

4th Dr. Asghar Ali Engineer Memorial Lecture - 2015

Freedom of Religion in India- Contemporary Challenges

Faizan Mustafa

It is indeed a privilege for me to deliver this year's Asghar Ali Engineer Memorial Lecture. I am indeed too small a person to have this honor. I am grateful to Advocate Irfan Engineer and Prof. Ram Punyani for bestowing this honor on me. My association with Late Asghar Ali Engineer goes back almost two decades; when, in 1997, both of us were together for five days in Thailand for an Asian Consultation on Human Rights & Pluralism. It was indeed a learning experience for me - Mr. Engineer's in-depth knowledge of Islam and understanding of communalism left a lasting impact on me.

Thereafter, I met him at number of places and hosted him at the Faculty of Law, Aligarh Muslim University. My last meeting with him was in February 2013 at Dehradun where he had come at my invitation to attend a Consultation on Minority Rights which was organized by Rural Litigation & Entitlement Kendra, Dehradun. I had a long chat with him at the airport and therefore it was difficult for me to believe when I heard news of his sad demise later that year (in May 2013). On his second death anniversary I pay my tributes to him and pray Almighty to rest his soul in peace and give him Jannatul Firdoos.

Asghar Ali Engineer was a crusader of rights of Muslim women and minorities; who wrote extensively on the issues of secularism and reform in Muslim Personal Law. No study on the Indian communal situation can be complete without referring to his works. He was indeed a legendary figure of our times and a scholar in his own right. He has written more than 40 books and hundreds of articles on various subjects. May Allah rest his soul in peace and give us courage to stand by our convictions and to face all the adversities and turbulences of life with patience.

Religion has always been an indispensable and inefaceable part of our lives. So have questions concerning how much religious freedom and in what form is it tolerable for a secular democratic republic. Religion and politics are so intricately connected that religion influences the political as well as the non-political processes both in the West and in the East and commands more significance than just being a matter of social and personal relevance even in secular polities.

In a country as diverse as India, the predicament of protecting religious minorities within a majoritarian religious culture becomes even more significant. Indian civilization displays a “manifest tendency towards an outlook that is predominantly religious”. The effect that religion has had on the progress of Indian history is tremendous. It is therefore quite remarkable that the emergence of India as a secular state in the mid-twentieth century is a remarkable social, political and religious phenomenon. Freedom of religion is the topic of contemporary relevance due to recent release of report of United States Commission on International Religious Freedom in which India has been criticized due to restrictions placed on free exercise of freedom of religion. European Report has put India in the category of countries of particular concern. Frequent utterances by the RSS and BJP leaders and failure of the Prime Minister in taking any concrete action against these leaders has created a kind of fear in the minds of religious minorities. Even Julio Ribeiro, former Director General of Police had to admit that after 2014 general elections he lives in fear and his small and peaceful community i.e. Christian community is being targeted. There incidents of violence against Churches have become routine phenomenon and the so called *Ghar Vapsi (reconversion to Hinduism)* is basically aimed at Christians and Muslims. Since freedom of religion was a subject very close to Engineer Sahib, I have picked up this subject to deliver this year’s memorial lecture.

- But since Asghar Ali Engineer was also a great scholar of Islam, first of all I would look at freedom of religion in Islam.

- Then I would discuss the issue of religion-state relationship in the context of secularism, its meaning, history and adoption in India.
- What kinds of debates took place in the Constituent Assembly would be the next issue on which I would speak this evening.
- Thereafter I would try to examine constitutional guarantee of freedom of religion in India.
 - How Indian judiciary has restricted this guarantee through what may be called an “essentiality test.”
 - How this test was used by the courts to decide purely religious questions?
- I would also examine the debate on religious conversions and the issue of constitutionality of anti-conversion laws.
- Finally I propose to talk of cow slaughter in the context of freedom of religion.

Freedom of religion in Islam

Islam gives freedom of conscience to all human beings. Muslims can invite non-Muslims to Islam, but they cannot compel them to embrace Islam. They cannot persuade anyone to accept Islam by moral, social or political pressure. The Holy Quran clearly says: There shall be no compulsion in the matter of professing a religion.

Say (O Prophet) non-Muslim I do
 Not worship them whom you do. Nor
 Do you (want to) worship whom
 Do . . . for you is your religion
 And for me is mine

- (Quran II: 256)

Islam not only forbids coercion in the matter of faith but also prohibits the use of abusive language against the deities of other religions. *“Do not abuse those whom they appeal to instead of God.”* No Islamic government can ban propagation of other religions in its

territory. The followers of other religions are also entitled to construct their places of worship and Muslims cannot interfere with them.

Although the Muslims believe that there is no truth and virtue greater than the religion of Islam, yet if somebody does not accept Islam, Muslims will have to recognize and respect his decision and allow him the freedom of conscience and religion.

The rights which an Islamic State gives to its non-Muslim citizens should not be confused with the rights given to minorities in modern States. This is because an Islamic State is an ideological State. People are divided into two groups:

- Muslims (who believe in the ideology of the State); and
- Non-Muslims (who do not believe in that ideology).

Since the Islamic State is an ideological State it is to be run primarily by those who believe in its ideology. Non-Muslims cannot take up the positions wherefrom they can influence the ideological basis of the State. Non-Muslim citizens of an Islamic State are further divided into two groups:

- Those who become its subjects after being defeated by the Muslims in a war.
- Those who become the subjects of an Islamic State under some treaty or covenant.

The non-Muslims, who live in the places which are conquered by Muslims, may be asked to pay a protection tax (*jazia*) and thereafter they are exempted from their duty to defend the territory. Their properties and other belongings are fully protected. Moreover the tax is levied only on able – bodied persons who can participate in war. Non-combatants, like women, children and old people, cannot be asked to pay *jazia*. Those who voluntarily want to participate in war are also exempt. In Muslim history many rulers did not impose *jazia*.

So far as rights of the second group are concerned, such non-Muslims are to be treated in accordance with the terms of the agreement. The Prophet (PBUH) has warned:

Beware! whosoever is cruel and hard
On such people (i.e. contractees) or
Curtails their rights or burdens them
With more than they can endure,
Or realizes anything from them
Against their free will, I shall
Myself be a complainant against
Him on the Day of Judgment.

The second caliph issued an ordinance on the conquest of Syria to Ubayda, the Muslim commander. It said:

Forbid Muslims to tyrannise the *dhimmis* or
Harm or exploit their properties
Fulfill faithfully all the terms reached with them.

The Prophet (PBUH) is also reported to have said:

One who kills a man under covenant (a non-Muslim citizen of an
Islamic State) will not smell even the fragrance of Paradise.

The following verses from the Quran lay down the general policy of Islam towards non-Muslims. These verses clearly demonstrate that Islam is a religion of peace and abhors violence and harshness towards non- Muslims.

But if they turn away from you, (O Prophet remember that) your
duty is a clear delivery of the Message (entrusted to you).

- (Holy Quran16:82)

If it had been Allah's will

They would not have taken
False Gods: but We
Make thee not one
To watch over their dongs
Nor art thou set
Over them to dispose
Of their affairs.

- (Holy Quran6:107)

(Say to every one of them,) 'Whatever good betides you is from God and whatever evil betides you is from your own self and that We have (O Prophet) sent you to mankind only as a messenger and all sufficing is God as witness. Whosoever obeys the Messenger, he indeed obeys God. And for those who turn away, We have not sent you as a keeper.

