibid.*

<sup>202</sup> *Commr. of Police v. Acharya Jagadishwarananda Avadhuta*, (2004) 12 SCC 770.

absolutely obvious and include social welfare and reform in it," Justice Lakshmanan writes. He further said that "Any activity carried out in promotion of a religious conviction or act of faith must be in compliance with the nation's penal code and constitution. It must be remembered that just because a certain segment deems something to be religious, it does not make it any less disgusting".

On the contrary side, ruling majority judgments of the Supreme Court are evolving around the essential nature of religious practices and customs only. By this, they overlook the aspect of social reform in personal laws obstructing the nation's development as a progressive State.

In the Sabrimala case, Justice Indu Malhotra gave another dissenting opinion on religious issues and opined that "it was not for the courts to meddle into issues of deep religious beliefs and it must be left to individuals practising the religion, in a secular society like India".

In the case of Shayara Bano, famously known as the triple talaq case, Chief Justice J. S. Khehar and Justice Abdul Nazeer directed the State for bringing a new law that can regulate the provisions of divorce in Islam and bring social reformation.

## 9.2 Landmark dissenting opinions related to right to religion

| S. No. | Name of Justices | Name of Cases   | Notable Dissenting Opinions  |
|--------|------------------|---|--|
| 1      | Justice Sinha    | Sardar Syedna Taher Saifuddin Saheb v. St. of Bombay, AIR 1962 SC 853 | 1. An expelled person is prohibited from exercising rights in connection with places of worship, as well as other rights to community property, which are all disputed of a civil nature and are not solely religious matters, such as the right to bury the deceased in the community burial ground<br><br>2. Religious ceremonies, customs |

|   |                       |  |  |
|---|-----------------------|--|--|
|   |                       |  | and practices connected with the particular form of worship that is the religion's tenet must be distinguished from customs or practices in other areas that may occasionally affect religious institutions but are less closely related to the ceremonies and rites whose performance is a necessary component of the religion.   |
| 2 | Justice Lakshmanan    | Commissioner of Police V. Acharya Jagadishwarananda (2004) 12 SCC 770.       | <p>1. The constraints that a State may impose under Article 25 (2)(b) are absolutely obvious and include social welfare and reform in it.</p> <p>2. Any activity carried out in promotion of a religious conviction or act of faith must be in compliance with the nation's penal code and constitution. It must be remembered that just because a certain segment deems something to be religious, it does not make it any less disgusting.</p> |
| 3 | Justice Indu Malhotra | Indian Young Lawyers Association v. State of Kerala 2018 SCC Online SC 1690. | 1. It was not for the courts to meddle into issues of deep religious beliefs and it must be left to individuals practising the religion, in a secular society like India.  |
| 4 | Chief Justice J.      | Shayara Bano V.  | In the case of Narasu Appa, it was   |

|  |                                  |                               |   |
|--|----------------------------------|-------------------------------|---|
|  | S. Khehar & Justice Abdul Nazeer | Union of India (2017) 9 SCC 1 | held that “personal laws are beyond the sphere of part III of the Constitution and hence, cannot be struck down by the Court.” <sup>203</sup> Writing a dissenting note in the triple talaq case, Chief Justice J. S. Khehar and Justice Abdul Nazeer held that "...proposition in the Narasu Appa case must be taken to the present declared position of law, upheld by several Supreme Court judgments including by two Constitutional benches. Shariat Act 1937 recognizes Muslim personal law as a 'rule of decision'. Therefore, the proposition that the 1937 Act confers statutory status on Muslim personal law cannot be accepted. Triple talaq cannot be held violative to part III of the Constitution as Muslim personal law or Shariat is not based on state legislation. Hence. It cannot be tested on the touchstone of being a state action." |
|--|----------------------------------|-------------------------------|---|

**Table 9.1 Landmark dissenting opinions related with right to religion**

*After considering all these judgments, it is concluded that the right to life is indefeasible and cannot be ignored or sacrificed for any reason. “The law of humanity and right to life is the superior right over all other fundamental rights; neither it can be ignored nor may be sacrificed by anyone”.* The State should intrude

<sup>203</sup> *State of Bombay V. Narasu Appa Mali*, AIR 1952 Bom 84.

into religious matters that are violating fundamental rights and the State should endeavour to transform the nation from an orthodox State to a progressive nation.

The theoretical outcome of this research resulted in two different theories. The ***“Theory of Religious Secularism”*** may help in describing the extent of freedom of religion and the powers of the State to intrude into personal laws for social reformation. This theory describes that religious freedom is a matter of personal choice and it must be enjoyed within a limited scope in public places. Professing their religion, nobody can hurt the feelings of other religions or religious persons. While entering a public place or institution, where that public place or institution is guided by uniform or secular rulings, the administration may make rules to wear the religious wearing or objects qualifying their dress code. However, in those cases where other persons have a threat to their life from these objects or wearing, the administration of that institute may compel them not to wear any religious mark or object inside the institution. The right to religious freedom does not allow intruding into other persons' freedom. When we enter a public place comprising a community of different religions, every person has equal freedom of religion. It is correct that religious freedom is a matter of personal choice and the person carries their rights along with him, but, standing in a public place, nobody can use his right in an absolute way. It must be controlled by the guiding rules of that public place.

***The Supreme Court deduced the test of essential practices to check the Constitutional validity of these customs and practices, whereas the Supreme Court was wrong to neglect the essential aspect of Constitutional norms.*** Being essential or non-essential practice to any religion may not be sufficient to provide protection under Articles 25 & 26; it is the test of all Constitutional provisions of part III of the Constitution first and then the Court may apply the test of essential practices. ***The ‘Essential Religious Practices Test’ deduced by the Supreme Court in the case of Shirur Mutt is a flawed theory, this test has remained unsuccessful to define the extent of religious freedom and remained unsuccessful to save the fundamental rights of citizens. This test also restricts the State from bringing social reformatory laws to curb social evils. In this research, a ‘Two-Tail Test’ is also suggested to check the Constitutional status of religious customs or practices that may outlaw the “Essential Religious Practices Test”.***



The second theory is the “*Doctrine of Persisting & Constructive Positivism*” which signifies the importance of dissenting opinions of courts and may help in resolving the critical issues that remained unresolved by the earlier benches. This Doctrine may also prove helpful to protect fundamental rights.

The analysis of the empirical study supports the “Theory of Religious Secularism”. The compiled analyses of all the responses received from the questionnaire floated shows the public opinion in consonance with the suggested theory. These questions are directly related to the application of the Theory of Religious Secularism in different situations, the responses of which gave a clear direction and resolution same as suggested in the theory. The majority of the persons agreed that the State should intrude in those religious matters which are violating fundamental rights and the State should enact social reformatory laws. These persons also agreed that freedom of religion is not an absolute right and it must be confined to the provisions of the Constitution.

Although much philosophical work is available in the public domain related to religious freedom issues, there was no definite solution found in these studies for the issues discussed here, nor was there any direction to resolve these issues.

This study is done from a different perspective and covers almost all issues relating to religious freedom. Although it is also complicated to resolve all the critical issues in this limited-time study and to answer all the unresolved queries having conflict in society from centuries back, still a different approach is applied and there is a ray of hope for a positive result.

