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THE CONTROVERSY SURROUNDING THE PLACES OF WORSHIP ACT, 1991: Challenges against Democracy, Secularism, and the Cherished Principles of Constitution

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Contents

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THE CONTROVERSY SURROUNDING THE PLACES OF WORSHIP ACT, 1991: Challenges against Democracy, Secularism, and the Cherished Principles of Constitution

Shreshth Srivastava & Vaishali Gaurha*

[***Abstract***: *One of the hallmarks of any democratic society is respect for every religion or beliefs such that those persons wishing to follow their faith or convictions should not be interfered with by the State authorities. Article 25 of the Indian Constitution, the genesis of 'Secularism', has recently suffered a disastrous blow due to some exogenous factors which in turn, has undermined the basic structure of Constitution. The present paper is an attempt to provide a critical analysis as to how the recent controversy surrounding The Places of Worship Act, 1991 attempts to defenestrate the entire fabric of the Secular nature of our country, the essential aspect of a strong democracy. The Places of Worship Act, 1991 imposes a non-derogable obligation towards enforcing our commitment to secularism under the Indian Constitution. The Act which was passed to preserve the status of existing 'places of worship' of all religions and denominations as it was on August 15, 1947, and for the abatement of suits and legal proceedings with respect to the conversion of the religious character of any place of worship, has come into question due to motivated religious zeal and some proxy-litigation. The preamble of the act highlights the social values of secularism which at present can be called as 'like bats of law flitting in the twilight, but disappearing in the sunshine of actual facts'.*]

Keywords: *Religion, law, places of worship, secularism, constitution, etc.*

'Note the problem of religion taken not in the confessional sense but in the secular sense of a unity of faith between a conception of the world and a corresponding norm of conduct. But why call this unity of faith, religion and not ideology, or even frankly politics'?

Antonio Gramsci[1]

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[1] Bruce Grelle, ANTONI GRAMSCI AND THE QUESTION OF RELIGION: IDEOLOGY, ETHICS, AND HEGEMONY 237 (2016).

I

Introduction

The constitutional scheme guarantees equality of religion to all individuals and groups irrespective of their faith, emphasizing that there is no religion of the state.[2] The Preamble of the Constitution when read with Articles 25[3] to 28[4] emphasises this aspect. It indicates the manner in which the concept of secularism is embodied in the constitutional scheme. Secularism as one of the foundational principle adopted by the Indian people has to be understood while examining the constitutional validity of any legislation on the touchstone of the Constitution. The concept of secularism is one of the facets of the right to equality woven as the golden thread in the fabric of our Constitution. Our vision of secularism is that the State shall have no religion and the State shall treat all religions and religious groups equally, without interfering in any manner with their right of religion, faith, and worship.

However, the recent controversy surrounding the Places of Worship Act, 1991 (hereinafter referred to as the 'Act') has undermined one of the most cherished tenets of secularism i.e., faith. Faith is a matter of personal belief and that of right of personal relations of an individual with what he regards as his maker, creator, or cosmos which he believes, regulates the existence beings and the forces of the universe. The Act, not only protects the status quo of the existing places of worship but also protects the faith of the people attached to these places.

The present paper is divided into six parts. The first part deals with the introduction of the subject. The second part deals with the historical developments which led to the enactment of the Act. The third part provides an analysis as to how Section 4(2) of the Act, acts as an exception to the power of the 'Judicial Review'. The fourth part deals with the analysis of the concept of the worship from the standpoint of the landmark judgment of *Ismail Faruqui* v. *Union of India*.[5] The fifth part enunciates how the recent controversy acts as a dent on the secular nature of the country. The last part of the manuscript deals with the concluding observations.

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[2] *S.R. Bommai* v. *Union of India,* A.I.R. 1994 S.C. 1918.

[3] Article 25, The Constitution of India, 1950: ('Freedom of conscience and free profession, practice and propagation of religion and Article 28 – Freedom as to attendance at religious instruction or religious worship in certain educational institutions').

[4] *Id*.

[5] (1994) 6 S.C.C. 360.

II

Historical Developments

The Act[6] was passed by the Narsimha Rao Government in September 1991. The objective of the Act 'to prohibit conversion of any place of worship and to provide for the maintenance of the religious character of any place of worship as it existed on the 15th day of August, 1947, and for matters connected therewith or incidental thereto'.