- (Holy Quran4:79, 80)

Will thou then compel mankind, against their will, to believe? No soul can believe except by the Will of God.

A brief explanation will make it abundantly clear that Islam is against forced conversion. Verse 256 of Sura 2 is very important in this context as it clearly lays down the basic principle of Islam – there can be no compulsion in matter of religion. We must keep in mind the circumstances surrounding the revelation (*Shan-i- nuzul*) of this verse:

- (i) the revelation blocked an Ansar women from forcing her Jewish boy to convert to Islam;
- (ii) the revelation blocked an Ansar father from forcing her two Christian sons to convert to Islam;
- (iii) the revelation permitted a member of the people of Book to retain his religion.

But eminent theologian Shah Waliullah does not accept the view that this verse is confined to particular incidents mentioned above. On the contrary, "the verse in his opinion should be held to convey the commandment therein generally. The Quranic phrase *la ikraha fid-dini* (there is no compulsion in religion) must be therefore generally understood to mean that no one should use compulsion against another in matters of religion and faith. The verse in question talks of a principle which gained recognition much later in modern International human rights Law i.e. the doctrine of religious tolerance.

Mohammad Asad rightly says about this verse that all Islamic jurists, without any exception, hold that forcible conversion is under all circumstances null and void, and that any attempt at coercing a non-believer (in Islam) to accept the faith of Islam is a grievous sin: a verdict which disposes of the widespread fallacy that Islam places before the unbelievers the alternative of conversion or the sword.

The history of world can never forget the Charter of Madina (622) – the first declaration of human rights in human history. It gave people the rights of protection, security, peace and justice: not only to Muslims but also to Jews as well as their allies who were not Muslims.

- It recognized Jews as a separate political and ethnic minority, and conferred on them a right to practice their religion quite freely.
- In fact, Jews were considered on an equal term with Muslims.
 - They were protected from external threat from any other nation.
 - But perhaps more significantly, they were protected from internal threat, persecution and prejudice.
- They were allowed to follow their own personal law. They were given a right to have a holiday, the Jews on a Saturday, and the Christians on Sunday.

Can any modern civilized state, which claims to be committed to human rights, be willing to give similar holiday to Muslims on Friday? Another special concession was

that the non-Muslims were permitted to manufacture, sell and consume alcohol. They were allowed to sell and eat even pork which is prohibited for Muslims.

Following are some of the vital and hard facts about the presence of non-Muslims in countries which were ruled by Muslims for centuries yet the facts speak for themselves:

- a. Muslims ruled India for about one thousand years. If they really wanted, they could have used their power and converted non-Muslims to Islam. Today more than 80% of Indian population does not profess Islam.
- b. The largest number of Muslims in the world live in Indonesia; yet no Muslim army ever went to conquer this country. Similarly there are millions of Muslims on the east Coast of Africa, yet no Muslim army ever went there too to convert people by force.
- c. Muslims were in complete command of Spain for 800 years. They never used force or compelled people to convert to Islam. Later the Christian Crusaders came to Spain and wiped out Muslims so much so that no one was left even to give *Adhan* (Prayer call) openly.
- d. Muslims have been ruling Arabia for more than 1400 years. Only for few years, the British and French were in command yet today, there are 14 million Arabs who are Coptic Christians i.e. Christians for generations. If Muslims had used forced conversion, there would not have been a single Arab who would have remained a Christian.

It is a known fact that between 1934 to 1984, Islam increased in the world by 235%. Can anyone tell which war or sword was used by Muslims in this period of Christian domination of world to convert people by force? The reasons for the spread of Islam have to be found in Islam itself.

Religion-State relationship in the context of Secularism

Let us now come to the second issue i.e. state- religion relationship. We can broadly understand the phrase 'secular state' as a relationship that exists between religion and the state. The understanding of secularism in the Indian context is a peculiar one. But then there exists a considerable difference between secularism as understood in the United States ('separation of Church and state') and one in India.

At this juncture, one may rely on David E. Smith's nuancing of the concept of secularism. According to him, the concept of secularism involves three distinct but interrelated sets of relationships involving state, religion and the individual.

- *Religion and the individual (freedom of religion)* can be best described as the relationship between religion and the individual from which the State is completely (in ideal terms) excluded. Religion can be understood in a myriad of ways – one of which can refer to the practices of certain organized religious groups and the second to beliefs and activities which may or may not be associated with the practices of the groups. Hence, in such a context, freedom of religion would mean that an individual is free to come to a decision as to which religion he or she wants to follow – by discussing the varying claims of the different relevant practices, and in coming to such a discussion, there is no interference by the State. Moreover, the freedom to choose a religion also includes the freedom to renounce the religion so chosen.

The exclusion of State, in this sense, has the following implications – the State cannot enforce any religion upon the individual nor can it profess any particular religion.

The state and the individual (citizenship) relationship assumes relevance because according to this an individual is a citizen of the state irrespective of his or her religious beliefs or practices. The state has no right to hold back any privileges from any individual on the basis of his or her religion. Essentially, under this concept, the State has no right to discriminate on the basis of religion. In my opinion, State here should

include all organs of the State. Apart from an individual's freedom of religion, the concept of freedom of religion also involves collective freedom of religion. The collective feature of this right is the freedom of individuals to associate for religious commitments and to form permanent organizations to bind to these commitments. In this sense it is a right of the group.

- *Relationship of State with religion* is an aspect of secularism which assumes that religion and state function in two complete disjoint sets of human activity. It is not the prerogative of the State to promote, profess, regulate, direct or otherwise interfere in religion. The State ought to maintain a considerable distance from the sphere of religious affairs. It is free from the burden of sponsoring any religious activity, of promoting any particular religion as the state religion. The State is supposed to be more concerned with other material concerns which fall directly within its legitimate ambit.

Smith argues that for true secularism, it is essential that the integrity of the first two relationships be preserved. That, he opines, can be done only through the total separation of the state and religion; for, if the realm of the state and religion were to overlap, "*religious qualifications might distort the principle of democratic citizenship*" and the "*state might interfere with freedom of religion.*" It is this that Jefferson referred to as "*erecting of a wall of separation between the church and the state*" in a letter written to the Danbury Baptists Association in 1802. As much as temporal power is not the concern of religion, the state too must desist from any promotion, regulation or interference in religion.

Secularism in India – Constituent Assembly Debates

Secularism in India evolved in a context markedly different from that in the West. While secularism in the west was conceptualized as a response to a history of religious

absolutism, in the Indian context it came as a response to the imminent threat posed by communal politics of the freedom movement. Further, the idea of secularism here was shaped by the role that religion played in the struggle for independence and the fact that religion was a way of life for many people in India.

When faced with the daunting task of drafting the constitutional provisions on the issue of religion and the role of the State in dealing with religious issues in a multi-cultural and a plural society as India, the framers of the Constitution adopted a secular state based on three principles of equality, liberty and neutrality.