*This study is not limited to just answering the theoretical problems, but a path is also suggested in the study for the future generations to divert the direction of the orthodox nation towards a progressive state and a Pandora box for advanced study is opened for future research scholars.* A gradual change in society is possible by state intervention in unconstitutional customs and activities performed in the name of religious freedom.

### **9.3 The accomplishment of research objectives and reply to the research questions**

Generally, the analysis of the study is given above; in particular, replies to the research questions, as observed in the study, are given below.

| Q. No. | Research Question  | Reply  |
|--------|--|--|
| 1.     | <b>Whether right to religion is ensured in true spirit to all persons in “Secular India”?</b>                  | It has been observed that the right to religion overlaps with other fundamental rights of persons in many spheres. There is a need to balance the right to religious freedom and other fundamental rights of the Constitution of India.  |
| 2.     | <b>How is the right to religion exercised in other countries compared to India?</b>                            | The right to religion is well exercised in other countries also. Democratic countries actively participate in human rights issues and the people of those countries are least participating in communal violence. Various international covenants are contracted with several European countries and United Nations organizations and member countries issue guidelines for supporting the personal liberty of human beings and freedom of faith, conscience and religion. |
| 3.     | <b>Whether the legislation and judiciary are fairly exercising their powers to ensure freedom of religion?</b> | Although both State organs, i.e., judiciary and legislation, are acting positively to ensure freedom of religion, still their powers are overlapping and their views are contradictory to each other. Due to a lack of clarity on Constitutional provisions and changing scenarios of social norms, their viewpoints need to be re-accessed.   |
| 4.     | <b>Whether the judiciary is exercising excessive powers under the preview of judicial</b>                      | The Supreme Court had deduced the essential religious practices test and lemon test to justify their reasoning. However, they forget the path driven by Constitutional   |

|           |  |  |
|-----------|--|--|
|           | <p><b>review?</b></p>  | <p>norms. These tests are nowhere mentioned in the Constitution and are a product of judicial activism. It is not the case that the judiciary has always misused its powers of judicial review, but due to the complex nature of religious issues, they failed to deduce an exhaustive test which resolves all critical issues related to unethical religious practices. As suggested in this conclusion and suggestion chapter of this study, the courts must check the Constitutional validity of any religious practice at the first instance and if it passes the test, then they should go for testing the essential religious practices test. Even in those cases, the legislation should have room to bring laws for social reform for the more considerable public interest.</p> |
| <p>5.</p> | <p><b>Whether the customary practices are in consonance with the Constitutional provisions in India?</b></p> | <p>Not all of the practices, but some, as discussed in the study, were found to be violative of Articles 14, 15, 17 and 21 of the Indian Constitution; hence these practices do not align with the Constitutional provisions in India.</p> <p>Santhara, FGM or Khatna, burning of fire-crackers, use of loudspeakers at holy places, the sacrifice of animals for religious purposes, cultural sport 'Jallikattu', unfair methods of divorce in different communities, gender-discriminatory and women derogatory customs or rituals, ban</p>  |

|    |   |  |
|----|---|--|
|    |   | upon entry of women into holy places, prohibition of a judicial remedy in personal laws, ex-communication cases etc., are some practices out of them.  |
| 6. | <b>Whether dissenting opinions of courts are important to give shape to right to life and religion?</b> | <p>Dissenting opinions are persuasive precedents and do not become part of the judgment. However, the dissenting opinion is recorded for several purposes. It has maintained the judiciary as independent till now and kept minority voices intact. A Dissent is not only an "appeal to a future intelligence" but an expectation of what is possible: if one judge can be convinced today, then tomorrow, perhaps two, or three, or even four might be. Charles Evans Hughes, an Associate Justice of the Supreme Court of the United States, has told that "A dissent in the court of last resort is an appeal to the brooding spirit of the law, to the intelligence of a future day when a later decision may correct the error into which the dissenting judge believes the court to have been betrayed."<sup>204</sup></p> <p>In this study, it has been noticed that dissenting opinions of courts are very much essential to give shape to the right to life and the right to religion. In many landmark cases, the Court had upheld the dissenting opinions of Constitutional benches that were delivered many decades earlier and some</p> |

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<sup>204</sup> Edward McGlynn Gaffney Jr., *The Importance of Dissent and the Imperative of Judicial Civility* 28 (Val. U. L. Rev. 583, 1994).

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|    |  | landmark dissenting opinions, critically discussed at academic tables many times, are in the queue to overturn the pages of the Indian judiciary. The most important fundamental right, i.e., the right to life, was violated for many decades, but it was the dissenting opinion of Justice H. R. Khanna which became law after 40 years in India and included the right to privacy as a part of the right to life.  |
| 7. | <b>Whether the State should interfere in the evil practices prevailing in the society in the name of religion?</b> | In this study, it has been observed that religious practices and customs differ from religious beliefs and faith. The latter part is protected under Articles 25 & 26 of the Indian Constitution, but this protection of religious freedom provided to religious practices and customs is subject to Constitutional norms and morality. The State should intrude into all matters of evil practices prevailing in society in the name of religion and for social reform, the State should bring social reform legislation. No evil practice held unconstitutional as per this study shall be allowed to violate the Constitutional scheme and to infringe on the fundamental rights of persons. |

**Table 9.2 The Accomplishment of research objectives and reply to the research questions**

## **9.4 Suggestions**

### **9.4.1 Research-oriented suggestions on the basis of findings of the study**

#### **9.4.1.1 Application of ‘Theory of Religious Secularism’**

The theory of religious secularism, which resulted as a theoretical outcome of this research study, seems most accurate to apply to all critical issues discussed here. However, no theory can be perfect in all situations, but thinking out of the box is a good initiative for resolving critical issues. This theory suggested dividing religious rights into two different spheres, which enables marking the exact sphere of religious freedom and the powers of the State to intrude into personal laws.

This theory also suggested that religious freedom, up to the extent of beliefs and faith in the existence or non-existence of God, is absolute and not for celebrating customs and practices, which must be confined to the provisions of part III of the Constitution. Another valuable suggestion given in this theory is that public places must be regulated with secular laws only and these laws must not be twisted for any particular religion.

This theory elaborated the ‘Doctrine of Ethical Religion’, which suggested that all religions must be ethical also, as the very purpose of all religions is the promotion of humanity and no religion may be involved to promote unethical or immoral activities.

This theory also suggested enacting uniform laws applicable to all persons in a uniform way affecting their civil lives. A person took birth into any religious family accidentally and it is not under control for that person to follow any specific religion. He may change his religion after attaining the majority and the development of rational thinking, but a change of religion also attracts a number of complications and criticism from society, which resists the person to do so. This theory suggests to remove the *veil of religion* and elaborated that all persons, who took birth on this planet are equal in nature, so applying different laws on persons taking birth in different religious families is not an accurate way to deal with any society. Moreover, under this theory, the State is held responsible for the maintenance of civil lives of the people and not for the religious principles.

This theory also suggested to codify a common code for uniform religious ethics that may be applied by all religious institutions uniformly upon their followers. It will

encourage the sense of brotherhood and will help to achieve the target of integrity, unity and fraternity among persons of different communities, which is the foremost objective of the Indian Constitution.