The Act was enacted to serve two purposes. First, the act prevents the conversion of any place of worship. The term 'place of worship' has been given the broadest possible meaning to cover the places of all religions and denominations. Second, the Act imposes a positive obligation on the state to maintain the religious character of every place of worship as it was on 15th August, 1947.[7] Further section 4[8] of the Act states that on the date of commencement of this Act, any suit pending with respect to the conversion of the religious character of any place of worship before any court, tribunal, or other authority shall abate and no suit or appeal shall lie on or after such commencement. The act also bars institution of fresh suits or legal proceedings regarding any conversion that might have taken place before the independence. However, the act permits any suit, appeal or proceeding to be instituted for any conversion taking place after 15th August, 1947.

The Legislature chose 15th August, 1947 as the date for freezing the characteristics of religious places, because this day marks the end of colonial rule in the country furnishing a constitutional basis for healing the problems of the past. This law is a legislative instrument that imposes a non-derogable obligation towards enforcing the country's commitment to the principle of secularism.[9]

Then the opposition, created a huge uproar and opposed the enactment of the Act and the same was denounced as an example of *pseudo-secularism* being established in the country.[10] The opposition said that this bill is introduced to appease the minorities. The Parliament's legislative competence was also questioned as issues pertaining to places of pilgrimage or burials were a subject of the State list. However,

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6 The Places of Worship (Special Provisions) Act, 1991, No. 42, Acts of Parliament, 1991 (India).

7 *Id*. at section 3 – Bar of conversion of places of worship.

8 *Id*. at section 4 – Declaration as to the religious character of certain places of worship and bar of jurisdiction of courts, etc.

9 *Supra* note 6.

10 Sanjeev Sabhlok, *Who's Pseudo- Secular now? Sure, Yogi Adityanath, do build a Ram Statute- but with your own money*, (THE TIMES OF INDIA Nov. 26, 2017), *available at:* https://timesofindia.indiatimes.com/blogs/toi-edit-page/whos-pseudo-secular-now-sure-yogi-adityanath-do-build-a-ram-statue-but-with-your-own-money/ (last visited on 9 Oct., 2022).

the Union government stated that it could use its residuary power under Entry 97 of the Union List to enact this law.[11]

The act not only imposes an obligation on the state to protect the religious characteristics of all the places of worship but also mandates the state and its organs at all levels to maintain harmony and tolerance.[12] It is a legislative intervention that upholds the principles of secularism by preserving non-retrogression. The intention of the parliamentarians while enacting the law can be explained in the words of Union Minister of Home Affairs, on 10th September, 1991:[13]

> 'We see this bill as our measure to provide and develop our glorious traditions of love, peace and harmony. These traditions are a part of a cultural heritage of which every Indian is proud. Tolerance for all faiths has characterized our great civilization since time immemorial. These traditions of amity, harmony and respect came under severe strain during the pre-Independence period when the colonial power sought to actively create and encourage communal divide in the country. After independence we have set about healing the wounds of the past and endeavoured to restore our traditions of communal amity and goodwill to their past glory. By and large we have succeeded, although there have been, it must be admitted, some unfortunate setbacks. Rather than being discouraged by such setbacks, it is our duty and commitment to take lesson from them for the future'.

As was held in various cases at the time, the Act is a legislative co-extension of the idea of secularism.[14] The act reflects upon the solemn duty entrusted upon the state as well as citizens to preserve and protect the equality of all faiths. The idea of secularism is integral part the basic structure of the Constitution, elucidating its importance. In the case of *State of Gujarat* v. *Islamic Relief Committee*,[15] the apex court observed that 'the State is obliged to treat persons belonging to all faiths and religions with equality'. An essential part of secularism is the protection of property and places of worship. In view of national unity and integrity, this principle of mutual respect and tolerance for each other has been included in the constitutional scheme and that in the preamble of the Act.

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[11] *Supra* note 10.

[12] K Venkataraman, *What does the Places of Worship Act Protect*, THE HINDU (Nov. 17, 2019), *available at*: https://www.thehindu.com/news/national/what-does-the-places-of-worship-act-protect/article29993190.ece (last visited 10 Oct., 2022).