- The principle of equality demanded that the state was to give no preference to one religion over another; while
- The principle of neutrality required that the State was not to interfere in religious affairs or organizations of religious communities; and
- The principle of liberty required that the state was to permit the practice of any religion, within the limits set by certain other basic rights that were to be protected by the state

As such, the State does not endorse any particular religion and all the religions enjoy complete protection under the Constitution. Since India is a pluralistic society, and religion especially has been a very volatile subject in India before independence, therefore the makers of the Constitution thought that in order to maintain stability, it is desirable to have a State which does not adopt any particular religion. Thus, what was contemplated by the framers was to have a State where secularism is “*not merely a passive attitude of religious tolerance but, a positive concept of equal treatment of all religions*”.

At this moment, it is necessary to examine the constituent assembly debates on the inclusion of secularism in the text of the Constitution. One of the first efforts to include the word ‘secular’ in the text of the Preamble was made by Shri Brajeshwar Prasad. He advocated that the word ‘secular’ be incorporated in the text of the Preamble because

that would boost the '*morale of the minorities*'. Also, he stated, that such incorporation shall also help keep in check the '*loaferism*' that is prevalent in politics. However, the motion was not voted upon. Shri Brajeshwar Prasad's amendment was ridiculed more for the reason that it attempted to make the nation a socialistic country with no place for religion in it rather than a liberal democracy.

The discussion on the concept of secularism took its final mantle in the dying days of the Constituent Assembly where almost all the members of the Assembly had come to form a common understanding that the establishment of a secular state was inevitable for the foundation of a liberal democracy. It was understood that the movement for the separation of religion from state formed the foundation for the democratization of the latter. Therefore, for India to be recognized as a democracy, secularism was but a necessity. Despite this clarity in thought, the most troubling issue was of the kind of secularism sought to be inculcated. Would secularism mean a complete separation of state from religion with no overlaps at all? Or given the Indian context, would fostering equal respect for all religions suit the Indian milieu?

One of the first discussions with respect to secularism was on the wording of the Preamble. Amongst the many motions moved by the Assembly members, one was to begin the Preamble with the words '*In the name of God*'. This was objected to on the basis of the fact that the rationale behind adopting a new Constitution was to encourage scientific temper amongst the citizens of the country and not stick to arcane and narrow minded models of oath-taking. It was said that by invoking god's name, a 'narrow or sectarian approach' was being adopted. However, the counter-argument to that was that in invoking the name of God, it was not a particular religion which was being appealed to. The opponents to the inclusion of the term 'God' in the Preamble can be informally categorized into two categories –

- The first type of opposition came from the quarter which insisted that since religion is a matter of personal choice, the will of the collective must not be imposed.

- Another category of opposition was from a voice which called for separation of religion from the purview of state not because of individual freedom but because the sacred could not be left to the whim and fancies of changing majorities. The sacred should not be dependent on the vagaries of democratic voting.

Nevertheless, the proposal to include the reference to God was not pursued and therefore not incorporated in the final version of the Constitution. Thankfully 'God' lost when the motion was put to vote.

After having gone through the discussion on the preamble, there are three major positions which can be observed :

First, an understanding can be branded as 'no concern theory' which saw a strict line of separation between state and religion. Since democracy was the desired result, individual liberty and freedom were essentials which necessarily meant that the choice of an individual is not to be meddled with when it comes to questions of his or her faith or his or her choice of a religion or the lack of it. This understanding of secularism necessitated that god may not be referred to in any way in the text of the Preamble because that would necessarily leave out that part of the citizens who do not belong to any faith. A strong opposition to the state's involvement in religious affairs was that given the recent independence, the need of the hour was to strengthen the Indian identity, i.e. the identity of being Indian, of being citizens of the Indian state and not belonging to one or the other religious group or community. The goal which was therefore sought to be achieved was to recognize individuals as citizens of the State and not belonging to any community. Hence, it was clear that the Constituent Assembly had finally resolved to not take into consideration matters of religion when it came to dealing with individuals as citizens of the State. Moreover, such an understanding of secularism promoted the impression that religion, in the newly independent nation was a divisive force and therefore had no place in the same.

The *second* understanding of secularism which was also popular among the members of the then Assembly was that state should maintain its distance from religion not because such a relationship would weaken the State but because it would demean religion. To allow the state to meddle in religious affairs would be to make the sacred dependent on the whims of changing majorities because the components of the state are never stable; whereas religion, in contrast, is. Religion, in this scenario was understood as a system of absolute truth over which none but the Supreme Being had control.

The *third* understanding which emerged from the discussions on the concept of secularism was that of 'equal respect'. This understanding, much like the first, called for religious liberty, i.e. the individual being free to decide upon his or her religious affiliations. However, taking a more practical understanding of the ground realities, it called for the State to play a role in religious affairs, although limiting it to respect all religions alike, and not favoring one community over the other. This, in a deeply religious society such as India, was an imperative aspect of State's relation with religion.

The Constitutional guarantee of Freedom of Religion

This brings me to the core issue of freedom of religion. There was discussion on the very name of this freedom. It was described as the '*right to worship or practice*'. It was also proposed to be named as the '*right to freedom of conscience*', '*to freedom of religious worship*' and '*to freedom to profess religion*'. However, later the Constituent Assembly's Minorities Sub-Committee decided to rephrase the same right as the '*right to freedom of conscience and the right freely to profess, practice and propagate religion*'.

The argument against freedom of religion to be restricted to merely that of worship was that by doing so, religion was being narrowed to only a set of rituals meant to be performed only in a circumscribed place of worship such as a temple or a mosque.

Such an understanding truly ignored the real meaning of religion, which was understood as a way of life. Another factor that attributed merit to the argument of the proponents of 'practice' was that India being a multi-religious society, the Constitution could not be expected to lay down the essentials for all religions and hence to broadly define right to freedom of religion in terms of 'practice' would be a more tenable option.

The proponents of the 'worship' understood that to interpret freedom of religion only in terms of 'practice' would be to exonerate all those practices which were by nature anti-social such as the practice of dowry or *sati* or even the *pardah* system. All these practices would thence take the garb of sanctity of practice as they would be protected for reasons of freedom of practice of religion, although being against the freedom of an individual, as such. Another contentious issue with respect to freedom of religion was the right to propagate the same. This entailed discussions on the conversion of minors and the role of consent therein.

Finally, when the draft Constitution's articles relating to religion were being discussed, it was recommended that a separate provision be included to expressly declare that the State had no role to play in the sphere of religion. Despite such deliberation and discussion, the phraseology of the kind of freedom of religion envisaged in the Constitution remained ambiguous till the very last days of the Constituent Assembly.

Post the discussions on the two extreme positions with respect to secularism, there did emerge a third 'middle path' which sought to merge the two extremes. To provide an illustration, this theory would seek to combine the right of religious worship and uniform civil code with the political reservation for minorities. However, this position didn't assume much popularity and failed to make its way into the final text of the Constitution. The position that finally found its way into the Constitution defined the right to freedom of religion as the one to 'practice' and not 'worship'.

The drafting committee of the constitution was in two minds on the extent of the right to freedom of religion. While KM Munshi proposed that the right to religion should include

right to free practice and profess the religion, without any aid from the State, Ambedkar proposed that no person can do away with their civil obligation to meet the demands of their religion. However, KM Panikkar objected to Ambedkar's proposal saying that there might be some exceptions where one might have to give up on their civil obligations to meet the demands of their religion. A consensus was finally reached on practice of religion but subject to certain limitations, like that of public order, health and morality etc. The debate was not over yet. There were also debates over whether to include the 'right to propagate'. Article 25 of the Indian Constitution ultimately gives the right to all citizens to freely "*practice, profess and propagate*" their respective religion; subject to certain limitations as those "*public order, morality and health*".