#### **9.4.1.2 Application of ‘Two-Tail Test’**

It has been observed that the Essential Practices Test deduced by the Supreme Court fails the Constitutional test and it is a flawed theory. It is not exhaustive to cover all critical issues related to religious customs and practices. This test does not examine other constitutional fundamental rights defined in Articles 14, 15 and 21. Any religious custom, ritual, practice or usage must pass the test of Articles 14, 15 and 21. It is suggested to apply the ‘Two-Tail Test’ resulted as an outcome of this study to check the Constitutional validity of the religious customs or practices. Although all the critical matters discussed in this study are under consideration of several courts or a matter of debate at the desks of national platforms and it will be prejudiced to say anything about the constitutionality of these practices, it is still suggested to draft a framework to check all the corners of conflict properly and to take the matter into consideration of the sphere of constitutional wires. The issuance of suggested guidelines is within the scope of this research study, without which the real purpose of this study will be defeated.

This test is developed to replace the test of the essential practice test, earlier deduced by the Supreme Court. The essential practice test is nowhere mentioned in the Constitution and is only the product of judicial activism. As the test of essential practices is not fully competent to answer all critical questions we have, it is suggested to rely upon the two-tail test to get a better result. The reason behind the reliability of the two-tail test is that it checks the constitutionality of the religious practice first and then after the essential nature of the practice. It seems rational reasoning to answer all the critical social issues that perhaps no one can contradict. If still there will be a criticism of this test and the above-discussed doctrines deduced as an analysis of this study, it would be welcome for debates and further deep analysis of the concerned topics by future research scholars.

#### **9.4.1.3 Application of the ‘Uniform Civil Code’ is a need of time.**

All laws that were in effect on Indian territory immediately before the Constitution's execution, insofar as they conflict with the provisions of Part III of the Constitution, shall, to the extent of such conflict, be void, according to Clause 1 of Article 13. The State is empowered to eliminate any imbalance, discrepancy, disadvantage, or prejudice resulting from any existing law under the caveat under clause 2 of Article 13. By putting "custom or usage" in the definition of "law," Clause 3 of Article 13 legitimizes the uncodified personal laws that were in effect in India or any portion thereof before the implementation of the Constitution. The combined reading of the whole Section concludes that if any custom or usage having in force before the enforcement of the Constitution is not constitutional on the wires of equality and parity and is found to be discriminatory in Articles 14 and 15, then it would not be operative. The State shall enact a law to remove such inequality, disparity and discrimination. When any such law comes to the notice of any State organ, it must be struck down, or a law must be enacted to correct the wrong things.

It is the case that personal laws and Acts have been in force before the commencement of the Constitution. There is no need to say that any personal law or Act enacted and enforced after the commencement of the Constitution should also be tested with the wires of Articles 14, 15 and 21 and to maintain the balance among all fundamental rights, any such personal law or Act must not violate these Articles.

After too much discussion and critical examination of several aspects of life, the question before us is that “What is the right thing to do?”. It has been observed that the Law of Humanity is over and above religious freedom. Saving fundamental rights is the foremost function of the State instead of providing absolute religious freedom. To make all codified and uncodified Personal Laws and Acts similar, it is need of time to apply the Uniform Civil Code like the Criminal Code. To enact and enforce Uniform Civil Code and to bring social reform, there is a need for State intrusion into religious customs, usage, rituals and practices which are violating fundamental rights. Evil practices violating Constitutional norms must be banned. People think it is challenging to implement a uniform civil code in India, having too many diverse religions and their followers, but it is not so. It seems complicated due to a lack of clear separation of religious matters concerning personal beliefs and faith of people



from official and political matters of government that are needed to make policies and to run the nation in a secular theme.

Moreover, it is not a process of a couple of days or months and it may take several years to bring change to society. The State endeavours their best efforts to protect fundamental rights and to maintain balance among all the communities to maintain peace and harmony in society. Still, some politically motivated communities or groups obstruct and interfere in the State's work and try to defeat the objective of the State.

*The State had already enacted and enforced many general Acts as a substitute for personal laws like the Special Marriage Act of 1954, Indian Succession Act, The Guardians and Ward Act, of 1890, Indian Divorce Act, of 1869 etc. The need is to apply these Acts uniformly to all persons irrespective of their religion, like criminal law, which may be named as Indian Civil Code or Uniform Civil Code.*

**Moreover, applying these universal laws will be very easy because these laws are already in force for decades and these Acts got challenged several times in different courts and proved constitutionally valid.**

#### **9.4.1.4 Application of 'Doctrine of Persisting and Constructive Positivism'**

Dissenting opinions are persuasive precedents and do not become part of the judgment. However, the dissenting opinion is recorded for several purposes. It has maintained the judiciary as independent till now and kept minority voices intact. A Dissent is not only an "appeal to a future intelligence" but an expectation of what is possible: if one judge can be convinced today, then tomorrow, perhaps two, or three, or even four might be.

The 'Doctrine of Persisting & Constructive Positivism' may prove helpful in testing the legality and constitutional validity of similar critical issues decided or lying pending in several courts with the wires of dissenting opinions. *If it is found that the reasoning behind the dissenting opinion has a sound base to make a debate on that similar critical issue, then a reference to dissenting opinion and its conclusion must be considered while deciding the pending issues in other courts.* It is nothing but just

an extra check on the critical issues upon which the judges have divergent views and complex matters.

Applying this approach to social issues compels society to think alternatively on complex topics and this doctrine is not limited to just religious matters, it can be applied in other spheres also where the landmark dissenting opinions have been recorded by eminent judges.

### **9.5 Suggestions related to statutory provisions**

On the basis of the research in hand, certain amendments related to several Acts and provisions are suggested here.

1. Section 2 of the Muslim Personal Law (Shariat) Application Act, 1937 saves and validates the application of customary laws of Islam in India. Pleading this Section, the followers of Islam practice several practices held unconstitutional in this study. This Section shall be struck down to the extent of validating the customs and practices contrary to the Constitutional scheme as these customs are violative of several Articles of the Constitution of India, i.e., Articles 14, 15, 17, 21 etc.
2. The effect of part III comprising Sections 18 to 29 of The Parsi Marriage and Divorce Act of 1936, limiting the scope of this Act up to Parsi Special Courts by barring the remedy available in general family courts constructed under the provisions of Civil Procedure Code, 1908 and the provision of involvement of special delegates comprised of five eminent persons under Section 19 of the said Act shall be held an unconstitutional. These provisions violate the right to privacy and bar the judicial remedy.
3. The majority judgment of the Sabrimala case held that 'morality in Articles 25 & 26 embodies Constitutional morality' is correct and declaration of Rule 3(b) of The Kerala Hindu Places of Public Worship (Authorization of Entry) Act, 1965 as an unconstitutional is also correct. Any custom or provision making discrimination based on gender and violating the fundamental rights of

persons shall be declared unconstitutional. The said issue is under consideration by the Supreme Court's nine-judge bench. This issue should be decided as the finding of the study in hand.