[13] Indian Parliamentary Debate, Lok Sabha No. 10, Session – I (Sep. 10, 1991) (remarks of Sri S.B. Chavan on continued discussion on the Places of Worship (Special Provisions) Bill) *in* Lok Sabha Secretariat, LOK SABHA DEBATES TENTH SERIES (VOL. 5, NO. 42) 448 (1991), *available at:* https://eparlib.nic.in/handle/123456789/3481?view_type=search (last visited 10 Oct., 2022).

[14] *Id*.

[15] (2018)13 S.C.C. 687.

III

Section 4(2): An exception to the Power of Judicial Review

One of the grounds on which the constitutional validity of the Act has been challenged is that Section 4(2) of the act bars judicial review. However, under this part of the paper the authors will try establish that this provision, in stead of being an impediment, acts as a valid element of judicial restraint.

One of the biggest challenges faced by the courts in public law adjudication is to determine the appropriate limits of their constitutional role. When a party to litigation argues that their rights are at stake, are there any circumstances under which the courts should refrain from protecting rights, or at least refrain from protecting them to an optimal degree?[16] While judges certainly possess legal training and expertise, they sometimes carry out their adjudicative function under conditions of uncertainty. Perhaps, sometimes they may not explicate or otherwise apprehend the wider social, political, or economic contexts in which the judgment takes effect.[17] At times, the courts may fail to assess the broader implications of their decisions and this can be construed by the recent act of the Supreme Court where they agreed to hear the petition filed by Ashwini Kumar Upadhyay (former spokesperson of BJP) challenging the provisions of the Places of Worship Act, 1991 on 11th October, 2022.[18]

As per Section 4 (2) of the Places of Worship Act, 1991:

> 'If, on the commencement of this Act, any suit, appeal or other proceeding with respect to the conversion of the religious character of any place of worship, existing on the 15th day of August, 1947, is pending before any court, tribunal or other authority, the same shall abate, and no suit, appeal or other proceeding with respect to any such matter shall lie on or after such commencement in any court, tribunal or other authority'.

The above-mentioned provision acts as a bar on judicial review, which has been held as one of the features of the basic structure of the Indian Constitution.[19] Such provision can be called as a special provision that bars judicial scrutiny in

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[16] Aileen Kavanagh, *Judicial Restraint in pursuance of Justice,* 60 UNIV. TORONTO L. J. 1 (2010).

[17] *Id*.

[18] V. Venkatesan, *Places of Worship Act: Is Supreme Court Unwittingly Helping Centre with proxy Litigation?* THE WIRE (Mar. 23, 2021), *available at:* https://thewire.in/law/places-of-worship-act-ashwini-kumar-supreme-court-ayodhya; Editorial, *SC to hear pleas against Places of Worship Act on October 11, 2022,* (THE INDIAN EXPRESS 09 Sept., 2022), *available at:* https://indianexpress.com/article/india/places-of-worship-act-supreme-court-issues-notice-to-centre-8140515/ (last visited 11 Oct., 2022).

[19] *Kesavananda Bharti* v. *State of Kerala*, (1973) 4 S.C.C. 225.

appropriate circumstances, i.e., judicial restraint. Judicial restraint is not the simplistic claim that judges should never interfere with legislative decisions or never review legislation in a probing and robust way but rather the principle that they should exercise a degree of restraint in appropriate circumstances.[20] The act which was drafted to preserve the status of the existing places of religious worship cannot be hampered by the way of *proxy litigations*. One of the grounds mentioned in the petition is that the act restricts the power of judicial review which has been held as on the tenets of the basic structure of our constitution. Thus, rendering the whole act as unconstitutional in nature. However, the authors are of the firm view that this exception is carved to prevent a pandora's box from its opening.

When adjudicating legal questions, judicial reasoning is governed by two types of considerations. The first is an evaluation of the substantive legal merits of the legal question before the courts.[21] In public law adjudication, such issues include whether legislation violates or respects rights or whether a decision by the secretary of state is fair or just or reasonable. Evaluating these substantive legal questions is the primary task of the courts. It requires them to establish what the law requires in a particular case[22] and in the present case the law requires to preserve the communal harmony.

The second consideration discernible in every jurisdiction, include the examples where courts demonstrate that they are not insensitive to the political responses to their decisions and are concerned to meet the accusation of judicial adventurism. Such factors clearly influence judicial decisions.[23] The question is whether or not it is legitimate for them to do so. In authors view it would be irresponsible for judges to decide cases while remaining oblivious to possible political and social responses to their decisions.