In order to maintain the neutrality of the State towards all religions, members of the Constituent Assembly suggested keeping religious instruction out of State funded institutions, to prevent the intermingling of the State and Religion.

The argument forwarded by Mahmood Ali Baig is very interesting and has mirrored the argument of many a multi-culturist who advocate personal laws' continuation as it is linked to the right to religious freedom. And since, for the pro-personal law group, religion is more a form of "way of life" and less of a spiritual phenomenon, for a free *practice* of religion; it would be paramount that the communities follow their own means of civil/social regulation. Hence, the arguments particularly in favor of the personal laws were subsumed by the idea that religious freedom and religious laws were interconnected, and the former was almost meaningless when the latter was being interfered with.

The original men of the "no-concern camp", Munshi and Ambedkar finally found middle ground, and it was decided that the Uniform Civil Code would not be immediately enforced (or be justiciable); however, there could be gradual implementation when there was positive reception from communities seeking to accept a common civil code. Hence, if there was no acceptance of such a code, and if the communities were not ready to give up their personal laws, there could be no Uniform Civil Code.

From the Constituent Assembly Debates on the Uniform Civil Code and Personal Laws, we could conclude that the complexity of the issue essentially lies in the question of whether we treat the idea of UCC as a factor that could unite diverse groups with various cultural backgrounds or as a question of religious freedom. In addition, whether personal laws are in harmony with constitutional safeguards enshrined by the Indian constitution?

First, there is a presupposition that a “uniform civil code” means a “common civil code” without making any enquiry into alternative interpretations. In other words “uniformity” does not necessarily mean that India must give up on its twin principles of pluralism and equality. It means that they must be seen as harmoniously entwined and sufficiently balanced. There is no basis for us to interpret a “uniform civil code” to mean a “common civil code” throughout India and for all people. . The framers have used word ‘uniform’ in Article 44 and not ‘common’ because ‘common’ means one and same in all circumstances whatsoever and ‘uniform’ means ‘same in similar conditions’. The mere fact that the personal laws are included in the concurrent list means framers did not think of uniformity. Constitution itself protects the local customs of Nagaland. Similar protection is also enjoyed by Meghalaya and Mizoram. Even all Hindus in the country are not governed by one law. It is also true of Muslims and Christians. Not only British common law traditions still continue to be operative in some parts but even civil law traditions such as Portuguese and French legal traditions are still very much valid and continue as valid. Moreover even today there is no uniformity of laws even amongst Hindus. Hindu Marriage Act is not applicable to all Hindus. Let us just take the example of Goa as it is repeatedly mentioned that Goa already has a Uniform Civil Code. But then Hindus of Goa are still governed by the Portuguese Family and Succession Laws. The reformed Hindu Law of 1955-56 is still not applicable to them. Unreformed Shastric Hindu law on marriage, divorce, adoption and joint family is very much valid. Same is true of Goan Muslims as 1937 Shariat Act has not been extended to Goa. Thus they are governed by Portuguese law as well as Shastric Hindu law. It is shocking to note that

Special Marriage Act which is a sort of modern civil code has also not been extended to Goa.

The Indian constitution is quite detailed in the manner in which it organizes itself in relation to religion. The right to religious freedom is elaborated in Articles 25-28 of the constitution. The Indian Constitution combines freedom of religion clauses with a mandate to the state to intervene in religious affairs if social welfare so demands.

- Article 25 allows the state to regulate or restrict any '*economic, financial, political or other secular activity which may be associated with religious practice*'.
- Article 25(1) of the Constitution guarantees to every person the freedom of religion in India. However, Article 25(2) gives the "*State the power to make any law regulating or restricting any economic, financial, political or other secular activity which may be associated with the religious practice.*"
- The State can also intervene and make a legislation providing for any social welfare or reform or to throw open Hindu religious institutions of public character to all classes and sections of the society.

Thus, the State has the power to regulate secular activities associated with religious practice but not the regulation of 'religious practices' as such. The activities which the State seeks to regulate must be of an "economic, commercial or political character though these may be associated with religious practice." **The question which then arises is how to decide whether activity is religious or secular?** This distinction becomes important because if it is religious, it cannot be regulated. This brings forth another question – as to **what is "religion" and which practices are "religious"?**

The Supreme Court answered this question in the *Sri Lakshmana* case in 1996, "religion is the belief which binds spiritual nature of men to super-natural being. It includes worship, belief, faith, devotion etc. and extends to rituals. Religious right is the right of a person believing in a particular faith to practice it, preach it and profess it."

What is a religious practice has to be decided by the court with reference to the doctrine of particular religion or practices regarded as parts of religion. In order that a practice to be treated as a part of the religion, it must be regarded by the religion as an 'essential' part of the concerned religion. This, it is said, is necessary – otherwise even purely secular practices, not essential to the religion, will be clothed with religious sanction and may claim to be treated as religious practices within the meaning of Article 25.

The right to freedom is further clarified in Article 26 which provides for corporate freedom to all religious denominations, permitting them to maintain their affairs in matters of religion, to own and acquire property and to administer property in accordance with law. Thereafter, Article 27 lays down that taxes could be levied for religious purposes as long as it is not specifically appropriated for the payment of expenses of any particular religion.

It is argued that Article 27 seeks to prohibit any spending of a public nature on religious activities. There are problems with this view. The the framing of Article 27 is such that it does not seem to proscribe the enactment of a law to incur expenses for the promotion or maintenance of any particular religion. It merely protects a citizen from being compelled to pay such a tax. The other view is that Article 27 only prohibits the compulsion of a citizen to pay taxes to be *appropriated specifically* in favor of a particular religion and that the levy a general tax for the benefit of all religions would be perfectly constitutional. This view finds support even in the opinion of D.D. Basu who argues that Article 27 would not render unconstitutional any appropriation or levy of taxes that either benefits religious institutions along with secular ones without any discrimination, or by which all religious institutions benefit equally.

Thus, Article 27 does not cover the issues of government spending on religion entirely or, as Smith puts it, it “*may reinforce the armour of individual rights, but it sidesteps the basic question of public policy.*” The question, then, that begs to be answered is – **considering that Article 27 does not explicitly prohibit state spending on religion but merely proscribes the compulsion of an individual to contribute to such**

spending, does this imply that the Constitution permits the state to expend public funds on religion?

If such an inference is readily drawn, it would lead to an apparent inconsistency in the constitutional scheme of Articles 27 and 28 of the Indian Constitution. While the former seemingly suggests that the state can expend public funds on religion so long as it does so equally for all religions, Article 28 seems to prohibit state funding or giving aid for religious instruction in educational institutions. One might object that Article 28 allows partial funding of institutions imparting religious instruction and does not forbid state funding of religious instruction *in toto*, but this deliberate exclusion can be rationalized on account of the social justice role that the welfare state in India plays by recognizing that while religious minorities have been given the right to establish educational institutions of their choice, they may in fact be unable to do so and may require some financial assistance from the state. By preventing institutions that receive such assistance from providing religious instruction, the state will in fact detract from the promise of secularism made to the religious minorities in India. Finally Article 28 provides that religious instruction could be provided even in educational institutions partly funded by the state provided that the institution had been established under an endowment or trust, which required that religious education, is imparted. It may be recalled that Haj subsidy was initially held as constitutional by the Supreme Court and it was only subsequently that the Court observed that this subsidy should be withdrawn in a phased manner.