4. Section 28 of the Prevention of Cruelty to Animals Act, 1960 provides and validates the sacrifice of animals for religious purposes. This Section, being found immoral, shall be declared unconstitutional. It should be declared that neither the animals should be killed nor any such killing for religious purposes should be permitted. It should also be prohibited for other purposes except in the case of a severe threat to the life of human beings from such animals. Even in the case of a severe threat to the life of human beings, the State should make all endeavours to save, protect and preserve these species of animals in animal reserve houses, i.e., zoos, wildlife centers etc.
5. In 2017, The Tamil Nadu State amended the provisions of the Prevention of Cruelty to Animals Act, 1960 and validated the most critical sport, 'Jallikattu', playing. The purpose behind this amendment was to preserve the cultural sports heritage of the State at the cost of the lives of human beings. However, being violative to the right to life provided under Article 21 of the Constitution of India, this amendment, up to the effect of giving validation to the cultural sport 'Jallikattu', shall be held unconstitutional.
6. The practice of Santhara in Jainism, being equivalent to suicide, shall be banned immediately and this practice should be declared punishable under Sections 306 & 309 of the Indian Penal Code of 1860.
7. Life-threatening weapons like swords, tridents, kirpan etc., shall be regulated under the Arms Act of 1959 and no person shall be allowed to carry these objects without having such license and nor should they be allowed to use these objects for any purpose except the extreme emergencies of self-defence as described in the Indian Penal Code of 1860.

8. The Noise Pollution (Regulation and Control) Rules, 2010 of the Environment Protection Act, 1986 and other provisions of the Environment Protection Act of 1986 enacted to save the environment shall be applied strictly without any exception to religious purposes or relaxation to any religious institution. Supreme Court has also directed to use of green crackers only, which are environment friendly and cause less pollution. The court has also directed not to use loudspeakers above a certain level of noise in public places and at night time after 10.00 P.M. But nobody is taking these laws seriously. Some religious customs like burning crackers, burning effigies and playing loudspeakers at holy places are violative of the Environment Act, 1986 and Article 21 of the Indian Constitution; hence these practices should be completely banned immediately, that too without any exemption or relaxation.
  
9. The Parsi customary laws ex-communicate the person contracting the marriage under the Special Marriage Act of 1954. Consequently, the person contracting such marriage loses his or her religious identity and he or she is not allowed to participate in religious processions of the Parsi communities. Even the burial of such an ex-communicated person was not allowed at the places reserved for the Parsi communities to bury Parsi persons. Contracting an inter-caste marriage is a personal right and a person doing so should not be prohibited for his or her other civil rights. Moreover, the State should encourage inter-caste marriages as social reform. Dispossessing a person of his civil rights and losing his religious identity upon contracting a marriage under the Special Marriage Act of 1954 should be held unconstitutional.
  
10. To make the Act of triple talaq punishable and to bring social reform, the State enacted The Muslim Women (Protection of Rights on Marriage) Act in 2019. This enactment was made after the landmark case of Shayara Bano. This Act again proves that 'hard cases give the direction to enact hard laws'. Holding a husband guilty upon the sole evidence of the complainant, i.e., the wife and charging him with punishment, is against the theme of criminal laws. The Act of triple talaq is a civil wrong; suspending the wife's company by the husband

and providing punishment for civil wrongs is wrong. Even if the legislature wants to treat these wrongs as criminal offences, there are ample provisions in the Indian Penal Code 1860 to cover these offences under domestic violence. It is suggested that providing the punishment upon the sole evidence of the complainant is gender-discriminatory and apprehends misuse of this Act in the hands of wrongdoers.

11. In 2007, the Supreme Court of India ruled that all marriages must be registered irrespective of religious custom. The Court also directs all the state legislation to enact proper provisions for compulsory registration of all marriages. Chapter 3 of The Special Marriage Act 1954, comprising Sections 15 to 18, also provides for the compulsory registration of marriages. Personal laws prohibit inter-caste marriages and it promotes enmity between religious groups. The State should apply these laws strictly to put a check upon illegal unions, curb the issues of bigamy or polygamy and inheritance of property in the hands of true legal heirs etc.
12. The cases of marriage failures and divorce petitions are rising day by day. Like other countries, the State should enact the laws and encourage couples, who are going to bind themselves with a marital knot, to make pre-settlements and sign Pre-Nuptial Agreements that will reduce the cases of divorce petitions, maintenance and other marital issues related to the division of property, custody of children etc.

## **9.6 General suggestions**

1. Spiritual leaders and religious gurus should come forward to clarify the purpose of their religious customs and practices because the explanation given by their words will have a large impact on society and it will be an easy way to divert the path of society in the right direction. Unethical practices must be stopped by these religious leaders. Moreover, these leaders are leading the whole society, so it becomes their duty also to curb the social evils of society.

The Law of humanity is over and above all religious laws. These religious leaders should give more emphasis on the law of humanity as guided by religious scriptures or texts and they should avoid spreading hatred feelings among the community.

2. The academicians and legal experts should clarify the extent of religious freedom in detail to the public. They should arrange guest lectures, seminars and other related events with the objective of setting peace and harmony in society. Proper interpretation of legal terms and educating the people about their fundamental rights is the duty of all responsible citizens of society.
3. In India, there is no clear distinction between the State and religion like in other countries. The State should intrude into personal laws and legislate social reformatory laws. It will set up peace and harmony in society. Also, the State should avoid intruding into those matters that are connected with deep religious faith and belief.

Being the caretaker of all fundamental rights, the State has full authority to intrude into religious customs, practices, usage and rituals to save other fundamental rights. The State must maintain balance among all the fundamental rights, whereas religious belief and faith are indefeasible and the State should not intrude into matters concerning religious belief or faith.

4. The State should constitute a Government organization including the representatives of Civil society which may be responsible for the protection of human rights. The State should also issue a helpline number for protecting the fundamental rights. All persons, who need specific help or guidance in relation to the violation of their fundamental rights, should provide proper guidance in this regard. If any person wants to file PIL or Writ, a proper mechanism in this regard should be arranged by the State. Moreover, Article 39A of the Indian Constitution also makes the State responsible to provide free legal aid to all persons in need of legal assistance.
5. Women are equal to men in all aspects. All persons should understand this law of equality. No religion promotes discrimination against women. Certain religious customs and practices were started in a patriarchal system of society that must be gone now. All people should treat women as equal to men in their

daily life activities. “The ban upon entry of women into holy places like Sabrimala temple or Hazrat Ali Durgah is discriminatory and derogatory for the status of women”,<sup>205</sup> and hence it needs State intrusion to make uniform laws to regulate gender-neutral laws in society. For particular matters of belief or faith concerning the physical limitations of women barring them from entering holy places, the choice should be the women's right, as it is a matter of personal choice. No regulatory agency, religious group or institution or State can bar them from entering holy places based on their gender and physical character as it would amount to discrimination, similar to untouchability and derogatory toward the status of women in society.