The judges must consider questions including, whether a decision would bring the judiciary into disrepute,[24] whether a particular judicial decision would produce a backlash in society, whether the society is ready for the legal change or whether it might be counter-productive to introduce it at this point in time. Although judges have an obligation to do justice in the individual case, that is not their only obligation. They also need to ensure that the courts are respected both by the other branches of government and by the public at large.[25] Just as they are concerned to

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[20] Edward S. Corwin, *Marbury* v. *Madison and the Doctrine of Judicial Review,* 12 MICH. L. REV. 538 (1914).

[21] Aileen Kavanagh, CONSTITUTIONAL REVIEW UNDER THE UK HUMAN RIGHTS ACT, 1998 281-93 (2009).

[22] *Id.*

[23] *Id*.

[24] *Supra* note 20.

[25] *Id*.

do justice in the individual case, they must also be concerned with their more long-term ability to fulfil this role.[26]

A Fruitless Political Agenda in the form of Proxy-Litigation

Frank Herbert said, 'When religion and politics ride in the same cart, a whirlwind follows.'[27] In simpler terms, when a person is guided by both religion and politics, he believes nothing can come his way, his movements become headlong, going faster and faster, forgetting the precipice does not show itself to a man until it is too late. This statement befits and reflects the current Indian context like a glove. The fact that even after upholding the validity of the Places of Worship Act, 1991 in judgments as recent as in 2019,[28] the Supreme Court is not only entertaining petitions but is also asking the centre for a reply is indicative of the tangent in which the Act may be directed.

In 2019, the historic judgment passed by the Supreme Court of India, resolving the title dispute between *Babri Masjid-Ram Janmabhumi*[29] came as a huge relief. It felt as if the dispute had been relegated to the pages of history. However, a *Varanasi* Court's recent order to carry out a comprehensive survey by the Archaeological Survey of India of the *Gyanvapi mosque* complex and a Civil Court in *Mathura* to hear dispute related to *Krishna Janmabhoomi* on July 1, 2022[30] threatens to turn the clock back and inflict new wounds.[31] This and other actions, when looked at sceptically, reverberates the fundamental derogatory idea and pandora's box that maybe opened through such actions and in slogans such as '*Ayodhya to sirf jhank ihai, Kashi, Mathura baaki hai'*. (*Ayodhya* is just the beginning; *Kashi* and *Mathura* still remain).[32]

In 2020, a petition was filed by Ashwini Kumar Upadhyay, stating that the Places of Worship Act infringes various articles of the Indian Constitution. The petition also mentions that the act bars judicial review, which is a part of the basic structure of the Constitution. An excerpt from the petition, which talks about the conundrum

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[26] Harry H. Wellington, *The Nature of Judicial Review,* 91 YALE L.J. 487 (1982).

[27] Frank Herbert, Dune, Quotable Quote, https://www.goodreads.com/quotes/43262-when-religion-and-politics-travel-in-the-same-cart-the (last visited 16 Aug., 2021).

[28] Dhananjay Mahapatra, *SC agrees to examine validity of Places of Worship Act,* THE TIMES OF INDIA (Mar. 12, 2021), *available at:* https://timesofindia.indiatimes.com/india/sc-agrees-to-examine-validity-of-places-of-worship-act/articleshow/81463934.cms (last visited 16 Oct., 2022).

[29] *M Siddiq* v. *Mahant Suresh Das*, (2020) 1 S.C.C. 1.

[30] Hamendra Chaturvedi, *Krishna Janmabhoomi Dispute: Civil Court in Mathura to start hearing today,* THE HINDUSTAN TIMES (Jul. 1, 2022), *available at:* https://www.hindustantimes.com/india-news/krishna-janmabhoomi-dispute-civil-court-to-start-hearing-today-101656611905145.html (last visited 16 Oct., 2022).

[31] Abhishek Kumar, *Gyanvapi Mosque will inflict fresh wounds after prolonged Ayodhya battle*, (THE PRINT 21 Apr., 2021), *available at:* https://theprint.in/campus-voice/gyanvapi-mosque-dispute-will-inflict-fresh-wounds-after-prolonged-ayodhya-battle/643179/ (last visited 16 Oct., 2022).