Judiciary & Freedom of Religion – The Essential Practices test

In British India the courts were frequently called upon to decide on matters pertaining to religious rights of the Indians. The court followed the practice of applying the religious laws of the Hindus and the Muslims, and initially relied on the advice of *Pandits* and *Maulvis* in determining the essence of the religion. Subsequently, the courts took over completely, maintaining that their interpretation was consistent with the religious texts.

The British undertook English translation of religious texts. But then since British judges treated these translated texts as laws in themselves, this led to wrong decisions and doctrine of precedent brought further rigidity in personal laws. In the process of ascribing an interpretation to religion, the British courts are known to have committed numerous 'egregious blunders'. Post-Independence the judicial interpretation to religion was to conform to the provisions of the constitution. With regard to freedom of religion, the courts continued the British practice of interpreting texts and other evidence to come to a conclusion as to the existence and centrality of the religious practice.

Now the stage is set for me to discuss the main argument of my lecture i.e. how judiciary has interpreted freedom of religion provisions. To decide on the scope of power to regulate religion vested with the state, the courts had to work out a scheme by which the power of regulation and reform granted by Art. 25(2) (a) and (b) was to be reconciled with the freedom granted under Art. 25(1).

Such an endeavour was first undertaken by the Indian Supreme Court in a 1954 case of *The Commissioner Hindu Religious Endowments, Madras v. Sri Laxmindra Thirtha Swamiar of Shirur Mutt*. The commissioner of Hindu Religious and Charitable Endowments was empowered under the Madras Hindu Religious and Charitable Endowments Act, 1951 to frame and settle a scheme if he had a reason to believe that the religious institution was mismanaging the funds placed under its care. When the commissioner exercised this power over the Shirur Mutt, the Mutt challenged this interference as being violative of its freedom of religion under Article 25(1) and 26 of the constitution. The state argued that it was allowed to do so under Article 25(2)(a) as it was regulating the secular function of the Mutt. The state based their argument on the premise that Article 25(1) only covered the relationship between the followers and the deity. The Supreme Court rejected this narrow understanding of religion and held that the term 'religion' in Article 25 will cover all rituals and practices which are *integral to that religion*. The court followed this conclusion by taking upon itself the responsibility to determine what is integral and what is not. The court impliedly rejected the 'assertion test', under which a plaintiff could just assert that a particular practice was a religious

practice. *The court said that it would be decided by taking into consideration what the religious denomination considered essential or crucial to the understanding of its denomination. This test of arriving at the definition was called the essential practices test and was to balance the powers of the State to regulate religion and the rights of communities to religious freedom.* Under this test before granting constitutional protection, the court goes into the question of the nature of the particular belief and the degree of importance attached to the belief by the concerned community. This exercise of determining the essential practice of a religion leads to obscure results and tends to lead the court into an area which in my humble view is beyond its competence. The court has applied this test to decide three types of cases.

- First, the cases in which court decided which religious practices should be offered protection.
- Second, the court used this test to decide the legitimacy of laws regulating religious institutions.
- Third, the court applied essentiality test to test the level of freedom to be conceded to religious denominations.

This evening I stand here to critique this approach of the Court.

Indian Supreme Court has pronounced judgments in several cases on purely religious matters. In the process it has decided many disputes involving the state activities and their impact on the people's religion. In fact there are decisions which have huge ramifications much beyond the traditional scope of legal disputes (restricted to the parties). These decisions have the impact on the very development and existence of religions. A case in reference is *Bal Patil v. Union of India*, where the Court refused to recognize Jainism as a separate religion and its followers to the status of religious minority. The Court classified Jainism as a mere "revolutionary movement within Hinduism". The Court's approach smirks of a particular political ideology in which uniformity is encouraged. The decision has the potential to question the very existence of Jainism as a distinct religion. Unfortunate decisions of this kind have prompted some

scholars to observe that it is the law that determines the scope of religion in Indian societies, rather than the other way around. Religions should indeed be independent of law.

The essential practice test was crystallized in *Venkataramna Devaru v. State of Mysore*, where the Court was dealing with the issue of restrictions on temple entry. The Court in this case engaged itself in the question of whether untouchability, manifested in restrictions on temple entry was an essential part of the Hindu religion. The Court after examining selective Hindu texts came to the conclusion that untouchability was not an essential Hindu practice. The more sensible approach, in my opinion, would have been to answer the question by placing reliance exclusively on the language of Article 25 which subjects it to the other provisions of Part III and then to apply the clear cut ban on untouchability as envisaged in Article 17. Instead, the Court adopted the controversial essential practice test. A more nuanced approach was adopted later in *Adithayan v. Travancore Devaswom Board*. In this case the court relied on Article 17 to reject an argument for appointing only Brahmin priests, grounded on the freedom to practice one's religion.

In the recently concluded case of *Gram Sabha, Battis Shirala*, a particular sect claimed that the capturing and worshiping of a live cobra during *nagpanchnami* is part of their religion. They placed reliance on the text of *Shrinath Lilamrut* which prescribed such a practice. The court relied on the more general *Dharmashastra* text to rule that since there was no mention of capturing a live cobra, it could not be an essential practice of the petitioners' religion. The court merely relied on a different authority which referred to general Hindu practice, without dealing with the question that the specific religious text of the villagers prescribed such a practice. Just like in *Hanif Qureshi*, the court has been equally vehement in rejecting animal sacrifices as part of the religion of certain Hindu sects. In a recent case the court rejected to categorize animal sacrifice under Article 25 by holding that it is a superstitious and barbaric practice, not supported by any religion. The court disregarded the empirical evidence of widespread practice shown by the petitioners.

The question before the court invariably has been whether to rely on the evidence of religious leaders, or to carry out their own research into matters of religion. The basic problem is that while interpreting what the religion prescribes as an 'essential practice' the court inevitably provides creative interpretations and is affected by the social image of the practice concerned. The court initially assured the religious leaders that it would determine the essential religious practices in accordance with the doctrines of the religion and the position enjoyed by the practices in the community. This assurance to the traditionalists would turn out to be a farce, as is seen in the reformist approach adopted in *Devaru* where the court interpreted the religious texts in accordance with the social change that it wanted to bring about.

The protection under Article 25 in its true sense was meant to guarantee freedom to practice one's own beliefs. The Supreme Court acknowledged this construction of the constitutional provision, when it observed that "*subject to the restrictions which this article imposes, every person has a fundamental right under our Constitution to entertain such religious beliefs as may be approved by his judgment or conscience*". The essential practice test is antithetical to this fundamental constitutional principle. Under the test, the court privileges certain religious practices over others by granting them legal protection. In my humble opinion court does not have the expertise to decide which practice/ritual of a religion is essential/non-essential. These are purely religious questions and prudence demands that these be left to religion and clergy.