6. The representation of women in Parliament, State legislations and other dignitary offices are very low as compared to men. The basic reason for low representation is the treatment of girls and women in society. Girls and women are not treated equally in society and religion and religious aspects have a great contribution to this distinction. The State should initiate to make equal representation of women in society which will be the best resolution to many social evils.
7. Several practices are violating fundamental rights and constitutional norms. All persons should abide by the country's laws and contribute to setting up peace and harmony in society. Article 51A of the Constitution of India provides 11 fundamental duties for citizens. Everybody talks about fundamental rights, but very less people gave emphasis fundamental duties. All persons are duty bound to maintain peace in society, keep the environment safe, not hurt anybody, maintain the integrity and fraternity in the nation etc. If all persons abide by the fundamental duties, then there will be no need to talk about fundamental rights. Moreover, the basis of all religions is dependent upon fundamental duties and not rights, but people have taken religion in the wrong direction.
8. In the matter of wearing religious clothes, marks and objects in public places, the State should make uniform rules irrespective of any particular religion. Irrespective of any religious purpose, a dupatta, hijab and turban used by

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<sup>205</sup> *Indian Young Lawyers Association v. State of Kerala*, 2018 SCC Online SC 1690.

persons of different communities serve the same purpose of caring for hair and protecting modesty. The rule should be uniform to wear a dupatta, hijab and turban. It is not so that these objects are necessary for any particular religion and it is a matter of personal choice for what to wear. The restriction may be applied to the extent of the colour of cloth or object worn by any person resembling the colour of that institution's uniform or to that institution's dress code.

9. The question before us is whether we are going in the right direction and whether the changes and advances that society is automatically adopting and incorporating into our law system are moral and ethical. The character of constructiveness and constitutionalism in these laws may also be at stake and challenged soon. Society has enlarged the extent of the right to privacy to include live-in-relationship, same-sex marriage and surrogacy in it, decriminalizing the offence of adultery and unnatural sex and incorporating anti-conversion laws by some states are some concerned matters. Most of the issues are directly or indirectly related to the personal choice of a human being and his or her daily routine life. It shows that the daily routine of human beings is also changing daily. Due to this, the meaning of moral values in their daily life is also changing, which is directly related to religious beliefs and faiths and these modern notions have also changed the meaning of life.

Changing the status of religious marriages between two persons having opposite sex into a union of live-in-relationship without marital ties or same-sex marriage is not validated by any personal law yet. The same is the case for surrogacy, which is not allowed in any personal law and starts the novel issues of the rights of surrogate mothers along with some other issues.

The voluntary freedom of sexual intercourse by an adult person with another adult person by decriminalizing the offence of adultery is also very far away from moral values. Any religion does not recognize the freedom of sexual intercourse by same-sex persons or sexual intercourse outside wedlock. Whether these changes are taking the human being far from morality or making a human being more liberal, it is complicated and beyond the scope of this study to discuss here. *The only purpose of this discussion is to find the*



***right path for the development of society and nation. Remaining moral in person is the main objective of all religions and enacting constitutionally moral laws is the right path for future generations.***

A comparative and critical study of research observations is made to accomplish the research objectives, the research outcome in the form of a novel theory is tested and replies to the research questions are made. Now, the responsibility for social transformation is upon the shoulders of all the future research scholars, academicians, legal luminaries, religious denominations and the general public, who are the best persons to debate this study analytically and critically and able to decide the right course for the future of the nation.

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25. <https://cjp.org.in/wp-content/uploads/2017/12/ORISSA-FREEDOM-OF-RELIGION-ACT-1967.pdf>
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27. <https://quran.com/33/33?translations=19,21,95,85>
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29. <https://www.thedivineindia.com/yada-yada-hi-dharmasya/6041>

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## ABBREVIATIONS

UK: United Kingdom

USA: United States of America

ICCPR: International Covenant on Civil and Political Rights

UDHR: Universal Declaration of Human Rights

ECHR: European Convention on Human Rights, formally known as the European Convention for the Protection of Human Rights and Fundamental Freedoms

AIR: All India Reporter

SCC: Supreme Court Cases

SCR: Supreme Court Reports

UCC: Uniform Civil Code

FGM: Female Genital Mutilation

SC: Supreme Court

HC: High Court

ICESCR: International Covenant on Economic, Social and Cultural Rights

CTCIDTP: The Convention against Torture and other Cruel Inhuman or Degrading Treatment or Punishment

CRC: The Convention on the Rights of the Child

ICERDW: International Convention on the elimination of All Forms of Racial Discrimination against Women

CPPCGCSR: Convention on the Prevention and Punishment of the Crime of Genocide and the Convention relating to the Status of Refugees

ICPRMWMF: International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families

HRC: The Human Rights Committee

UNDEFIDRB: U.N. Declaration on the Elimination of All Forms of Intolerance and Discrimination Based on Religion or Believe

UNC: The United Nations Charter



## QUESTIONNAIRE

### INTRUSION OF STATE INTO RELIGIOUS RIGHTS WITH SPECIAL REFERENCE TO DISSENTING OPINIONS OF COURTS: A CRITICAL APPRAISAL

Hi, this is Dimple Jindal, Pursuing Ph.D. from Lovely Professional University, Phagwara.

India is a secular State and the Constitution of India provides freedom of religion to every person.

There are several conflicts in our society related to religions, religious customs & practices

and freedom of religion. This survey is being conducted to find a resolution for these social

conflicts and to make India a progressive state. I request you all to take part in this

survey and make the objective of this study successful.

Disclaimer:

The comments and answers will not be disclosed to anyone else. This Questionnaire is strictly adhered to for academic purposes and is directly or indirectly related to personal

beliefs and religious matters, but the purpose of this study is not to undermine any particular religion or minority group or to hurt the feelings of any religious community or marginalised group.

\* Required

1. Religion and morality are two sides of the same coin. Do you agree that all

\* customs and practices based upon religious principles must be moral also?

*Mark only one oval.*

Yes, religion includes morality in itself and religion cannot be apart from morality.

No, religion has nothing to do with moral principles. Religion and morality are different.

Not sure.

Other

2. Can a personal law restrict the freedoms provided by the Constitution of India? \*

*Mark only one oval.*

Yes, religions can impose reasonable restrictions over and above the Constitution.

No, Constitution provides for the fundamental rights and duties and it must be upheld.

Not Sure

Other

3. Is it the obligation of State (legislation & Judiciary) to contribute in the protection of human rights while making intrusion in personal laws?

*Mark only one oval.*

Yes, the State is caretaker of the fundamental rights and can enact laws for social reformation and empowerment of any suppressed community.

No, personal laws are covered under religious freedom.

Not sure.

Other:

4. Whatever is declared as illegal or sin/ immoral in religious scriptures, cannot be held valid in religious customs or practices.

Do you agree with this statement?

*Mark only one oval.*

Yes, religious scriptures are the main source of personal laws. Therefore religious customs and practices cannot run contrary to the religious scriptures.

No, religious customs or practices, being followed by immemorable times, should be held valid.

Not Sure

Other

5. The Bengal Sati Regulation Act banned the Sati practice in British India.

Do you agree that the Act restricted the practice of Sati afterwards and improved the social status of woman?

*Mark only one oval.*

Yes, State enacted Bengal Sati Regulation Act improved the social status of women. No, this Act has no contribution in improving the social status of women.

Not sure.

Other

6. Do you agree that the ban on instant triple talaq will be helpful to improve the social status of woman?

*Mark only one oval.*

Yes, State intervention in abolishing instant triple talaq will be helpful to improve the social status of women.

No, State intervention in such matters violates religious freedom.

Not sure

Other

7. NIKAH HALALA\* is a recommended practice in Islam.

Do you agree that State should impose ban on the practice of NIKAH HALALA?

(\* NIKAH HALALA is a practice in which a woman, after being divorced by triple talaq, marries another man, consummates the marriage, and gets divorced again in order to be able to remarry her former husband. )

*Mark only one oval.*

Yes, the practice of Nikah Halala is derogatory for women and the State should impose ban on this practice.