[32] *Id*.

regarding *Krishna Janmabhumi*, presents striking similarity to that of the blood-shed, violence led, *Babri Masjid-Ram Janmabhumi Dispute*. Ashwini Upadhyay, in his petition, stated: [33]

> 'Hindus are fighting for complete possession of birthplace of Lord *Krishna* from hundreds of years and peaceful public agitation continues till date but while enacting the Act, Centre has excluded the birthplace of Lord Ram at *Ayodhya* but not the birthplace of Lord *Krishna* in *Mathura*, though both are incarnations of Lord Vishnu, the creator and preserver. Thus, restriction on Hindus to approach Court is arbitrary irrational and against the principle of rule of law, which is core of Article 14-15'.

Such act of entertaining fruitless petitions raises a question of significance, i.e., whether the courts are helping the Central Government through proxy litigations? Proxy litigations, as one may call it may be used to strike down the act as being unconstitutional without the direct interference of the legislature. To avoid the embarrassment of scrapping the act of its own accord, the petitioners want the judiciary to hold it as unconstitutional. Despite observing the sanctity of the Places of Worship Act in the *Ayodhya case*,[34] it is astonishing to see the change in the attitude of the Supreme Court. The petition which ought to have been dismissed at the very first instance is currently under the process of judicial review.[35]

In *Ayodha case*,[36] the court held:

> 'Parliament enacted the Places of Worship Act, 1991 to fulfil two purposes. First, it prohibits the conversion of any place of worship. In doing so, it speaks to the future by mandating that the character of a place of public worship shall not be altered. Second, the law seeks to impose positive obligation to maintain the religious character of every place of worship as it existed on 15th August, 1947 when India achieved Independence from Colonial Rule. This act imposes a bar on the institution of fresh suits or legal proceedings. The only exception is in the case of suits, appeals or proceedings pending at the commencement of the law on the ground that conversion of a place of worship had taken place after 15-8-1947'.

However, in the present petition[37] a three Judge bench of the apex court observed that the Act does not bar from ascertaining the religious character of places of worship.[38] One may wonder the characteristic of a place of worship can be

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[33] *Ashwini Kumar Upadhyay* v. *Union of India*, (2020) 7 S.C.C. 693.

[34] *Supra* note 29.

[35] Editor, *Places of Worship Challenged in SC: 'Passed in most undemocratic of manners possible'*, THE INDIAN EXPRESS (Sep.9, 2022), *available at:* https://indianexpress.com/article/india/places-of-worship-act-challenged-in-supreme-court-8139758/ (last visited 17 Oct., 2022).

[36] *Supra* note 29.

[37] *Supra* note 33.

[38] Editor, *1991 Law doesn't bar finding religious character of place of worship: SC,* BUSINESS STANDARD (May 20, 2022), *available at:* https://www.business-standard.com/article/current-affairs/1991-law-doesn-t-bar-finding-religious-character-of-place-of-worship-sc-122052001594_1.html (last visited 18 Oct., 2022).

determined by prevalence of practice by the pilgrims at the place. In our case the Muslim parties have been offering namaz to these sites for centuries. Therefore, these sites occupy the characteristic feature of Islam as it existed on 15th August, 1947 and thus protected by the Places of Worship Act, 1991.

Therefore, we are of the opinion that instead of determining the religious character of place of worship, the act protects the existing characteristic of the place of worship. Therefore, with utmost respect we disagree with this observation of the Hon'ble Supreme Court. In the *Ayodhya Case*,[39] the court held:

> 'The law cannot be used as a device to reach back in time to the rise and provide a legal remedy to every person who disagrees with the courts which history has taken. The courts of today cannot take cognizance of historical rights and wrong unless it is shown that their legal consequences are enforceable in the present'.

This observation by the court shows that it will not be wise and proper to change what happened centuries ago. But, the recent stance of Supreme Court shows a complete opposite picture. The battles to recover the mosque next to the *Kashi Vishwanath* temple and the building of a temple in *Mathura's Eidgah* have been led by the *Vishwa Hindu Parishad*, a branch of the *Sangh Parivar*. Therefore, it has not only praised the court's decision but is also urging a review of the Act.[40]

One can clearly make out that the centre is using the apex court as a body that can strike down the law, righting the historical wrongs and making ways for new petitions. The court is under the duty to get back the past glory of the nation, as the petitioners suggested, 'it is the duty of everyone to make every endeavour to get back past glory of lost nation thus Centre cannot enact law to legalize barbarian acts of invaders'.[41] They claim that centuries ago the barbaric invaders entered into our land and have dismantled our holy temples.