The problem with the very basis of the essential practice test is evident from the court's own observation in *Tilkayat Maharaj v. State of Rajasthan*. The court observed that it could be possible that while determining the centrality of a practice to a particular community, the evidence could reveal that the community has varied opinions with regard to the importance of the practice in question. The court then went on to rule that in such a situation the court cannot blindly apply the formulae that the community should decide which practice is integral to it, rather, the court will have to apply its mind and decide whether the practice is of a religious character and integral to the

community. The role ascribed to the court in *Tilkayat Maharaj* is that of a *Pandit* or a *Maulvi*, or clergy. The judiciary is burdened with the task of resolving the deviation in the practice of a community by choosing a particular practice over the other.

Moreover, the Court like the religious heads gives its own interpretation of the scriptures and teachings. In *Shah Bano* also, the court should have just decided the case under Code of Criminal Procedure. It was unnecessary for the court to interpret verse 241 of chapter Two of Holy Quran.

The essential practice test inevitably asks the court to answer questions of religion, which the court is ill equipped to answer. The court tries to apply the certainty of law to religious questions, where there is always a divergence of opinion. Ronald Neizen notes that the problem with adjudicating on cultural practices is that the judiciary prefers black and white answers whereas the very nature of culture is subjective. Justice Chinnappa Reddy accepted that religion had a similar nature and was incapable of precise definition. Religion, like culture, is uncertain and it is beyond the mandate of Article 25 to judicially create certainty in religious matters.

The Constitution guarantees individuals the freedom to practice their religion, thus it is an *individual right* not a guarantee to the community to protect its essential features. The higher judiciary has been consistent in holding that the protection of Article 25 extends to practices and performance of certain rituals/ceremonies which are connected to the belief of the *individual*. The judicial innovation of demarcating particular practices of a religion as constitutionally protected impinges on the fundamental right of the individuals who opt to practice their religion through varied practices.

The *Ajmer Durgah Committee Case* is an example of the disregard shown by the judges to practices that they did not consider to be a part of religion. The court relied on a report prepared on the nature of Sufism in India and characterized it as a revolt of the heart. The court treated the Sufi practices as arising merely out of superstition and not grounded in Islam as such. It also took note of several non-*chistis* and non-Muslims

visiting durgah which was totally irrelevant. The court failed to consider the relevance of the practice to the petitioners in the case at hand, the Sufis and the historical data presented by them as to the importance of the Ajmer Durgah to their religious beliefs.

In *Commissioner of Police v. Acharya Jagdishwarananda*, the apex court held that the essential practices of a religion mean the core beliefs on which the religion is founded and the practices must be fundamental for the following of the religion. The practice must be such that if taken away it causes a fundamental change in the character of the religion or in the belief. Even if we accept this overtly restrictive definition of religious practices, the Supreme Court in certain cases has ignored authoritative sources to arrive at an unintelligible conclusion.

In *Fasi v. S.P of Police*, the petitioner, a police officer challenged a regulation in Kerala High Court which did not permit him to grow a beard as violative of his freedom to practice his religion. The petitioner placed reliance on the Hadith number 780.781 given in *Sahih-Al-Bukhari*. I am confident that the enlightened audience is fully aware of the position occupied by the Hadith and significance which Muslims attach to *Sahih Bukhari*. The teachings and practices of Prophet Muhammad (Peace Be Upon Him) are the second source of Islamic law. Additionally, *Sahih Bukhari* is considered to be the most authentic of the collections of prophetic teachings and is the most revered book after Quran. It is disgusting to note that rather than looking at the question of essentiality of beard in Islam, the court rejected the petitioner's argument by simply relying on the irrelevant fact that certain Muslim dignitaries do not sport a beard and that the petitioner did not have a beard in his previous years of practice. Therefore the court here chose to rely on the fact that certain members of the community did not follow the practice. The court did not deal with the authentic sources cited by the petitioners and their importance in Islam.

Similarly in the *Tandava Dance Case*, the Calcutta High Court had found that the *tandava dance* was an essential practice of the *Ananda Margi faith*. In this case the

Supreme Court overturned the High Court's decision and held that the *tandava dance* was not an essential practice of the *Ananda Margi* religion. The reasoning provided by the court was that in an earlier case the Supreme Court had already ruled that the *tandava dance* was not an essential practice and the same cannot be circumvented by the members of the religion. What an argument. Precedent would determine essential/non-essential features of a religion. Another reason provided was that the *Ananda Margi faith* had come into existence in 1955 and the *tandava dance* was adopted only in 1966, therefore as the faith existed without the practice, it cannot be accepted as an essential feature of the faith. This approach of the apex court seems to identify a religious practice as only an integral practice if it existed when the religion was founded. This absurd logic would lead to a frozen in time approach to religious practices, where the law does not recognize that religions too may change and adapt with time. This will have huge consequences in denying freedom of religion. For instance any practice of Islam which Muslims adopted after Prophet's death would be considered optional and non-essential and thus not protected by Article 25. Similarly no Christian or Jewish practice would be protected if it was not there during the life of Jesus and Moses. Dynamic growth of religion is certainly hampered by these kinds of decisions.

The court ignored the fact that Anant Murthiji the religious head of the *Ananda Margi's* had prescribed the *tandava dance* in the revised version of *Carya Carya*. The *Carya Carya* is the only authoritative text of the *Ananda Margi faith* and the court overlooked its acceptance of the *tandava dance* and choose to rely on the essential practices of the religion when it was founded. The dissenting opinion of Justice Lakshmanan relies on this authoritative text to grant the protection of Article 25 to the *tandava dance*.

The so called doctrine of 'essentiality test' reached absurd levels in *Ismail Faruqui v. Union of India*. Here Supreme Court was dealing with the issue of the state acquiring the land over which the Babri Masjid stood. One of the legal issues before the court was whether the state had the power to acquire a mosque. Instead of settling the issue in favour of the state by relying on the principle of eminent domain, the court went into the

question of whether praying in the mosque is or is not an essential practice of Islam. The court held that while offering of prayers is an essential practice, the offering of such prayers in the mosque is not, unless the place has a particular religious significance in itself. The court relied on the decision of the Lahore High Court which had allowed acquisition of a mosque to answer the question of religious significance of praying in the mosque. The most obvious authority, the Quran was not referred to by the court. The Quran and Hadith do prescribe congregational prayer and the mosques provide means to achieve this objective. The conclusion reached by the court, that a mosque can be acquired for a compelling state purpose is legally sound but its determination on the status of the practice to pray in the mosque is absolutely fallacious.

Religious conversions and Constitutionality of Anti-Conversion Laws

This brings me to the controversial issue of anti-conversion laws. In the case of *Rev. Stanislaus v. State of Madhya Pradesh*, the Supreme Court upheld the Anti-conversion laws enacted by the Madhya Pradesh and the Orissa State governments. Though the majority of arguments were about State's competence to enact the law, the apex court totally ignored the most important contention accepted by the Orissa High Court in *Yulitha Hyde v. State of Orissa* where the petitioners expressly averred that conversion was a part of the Christian religion.

In the Orissa High Court noted that "counsel for the several petitioners have freely quoted from several Christian scriptures of undoubted authority to show that propagating religion with a view to its spreading is a part of religious duty for every Christian and therefore must be considered as a part of religion. Learned Government Advocates did not dispute this assertion of fact. We, therefore proceed on the basis that it is the religious duty of every Christian to propagate his religion." It is, therefore, clear first that conversion was a part of the Christian religion, and, secondly, that this proposition was not controverted by counsel appearing on behalf of the State. The

Orissa High Court recorded the finding that “Article 25(1) guarantees propagation of religion and conversion as a part of Christian religion”.