No, State intervention in such matters violates religious freedom.

Not sure

Other

8. Should any public place be allowed for performing any religious activity? \*

*Mark only one oval.*

Yes, there must be absolute freedom for the same.

No, none of the rights are absolute and the State can impose reasonable restrictions on the same.

Not sure

Other

9. Who can challenge the constitutional validity of religious customs or practices?

*Mark only one oval.*

Only victims of such practices have a right to challenge.

Only followers of the same religion should be allowed to challenge religious customs or practices.

Any person, irrespective of his religion can challenge the religious customs or practices of any religion for social reformation purpose.

Not Sure

Other

10. Do you agree that State intervention in the matters of dress code, which is restricting the wearing of hijab, doesn't violate fundamental right to education?

*Mark only one oval.*

Yes, they are free to join other schools operated by Muslims organizations like 'Madrassas'.

No, denial of wearing hijab causing denial of education in public schools, and hence violating the fundamental rights to education.

Not Sure

Other

11. Law doesn't allow to take one's own life, but religion justifies the act of 'SANTHARA'\* for salvation purpose.

Do you agree that State should hold Santhara as unconstitutional?

(\*SANTHARA - It is a religious practice of voluntarily fasting to death by gradually reducing the intake of food and liquids. It is viewed in Jainism as the thinning of human passions and the body, and another means of destroying rebirth- influencing karma by withdrawing all physical and mental activities.)

*Mark only one oval.*

Yes, taking one's own life for any purpose is immoral and illegal, hence it must be held as unconstitutional.

No, this matter is related to deep religious faith and the State shouldn't interfere in these matters.

Not Sure

Other

12. Law doesn't allow causing bodily hurt or grievous hurt to anyone, but religion justifies the act of 'KHATNA'\* and 'FEMALE GENITAL MUTILATION'\* for

religious purpose and participation of human beings in 'JALLIKATTU'\*.  
Do you agree that State should ban the practice of Khatna, Female  
Genital Mutilation and Jallikattu?

(\*KHATNA is the recommended practice of male circumcision in Islamic  
culture; FEMALE GENITAL MUTILATION involves the partial or total  
removal of external female genitalia; JALLIKATTU is a traditional event in  
which a bull is released into a crowd of people and the participants try to hold  
the hump for as long as possible to show the bravery.)

*Mark only one oval.*

Yes, causing bodily hurt or grievous hurt is illegal and the State should intervene in  
such matters.

No, this matter is related to deep religious faith and the State shouldn't  
interfere in these matters.

Not Sure

Other

13. Do you agree that the State should intervene into personal laws and ban  
polygamy allowed by some personal laws or customs?

*Mark only one oval.*

Yes, polygamy is derogatory for the women status in society.

No, religion justifies marrying with more than one wife

Not Sure

Other

14. It has been observed that Shrine Boards are a better option than self-regulated  
religious bodies to control and administer pilgrim places and to provide better  
infrastructure and facilities to pilgrims.

Do you agree that State regulated Shrine Boards should be constituted at  
all pilgrim places?

*Mark only one oval.*

Yes, Shrine Boards are public bodies, uses the funds in a transparent manner,

provide better infrastructure and facilities at pilgrim places.

No, religious institutions are free to control and administer their pilgrim places and the State cannot intervene in it.

Not sure

Other

15. Due to matters of deep religious beliefs and faith, women are not allowed to enter inside many pilgrim places like temples or mosques.

Do you agree that it amounts to gender discrimination and the State should intervene in such matters?

*Mark only one oval.*

Yes, it will improve the social status and dignity of women and protect her fundamental rights.

No, this matter is related to deep religious faith and the State shouldn't interfere in these matters.

Not sure

Other

16. As per provisions of Arms Act 1959, carrying the Kirpan (having the size of 6" blade and 9" in total length) in public place is allowed to baptised sikh persons only, but it is not so easy to identify a true baptised sikh person.

Do you agree that baptised sikh persons must be registered by a regulatory body and these persons should carry their identity card with them?

*Mark only one oval.*

Yes, State should enact law for registration of baptised sikh persons to carry kirpan with them.

No, carrying religious wearings are covered under freedom of religion, hence no such registration is required.

Not sure

Other

17. Is it justified to apply Uniform Civil Code as like Criminal Code in a secular nation India having diverse religious communities?

*Mark only one oval.*

Yes, personal laws leads to gender discrimination and encourage disparity among persons belonging to different communities, sexes and ages, so Uniform Civil Code must be applied.

No, religion is inherently embedded in civil life of persons. State can not apply Uniform laws

Not Sure

Other

18. Full Name \_\_\_\_\_

19. Address \_\_\_\_\_

20. City \_\_\_\_\_

21. Age (in years) \*

*Mark only one oval.*

Below 18

18-30

30-50

50-75

Above 75

22. Region \*

*Mark only one oval.*

Urban

Rural

Semi-urban

Other

23. Mobile \_\_\_\_\_



24. Gender

*Mark only one oval.*

Male

Female

Third gender

Prefer not to say

25. Marital Status

*Mark only one oval*

Single

Married

Divorce

Widow/ Widower

Prefer not to say

26. Educational Qualification

*Mark only one oval*

Not Educated

Below Matriculation

10+2

Graduate

Post Graduate

Doctorate

Other

27. Occupation/ Profession

*Mark only one oval*

Self-employed

Salaried employee

Professionals like Doctors, Engineers, Architectures, C.A., Advocates etc.

Student

Unemployed

Other

28. Religion

*Mark only one oval*

Hindu

Muslim

Sikhs

Christian

Parsis

Jain

Jew

Prefer not to say

Other

### Publication Details

| S.No | Type of Paper (Journal Paper/Conference proceeding/Book Chapter) | Name of the Journal/Conference/Book             | Journal indexing (Scopus/UGC/Web of Science) | Title of the Paper   | Published Date | Volume & Issue Number | ISSN/ISBN Number | Impact Factor/SJR | Type of paper (Research/Review) | Whether this is thesis work or not (Yes/No) | Web link of journal indexing |
|------|--|---|--|--|----------------|-----------------------|------------------|-------------------|---------------------------------|---|------------------------------|
| 1    | Research Paper (Journal Paper)                                   | Turkish Bulletin Journal of Qualitative Inquiry | Scopus                                       | Fundamental shift to online amidst Covid-19                                      | July 2021      | Vol-12<br>185-3       | 5141-5146        |                   | Research Paper                  |   |                              |
| 2    | Research Paper (Journal Paper)                                   | Shudhanshu's                                    | UGC - Core List                              | Specialty of Growth: An analysis with special reference to the Book 'Small Talk' | July 2022      | Vol-9<br>185-101      | 2277-7677        |                   | Research Paper                  |   |                              |
| 3    |  |   |  |  |                |                       |                  |                   |                                 |   |                              |
| 4    |  |   |  |  |                |                       |                  |                   |                                 |   |                              |

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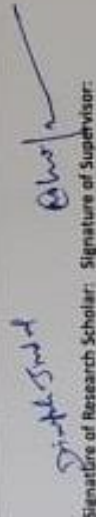
Name and UID of Supervisor: Dr Meenu Chopra (1850)