In the case of *Gyanvapi* Mosque, there is no real dispute. It is historically evident that the parts of the Vishwanath temple were destroyed and, the walls of the mosque have been raised to a plinth of the temple.[42] In the past, demolition of religious institutions has been a function of state power, but the same logic cannot be put into force now. Now that the powers are in the hands of the majority, it cannot be said

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[39] *Supra* note 29.

[40] Prashant, *Gyanvapi case reopens the politics of religion that Supreme Court had sealed shut in Ayodhya,* (THE PRINT 17 Sep., 2022), *available at:* https://theprint.in/opinion/newsmaker-of-the-week/gyanvapi-case-reopens-the-politics-of-religion-that-supreme-court-had-sealed-shut-in-ayodhya/1131523/ (last visited 18 Oct., 2022).

[41] *Id*.

[42] Pratap Bhanu Mehta, *Weaponising Faith: The Gyanvapi Mosque-Kashi Vishwanath dispute*, (THE INDIAN EXPRESS 13 Apr., 2021), *available at:* https://indianexpress.com/article/opinion/columns/gyanvapi-mosque-dispute-kashi-vishwanath-temple-asi-7270802/ (last visited 20 Oct., 2022).

that *Kashi* and *Mathura* must be claimed as they were five centuries ago. However, the reason, author's stress, for this upheaval is not religiosity rather is of political connotation. The reason is politically motivated to show the strength and dominance of the majority and permanently indict the minorities. Religion is used as a weapon against the other community. More often than not, the incitement to prove the claim over a disputed religious property is to gain hegemony and control over that property. Establishing an antagonistic and hostile relationship between the two religions is not new; over and over again it has been done to fill the vote banks even at the cost of lives of people. In this context, it is pertinent to note the observation by The Australian High Court in the case of *Adelaide Company* v. *Commonwealth*:[43]

> 'Protection of religion was not absolute: religious privileges must be reconciled to the sovereign power to ensure peace, security and orderly living without which the constitutional guarantee of civil liberty would be a mockery'.

If the above-mentioned observation of the High Court is taken into consideration in the present scenario, then it can be very well said that an attempt to declare the Places of Worship Act unconstitutional by an act of proxy-litigation is under mining the civil liberty.

Doctrine of 'Strict Necessity'

While judicially reviewing the feasibility of a legislation, the courts can use another doctrine, the doctrine of necessity. This doctrine refers to the fact that the courts can decide the constitutional issues of any Legislation, if strict necessity compels them to do so. This term was used for the first time in 1954 in Pakistan when the Pakistani CJ, Muhammad Munir, validated the use of emergency powers by Governor-General, Ghulam Mohammad. In his judgment, the Chief Justice cited Bracton's maxim, 'That which is otherwise not lawful is made lawful by necessity', thereby providing the label that would come to be attached to the judgment and the doctrine that it was establishing.[44]

The question which authors put forth – *What is the strict necessity in the present case?* The petition which ought to have been dismissed upon its acceptance has raised serious questions upon the extent of judicial review.

The apex court in the cases of *Ismail Faruqui*[45]and *Mahant Suresh Das*[46] held that the Places of Worship Act is based on the cherished principle of the secularism, while in the former case the court went to an extent stating that this act is there to prevent the incidents like *Ayodhya* happening again in future. If history is considered, then

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43 (1943) 67 CLR 116.

44 *Id.*

45 *Supra* note 5.

46 *Supra* note 29.

these religious disputed places have witnessed a large number of communal violence which has severely affected the safety of the public and this law is there to prevent such disruption. Therefore, this branch of the law is the law of civil or state necessity.

The authors would like to argue that this Act might be unlawful in certain aspects, as pointed out by some jurists,[47] though the authors do not concede to those arguments. But the necessity demands it to be lawful, which can be very well explained by the maxims – *id quod alias licitum non esset necessitas faciat licitum* (that which otherwise is not lawful, necessity makes lawful); *salus populi suprema lex* (the safety of the people is the supreme law); and *salus reipublicae est suprema lex* (the safety of the State is the supreme law).