It was argued in the Supreme Court that since these Acts relate to the prohibition of conversions, they are contrary to constitution as they are indeed hindrance in the ‘propagation’ of one’s religion. But the Supreme Court upheld their validity. Explaining the ambit of Art. 25 Supreme Court held that Art. 25(1) of the constitution does not grant the right to convert another person to one’s religion, but to transmit or spread one’s religion by an exposition of its tenets. Art. 25(1) guarantees “freedom of conscience” to every citizen, and not merely to the followers of one particular religion, and that in turn postulates that there is no fundamental right to convert another person to one’s own religion, because if a person purposely undertakes the conversion of another person to his religion, as distinguished from his effort to transmit or spread the tenets of his religion that would impinge on the “freedom of conscience” guaranteed to all the citizens of the country alike.

The Supreme Court which reversed the judgment of the Orissa High Court made no attempt to show that the question raised and decided was either irrelevant, or was wrongly decided. In spite of provisions of laws being challenged, the court did not set out the impugned provisions in its judgment. The court similarly did not discuss definitions of ‘inducement’ and ‘allurement’ which was the primary bone of contention. It is shocking to note that the apex court did not revert to the legislative history of Article 25 as term ‘propagate’ was included as compromise to assure Christians that it would include freedom to convert. The decision of apex court was termed as “*productive of greatest public mischief*” by H.M. Seervai, India’s greatest constitutional law expert.

Supreme Court has clearly denied freedom of conscience and the judgment deserves reconsideration. In fact all considerations applicable to freedom of speech and expression under Article 19(1) (a) should be applicable to right to propagate. The right to propagate one’s idea is inherent in the concept of freedom of speech and expression. Recent conversion incidents must be used as an opportunity to revisit this decision and

an effort must be made by the court to expand the meaning of religious freedom as has been done by it with regard to other fundamental rights such as right to life and personal liberty. This case again displayed the inconsistency in the Supreme Court's application of essential practices test.

The Constituent Assembly Debates give a clear idea of the burning debate which took place during the inclusion of Draft Article 19 (which later became Article 25) from December 3-6, 1948. The present day concerns of forced conversions were raised then also and a comprehensive answer was received on the floor of the house. KM Munshi categorically noted that the Christian community demanded a right to propagation not with the intention of converting the masses but because propagation was a fundamental part of practicing and professing their faith. It was also noted in those debates that the right to propagation should not be seen as a right given to the minority community but as a general right available to all communities so that all people are made increasingly aware about other religions. SV Santahanam was of the opinion that the right to conversion was introduced with due care as it was not an absolute right but subject to the state regulation when force or undue influence is being exerted.

Moreover, if a reductionist understanding of propagation is taken seriously, the induction of such a term in the Constitution would be rendered meaningless. This is so because the mere right to propagate for the enlightenment of others would already be covered under the Right to free speech and expression under Article 19 (1) (a) of the Constitution. Thus the right to convert was actually included in Article 25 and sufficient safeguards have been provided for the same also.

It has been demonstrated through the arguments advanced above that anti-conversion laws are less related to maintenance of public order but more to do with controlling religion and religious freedom. It goes against the idea of religious equality as the courts have failed to recognize an important tenet of non-Hindu religions like Christianity and Islam. Therefore the only unfortunate conclusion which can be derived is that these legislations are motivated by religious ideology more than anything else.

It is clear from the above discussion that the judiciary has failed to develop a proper method to determine the practices which are essential to a religion. The failure of the court is because of the nature of religion and the existence of varied practices among the members of the same religion. The essential practice test is not feasible because the court does not have the tools to maintain consistency in its determination of practices that are integral to the religion.

Ban on Cow slaughter and Freedom of Religion

Since Maharashtra law on cow slaughter was recently assented to by the President and matter the of constitutionality of this law is pending in the High Court, I think it is in the fitness of things to specifically speak on this issue in some details from the perspective of freedom of religion. BJP manifesto for Haryana elections had promised BJP would bring an Act to stop cow slaughter in the state. “The slaughter of cow would be considered equal to murder of a person,” were the remarks of Ganeshi Lal, chairman of manifesto committee. Narendra Modi himself in the Lok Sabha elections several times referred to the so called 'pink revolution'. April, 2014 BJP manifesto also promised similar ban and one of the slogan was *Modi ko matdan, gai ko jeevadan* [Vote for Modi, give life to the cow]. Few years back Justice M. L. Kaul of Punjab & Haryana High Court had observed that the penalty for cow slaughter must be enhanced as cow slaughter is a serious offence and any person convicted for it should be dealt with severely under the law. Expressing concern over the offence of cow slaughter entailing imprisonment of just five years, the learned judge said that it should be treated at par with murder, with 14 years rigorous imprisonment.

In the constituent assembly, some members wanted a complete ban while others were in favor of partial prohibition only. Dr. Raghu Vira argued that in our civilization *Brahma-Hatya* and *Go-Hatya* are at par. He went on to say, “cow is the mother of the individual, she is the mother of the nation.” It is interesting to note that Muslim members made a forceful case for the inclusion of the cow slaughter in the fundamental rights chapter of

the constitution so that the prohibition becomes absolute. Z. H. Lari strongly argued for the inclusion of the ban on cow slaughter in fundamental rights and opposed its inclusion in the directive principles which are vague and non-justiciable. Syed Muhammad Saadulha also favored a total ban on the ground that cow slaughter is part of Hindu religion. Finally, cow slaughter was inserted only as a directive principle.

As a matter of fact during the Muslim rule, only 20,000 cows were slaughtered in a year but the British were killing approximately 30,000 per day. In fact British had established India's first slaughterhouse in 1761. The cow protection movement of 1880-1894 was basically directed against the British and Muslims actively participated in it. In *Hanif Qureshi v. State of Bihar* the Supreme Court refused to accept that cow Slaughter during *Bakr-id* was an essential practice of the Muslim petitioner. The court referred to the Quranic verses which provided for slaughter of goats and cows and also made references to authentic Hanafi school text of Heydeya to conclude that sacrificing cow on Bakr-id is not an essential Islamic practice. The court relied on historical data which suggested that the Mughal Emperors had prohibited cow slaughter out of respect for the Hindus. Additionally, the court said that there was no affidavit on record to show that a *Maulvi* had stated that cow slaughter is an essential religious practice. This approach of the court is going back to the initial practice of the British of relying on testimony of the so called experts on religion. Also keep in mind that in conversion law it was clearly shown by the clery and accepted by the Orissa High Court that conversion is an essential Christian practice. But these facts were not accepted by the court in conversion case.

The impact of rejecting to view cow slaughter as a religious practice is clear in the Supreme Court's later decisions. The court has moved away from the *Hanif Qureshi* position of allowing slaughter of cows of a certain age, to the position that a complete prohibition on cow slaughter does not affect the fundamental rights of the butchers. The tool used by the courts in the *Hanif Qureshi* was a peculiar interpretation of the Quran. The court ignored the fact that sacrificing a goat or a cow or buffalo or camel on *Bakr-id* is an essential practice in Islam. Additionally, the Quran prescribes that one cow/buffalo

would satisfy the religious requirements of seven people, this effectively makes sacrificing a cow/buffalo the only affordable option to most of the population.