Registration Number: 41900158

## LIST OF PAPERS PRESENTED

### Publication Details | Paper Presentation Detail

| S.No | Type of Paper (Journal, Paper/Conference, proceeding/Book, Chapter) | Name of the Journal/Conference/Book  | Journal Indexing (Scopus/UGC/Web of Science) | Title of the Paper   | Published Date | Volume & Issue Number | ISSN/ISBN Number | Impact Factor/SJR | Type of paper (Research/Review) | Whether this is thesis work or not (Yes/No) | Web link of journal indexing |
|------|---|--|--|--|----------------|-----------------------|------------------|-------------------|---------------------------------|---|------------------------------|
| 1    | Research Paper  | National Conference on Emerging Trends in Law and Technology (ET&L-2021)   |  | Role of Technology in Regulation of Emerging and Disruptive Business Models in the Digital Era | May, 21        |                       |                  |                   |                                 |   |                              |
| 2    | Research Paper  | International Conference on Quality, Diversity and Inclusivity (IQDI-2021) |  | Equality of Gender: An analysis with Special Reference to the Subcontinent                     | Sept 21        |                       |                  |                   |                                 |   |                              |
| 3    |   |  |  |  |                |                       |                  |                   |                                 |   |                              |

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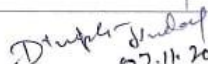
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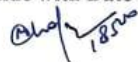
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| Sno. | Title of paper with author names   | Name of journal / conference                  | Published date | Issn no/ vol no, issue no | Indexing in Scopus/ Web of Science/UGC-CARE list (please mention) |
|------|--|---|----------------|---------------------------|---|
| 1.   | Fundamental Right to Religion in India amidst COVID-19<br>Dr. Dimple Jindal & Dr. Meenu Chopra | Turkish Online Journal of Qualitative Inquiry | July, 2021     | Volume-12<br>Issue No-3   | SCOPUS- ISSN No- 5441-5456  |
| 2.   | Equality of Gender: An Analysis with special Reference to the Sabrimala Case<br>Dimple Jindal  | Shodh a Samhita                               | July, 2022     | Vol No- IX<br>Issue-10 V  | UGC- Care list<br>ISSN No- 2277-7067                              |
| 3.   |  |   |                |                           |   |

  
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## Fundamental Right to Religion in India amidst COVID -19

PDF (<https://www.tojqi.net/index.php/journal/article/view/2434/1582>)

Dimple Jindal, Dr. Meenu Chopra

### Abstract

I have but one candle of life to burn, and I would rather burn it out in a land filled with darkness than in a land flooded with light." [i] Freedom of religion was one of the most undermined fundamental rights during lockdown. Article -1 of "The U. N. Charter" [ii] encourages for the religious freedom to all its member nations. People follows their religions for their whole life believing that they would get salvation after their death and keep walking upon the path shown by their religion or idol of their religion. It is believed that there is nothing but religion goes with the man even after his life. "Lost people matter to god, and so they must matter to us" [iii]. "The rights of a dead hold more weight than a ruler, because that is the weight of divine law" [iv]. After the death of a person, his body departs from his soul and the body is buried or cremated as per his religious last rites. Although the dead person is no more living human being, still the body have some fundamental rights belongs to his religion, which he was professed during his life.

This paper generally broadens the scope of 'person' defined in various statutes to include dead persons in it and specifically it includes 'right to decent burial or cremation' and 'right to human dignity after death' in Article -21 of Indian Constitution i.e., 'Right to life'. In this paper, the development of religious freedom in regards to last rites of a dead from the ancient Greek period to today's democratic & socialist approach is streamlined through the waves of international treaties, conventions and landmark Supreme Court & High Court's Decisions. Justice B.P. Jeevan Reddy said that, "Introducing religion into politics is to introduce an impermissible element into body politic and an imbalance in our constitutional system" [v]. Still, right to life is considered top most fundamental amongst all other religious rights by majority of courts, specifically in emergency conditions like Lockdown. More than hundred countries across the world have implemented lockdown as a tool of last resort and worldwide people managed to perform religious rituals and prayers for an end to spread of corona virus from their home only and for them, deferring all religious services seems like an emblem of lost chance to sigh, to breathe and to gather together.

Several operations & missions initiated by the state to curb this pandemic and the process of vaccination is also initiated all over the world. Social media proves like blessings in disguise during lockdown. Perhaps this lockdown remains helpful to encourage the states for balancing religious freedom along with other human rights.

[i] Rev. Robert Sinkler, Candle in the dark – The authorized biography of Ion Keith Falconer (The Arab

World Pioneers, 2016).

[ii] The Charter of The United Nations, 1945.

Seydi A. H. K. K.  
Dimple Jindal  
4/8/2022



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**शोधसंहिता**

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Research Scholar

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Editor-in-Chief



EQUALITY OF GENDER: AN ANALYSIS WITH SPECIAL REFERENCE TO THE SABRIMALA  
CASE

Dimple Jindal

Research Scholar

**Abstract:** The objective of Article 15 (3) of the Indian Constitution is to uplift the social status of women in society and to curb all the evil practices running under the face of personal laws or religious customs which are downgrading the living standards of women and children in society. Supreme Court has also played a pivotal role in developing a sense of equality between men and women, which is a core issue of all matters related to women's dignity. Due to too many diverse religious communities in India, the State has remained unsuccessful in implementing the provisions of Article 44 of the Indian Constitution, i.e., uniform civil code, and due to the same factor, there are different civil laws applicable to different communities as per their customary practices and beliefs. Diversity is the strength of unity. The right to equality is not an exclusive right, and it must be balanced with other fundamental rights. One can't ignore other important fundamental rights for the sake of the just right to equality. There is a need for balance between all the fundamental rights provided by the Constitution. The public protest and PIL filed by the Indian Young Lawyers Association in 2006 led to a 2018 judgment delivered by the Supreme Court lifting the ban upon entry of women into the Sabrimala temple. In the face of judgment, it seems a bold step by the Supreme Court to end a centuries-old practice of doing gender injustice, but is it really so? The dissenting opinion delivered by the only women Justice from the bench of 5 Judges supports a different theory. This paper throws light upon dissenting views of Justice Indu Malhotra, who is herself a woman and who had clarified how unequal classification becomes justified in different scenarios.

“To treat women as children of lesser God is to blink at Constitutional morality”<sup>1</sup>.

Justice D. Y. Chandrachud

**Introduction**

Article 14 of The Constitution of India<sup>2</sup> provides equality before the law, and Article 15 of The Constitution of India<sup>3</sup> prohibits any discrimination based on religion, race, caste, sex, place of birth or any of them. Clause (3) of Article 15 provides that nothing in this article shall prevent the state from making any special provision for women and children. The objective of this clause is to uplift the social status of women in society and to curb all

<sup>1</sup> Indian Young Lawyers Association v. State of Kerala, 2018 SCC Online SC 1690

<sup>2</sup> The Constitution of India, 1950

<sup>3</sup> The Constitution of India, 1950

*Dr. Indu Malhotra  
Dimple Jindal  
4/18/2022*

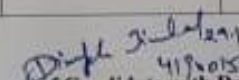


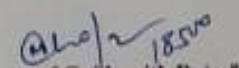


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|------|--|---|----------------|---------------------------|-------------|
| 1.   | Role of Technology in regulating matrimonial relations established as per religious ceremonies | National Conference on Emerging Trends in Law & Technology<br>ETLT-2021         | May, 21        |                           |             |
| 2.   | Equality of Gender: An analysis with reference to the Sabarwal Case                            | International Conference on Equality, Diversity and Inclusion Issues & Concerns | Sept, 21       |                           |             |
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**Guru Nanak Dev University**  
Regional Campus Jalandhar  
(Punjab)

Department of Engineering & Technology  
Department of Laws

NATIONAL CONFERENCE ON  
EMERGING TRENDS IN LAW AND TECHNOLOGY  
**ETLT-2021**  
21-22 May 2021

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This is certified that

\_\_\_\_\_ Dimple Jindal from Lovely Professional University, Phagwara

has presented a paper entitled 'Role of Technology in regulating matrimonial relations established as per religious ceremonies' in virtual mode

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Dr Butta Singh

Dr Varinder Singh

Dr -Jyoteesh Malhotra

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# LOVELY FACULTY OF BUSINESS AND ARTS

[Under the Aegis of Lovely Professional University, Jalandhar-Delhi G.T. Road, Phagwara (Punjab)]

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## Certificate of Presentation

This is to certify that Dr./Mr./Ms. Dimple Jindal of Lovely Professional University, Phagwara, Punjab presented a paper entitled **Equality of gender: An analysis with special reference to the Sabrimala case in International Conference on Equality, Diversity and Inclusivity: Issues and Concerns** organized on 25<sup>th</sup> September, 2021 by School of Education & School of Humanities, Lovely Professional University, Punjab.

Date of Issue : 09-10-2021

Place : Phagwara (Punjab), India



Prepared by  
(Administrative Officer-Records)



Organizing Secretary



Conference Director

## **List of Constitutional & Statutory provisions**

### **1. Article 13 of The Constitution of India 1949**

#### **Laws inconsistent with or in derogation of the fundamental rights**

(1) All laws in force in the territory of India immediately before the commencement of this Constitution, in so far as they are inconsistent with the provisions of this Part, shall, to the extent of such inconsistency, be void

(2) The State shall not make any law which takes away or abridges the rights conferred by this Part and any law made in contravention of this clause shall, to the extent of the contravention, be void

(3) In this article, unless the context otherwise requires law includes any Ordinance, order, bye law, rule, regulation, notification, custom or usages having in the territory of India the force of law; laws in force includes laws passed or made by Legislature or other competent authority in the territory of India before the commencement of this Constitution and not previously repealed, notwithstanding that any such law or any part thereof may not be then in operation either at all or in particular areas

(4) Nothing in this article shall apply to any amendment of this Constitution made under Article 368 Right of Equality

### **2. Article 14 of The Constitution of India 1949**

#### **Equality before law**

The State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India Prohibition of discrimination on grounds of religion, race, caste, sex or place of birth

### **3. Article 15 of The Constitution of India 1949**

Prohibition of discrimination on grounds of religion, race, caste, sex or place of birth

(1) The State shall not discriminate against any citizen on grounds only of religion, race, caste, sex, place of birth or any of them

(2) No citizen shall, on grounds only of religion, race, caste, sex, place of birth or any of them, be subject to any disability, liability, restriction or condition with regard to  
(a) access to shops, public restaurants, hotels and palaces of public entertainment; or  
(b) the use of wells, tanks, bathing ghats, roads and places of public resort maintained wholly or partly out of State funds or dedicated to the use of the general public

(3) Nothing in this article shall prevent the State from making any special provision for women and children

(4) Nothing in this article or in clause (2) of Article 29 shall prevent the State from making any special provision for the advancement of any socially and educationally backward classes of citizens or for the Scheduled Castes and the Scheduled Tribes

### **4. Article 21 of The Constitution of India 1949**

Protection of life and personal liberty

No person shall be deprived of his life or personal liberty except according to procedure established by law

## **5. Article 25 of The Constitution of India 1949**

Freedom of conscience and free profession, practice and propagation of religion

(1) Subject to public order, morality and health and to the other provisions of this Part, all persons are equally entitled to freedom of conscience and the right freely to profess, practise and propagate religion

(2) Nothing in this article shall affect the operation of any existing law or prevent the State from making any law

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

(b) providing for social welfare and reform or the throwing open of Hindu religious institutions of a public character to all classes and sections of Hindus *Explanation I The wearing and carrying of kirpans shall be deemed to be included in the profession of the Sikh religion* *Explanation II* In sub clause (b) of clause reference to Hindus shall be construed as including a reference to persons professing the Sikh, Jaina or Buddhist religion, and the reference to Hindu religious institutions shall be construed accordingly

## **6. Article 26 of The Constitution of India 1949**

Freedom to manage religious affairs Subject to public order, morality and health, every religious denomination or any section thereof shall have the right

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

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

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

(d) to administer such property in accordance with law

## **7. Section 2 in The Muslim Personal Law (Shariat) Application Act, 1937**

Application of Personal law to Muslims.

Notwithstanding any custom or usage to the contrary, in all questions (save questions relating to agricultural land) regarding intestate succession, special property of females, including personal property inherited or obtained under contract or gift or any other provision of Personal Law, marriage, dissolution of marriage, including talaq, ila, zihar, lian, khula and mubaraat, maintenance, dower, guardianship, gifts, trusts and trust properties, and wakfs (other than charities and charitable institutions and charitable and religious endowments) the rule of decision in cases where the parties are Muslims shall be the Muslim Personal Law (Shariat).

## **8. Section 18 of The Parsi Marriage and Divorce Act of 1936**

Constitution of Special Courts under the Act.

For the purpose of hearing suits under this Act, a Special Court shall be constituted in each of the Presidency-towns of Calcutta, Madras and Bombay, and in such other places in the territories of the several State Governments as such Governments respectively shall think fit.

**9. The Kerala Hindu Places of Public Worship (Authorization of Entry) Act, 1965**

Places of public worship to be open to all sections and classes of Hindus.

Notwithstanding anything to the contrary contained in any other law for the time being in force or any custom or usage or any instrument having effect by virtue of any such law or any decree or order of court, every place of public worship which is open to Hindu generally or to any section or class thereof, shall be open to all section and classes of Hindus; and no Hindu of whatsoever section or class shall, in any manner, be prevented, obstructed or discouraged from entering such place of public worship, or from worshipping or offering prayers thereat, or performing any religious service therein, in the like manner and to the like extent as any other Hindu of whatsoever section or class may so enter, worship, pray or perform:

Provided that in the case of a place of public worship which is a temple founded for the benefit of any religious denomination or section thereof, the provisions of this section shall be subject to the right of that religious denomination or section, as the case may be, to manage its own affairs in matters of religion.

**10. Section 28 of The Prevention of Cruelty to Animals Act, 1960**

Saving as respects manner of killing prescribed by religion.

Nothing contained in this Act shall render it an offence to kill any animal in a manner required by the religion of any community.

**11. Section 306 of The Indian Penal Code**

Abetment of suicide.

If any person commits suicide, whoever abets the commission of such suicide, shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.

**12. Section 309 of The Indian Penal Code**

Attempt to commit suicide.

Whoever attempts to commit suicide and does any act towards the commission of such offence, shall he punished with simple imprisonment for a term which may extend to one year 1[or with fine, or with both].

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