Several states have enacted laws imposing restrictions on slaughter of animals, including a total ban on the slaughter of cow. Some of these laws did come for the scrutiny of courts and almost all of them, except in minute details were upheld as constitutional. But certain questions regarding these decisions still remain unresolved. One such vital issue is whether these decisions are sound pronouncements of law if examined from the perspective of freedom of religion guaranteed to Muslims of India by the Indian constitution. Constitutionally speaking between the directive principle of prohibition on cow slaughter and fundamental right to religion, it is the later which is more important and thus shall prevail. Cow is revered because it is considered sacred amongst Hindus. But then why no one ever raised the question about the status of cow under Hinduism. Is cow reverence an essential practice of Hindu religion? Is it not a fact that beef eating was common in the Vedic and subsequent times even among Brahmins? Is it not a fact Dalit and Tribal still consume beef meat. We may recall the logic of Kerala High Court that if some Muslim dignitaries do not keep beard, it is not an essential practice of Islam. By this argument since some Hindus do eat beef and therefore beef eating cannot be held as an essential practice of Hinduism.

In 2004, in the case of *Om Prakash v. State of Uttar Pradesh*, the prohibition of sale of eggs in the municipal region of Rishikesh (a Hindu pilgrim city) was upheld by the Supreme Court on the grounds of culture and religious values of the dominant narrative of the religion. It was opined by the court that the inhabitants and pilgrims would prefer a “clean” vegetarian environment in the city. This is nothing but imposing majoritarian view on the other communities.

At this juncture, it is pertinent to look at into the interplay between freedom of religion and other fundamental rights. The ban on beef and eggs directly hits the rights of the butchers, vendors and other subsidiary undertakings which are closely connected to the slaughter of cows (tannery, hides, gut-making, blood-dehydrating) to carry on trade

without restraint. It is not denied that the right to trade is not an absolute one and is subject to reasonable restrictions. However, the restriction based on the dominant Hindu rhetoric of the religion, denying millions of other Hindus their narrative of the religion (which does not restrict the consumption of this meat), cannot be said to be based on reasonable grounds.

Further, banning the slaughter of cows has not only affected the economy in terms of loss of revenue from the leather industry, but also loss of economic opportunity to thousands of people belonging to lower castes as the majority of persons employed by this industry are those who belong to lower castes, as occupation in these activities are considered 'unclean'. Loss of economic opportunity pushes them further lower in the social strata. Additionally, majority of beef eaters in the country are Dalits, Adivasis (Tribals/Aboriginals), Muslims and Christians who constitute the lower wrung in the hierarchy of power, with a majority of them relying on beef as a chief source of nutrition, as opposed to pulses or vegetables which are relatively more expensive. Denying them their source of nourishment would push them to the brink of poverty.

Essentiality Test and Secularism

This brings me to the last part of my lecture. What is the relationship between essentiality test and secularism? The essential practices test strikes at the very conception of secularism at two levels.

The first limb of Indian secularism is freedom of religion. The essential practices test takes away this freedom of religion as the practitioners of the religion are not allowed to decide what constitutes or does not constitute an essential part of their religion. This becomes far more problematic because secularism does mandate that the organs of state including judiciary treat all religions equally. The invocation of essential practices test by the Supreme Court doesn't look in line with this fundamental principle of secularism. The court has interpreted and disapproved practices of both Hinduism and Islam for not being essential enough to be entitled to Article 25 protection.

The second problem is the reformist agenda followed by successive Supreme Court judges through the essential practices doctrine. The most striking aspect of the essential practices doctrine is the attempt by the court to fashion religion in the way a modern state would like it to be rather than accept religion as represented by its practitioners. Court's use of the essential practices doctrine has served as a vehicle for legitimating a rationalized form of high Hinduism and delegitimizing usages of popular Hinduism or Islam as mere superstition. Nearly all the cases where the Supreme Court applied the essential practices test to Hinduism, display the judge's inherent desire to reform and modernize the majority religion. In *Shirur Mutt*, the Supreme Court started with its mission to reform temple entry for untouchables. This was continued in *Devaru* case. Then the court targeted temple intermediaries like priests and attendants by declaring them to be non-essential part of the religion in cases like *ERJ Swami v. State of Tamil Nadu*. This trend was given a boost by Justice Ramaswamy in 1990s when he allowed state regulation of all major Hindu shrines like Tirupati, Jagganath, Kashi Vishwanath and Vaishno Devi. Therefore, it is quite evident that judges like Justice Gajendergadkar and Ramaswamy pursued their own agenda of reforming and modernizing Hinduism in the garb of so called essential practices test. These reformist tendencies were continued through numerous future cases like *Tandava dance* case and other similar cases. The essentiality test does take away the freedom of religion of a group by not allowing them to decide their own practices in accordance with their religious texts.

The cases discussed by me this evening clearly demonstrate that the judiciary has styled itself as the *messiah* designated to cleanse the religion from superstition and reform them to suite its own idea of modern rationality. The Supreme Court's insistence to apply the essential practices test and not following American approach of letting the practitioners decide what constitutes their religion has struck at the very foundation of religious freedom in India. Practices of Hinduism and its denominations have been targeted by reformist judges as they considered them to be based on superstition and practices central to Islam were targeted by court either because of the sentiments of the

majority community (*cow slaughter case*) or because of misplaced understanding of Islamic practices (*mosque case*).

The whole concept of providing constitutional protection only to those elements of religion which the court considers 'essential' is problematic.

First, it assumes that there can be objective criteria to decide what is essential and what is not. This is a wrong assumption as the idea of religion is very subjective. As observed by the Australian High Court in *Jehovah's Witness v. Commonwealth* way back in 1943: "What is religion to one is superstition to another".

Secondly, such an approach assumes that one element or practice of religion is independent of others. This approach assumes that some things are central to religion and others are merely incidental. This is not the correct understanding of religion as all elements and practices together constitute a religion.

Thirdly, this approach assumes that religions are static and what was central a few centuries ago must continue to remain central even today. This is wrong as like everything else, religions should also be allowed to change and evolve with time. Therefore, a practice which was not central fourteen centuries ago and was thus absent from the scriptures, may have become central over the years.

The 'essential practices test' has proved to be the biggest deterrent to freedom of religion in India. It was invented by the Supreme Court out of thin air and without any constitutional basis. The constitution of India, provides protection to religion and not just to 'essential' or 'central' elements of a religion. This doctrine has been propounded by judges who considered themselves to be social reformers and not just the adjudicators of disputes. There is a need for the Supreme Court to reconsider its reliance on the 'essential practices test'.

This is not to say that there should be no social reform. State is not powerless in this regard. All social reforms should be done under the exceptions provided under Article

25. State has been given power to regulate religions in the name of public order, health, morality, other fundamental rights etc. It can take up any secular or economic or political activity which is associated with the religions. It has adequate powers under Article 25 to initiate social welfare and reforms and therefore religions should not only be interpreted in terms of essential/non-essential features and practices. Hence, in such circumstances governmental restrictions on freedom of religion would be legally valid and would in no way impinge on freedom of religion. Moreover such restrictions would ensure economic development in its broader sense.

Once again I am grateful to Mr. Irfan Engineer and others for inviting me to deliver prestigious Asghar Ali Memorial Lecture. I am also thankful to all present here for giving me patient hearing this evening.