The classic example of the above doctrine is the case of *The Attorney General of the Republic* v. *Mustafa Ibrahim*[48] (The Mustafa Ibrahim Case (Cyprus) of 1964). In its background, Cyprus was a deeply divided society with the Greek and Turkish people being separated by race, nationality, religion, and language; the continual state of tension on the island was aggravated by the active and continuous involvement of the two mother countries, Greece and Turkey. The independence Constitution of 1960 (in order to give reassurance to the 18 per cent Turkish Muslim minority) required the concurrence of the Turkish Cypriots in all important matters of State and deeply entrenched their rights. The resulting complex and rigid Constitution were rendered further unworkable by the provision that certain parts of the Constitution were unamendable by any means.

Three years after independence the Turkish Cypriots had withdrawn from participation in the machinery of government, the neutral Presidents of the superior courts had resigned, and for a period the Turkish judges failed to attend their courts. In 1964, by means of the Administration of Justice (Miscellaneous Provisions) Law (No 33 of 1964), the House of Representatives (lacking its Turkish members) purported to merge the Supreme constitutional Court of Cyprus and the High Court of Cyprus into a single Supreme Court comprising the existing members of the two superior courts. In the *Mustafa Ibrahim Case*, an appeal was brought before the new Supreme Court and the jurisdiction of the Court to entertain the appeal was challenged on grounds of 'unconstitutionality'. The Court in this case held:[49]

> 'The law, in a word, includes the doctrine of necessity; the defence of necessity is an implied exception to particular rules of law. The law was enacted on 9 July 1964 as

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[47] Saurabh Sharma, *Places of Worship Act impedes civilizational justice, must be struck down: Jai Sai Deepak,* (FINANCIAL EXPRESS 19 Apr., 2021), *available at:* https://www.financialexpress.com/india-news/places-of-worship-act-impedes-civilizational-justice-must-be-struck-down-j-sai-deepak/2236093/ (last visited 20 Oct., 2022).

[48] 1964 C.L.R. 195.

[49] *Id*.

> an urgent measure and a temporary one, a legislative measure which sets up the necessary judicial machinery for the continued administration of justice in cases where the machinery provided for under the Constitution has either broken down indefinitely or is liable to break down from time to time. In such a case necessity renders validly applicable what would otherwise be illegal and invalid. Otherwise, the absurd corollary would have been entailed, viz. that a State and the people should be allowed to perish for the sake of its Constitution'.

The same can be said about the Act. This act of Parliament cannot be declared as unconstitutional because it not only protects the religious belief of the people but also protects the religious sentiments of the people. It sometimes happens, however, that a constitution and the legal order under it are disrupted by an abrupt political change not within the contemplation of the Constitution.[50] Any such change is called a revolution, and its legal effect is not only the destruction of the existing Constitution but also the validity of the national legal order.[51] From a juristic point of view the method by which and the persons by whom a revolution is brought about is wholly immaterial. Equally irrelevant in law is the motive for a revolution, inasmuch as a destruction of the constitutional structure may be prompted by a highly patriotic impulse or by the most sordid of ends.[52]

IV

Concept of Worship in *Mohd. Ismail Faruqui Case*

As has often been noted, worship does not appear to be a propositional attitude. In worshipping someone, one is not related to a content or proposition but to an intentional object (which might not exist). But despite the fact that it is not in itself a propositional attitude, worship seems to be intimately related to propositional attitudes. In typical instances of worship, the worshipper has certain beliefs associated with the object of worship. For example, worshippers generally regard the object of worship as being morally superior to themselves.[53] In religious philosophy and practise, worship is at the centre. The worship of God is the focal point of religious ceremonies, and fundamental theological concepts like sin, atonement, and redemption make implicit references to worship. Though worship plays a crucial function, philosophers of religion have surprisingly little to say about it. If adoration were not, in many ways, a mysterious attitude, this silence would not

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[50] Glanville Williams, *'The Defence of Necessity'* in current legal problems, 6 LONDON: STEVENS 24 (1954).

[51] Leslie Wolf-Phillips, *Constitutional Legitimacy: A Study of the doctrine of necessity*, 1 THIRD WORLD QUARTERLY 11 (1979).

[52] *Id*.

[53] *Id.* at 220.

be surprising. In this chapter, we explore a key query raised by the concept of worship: What is belied in the idea of worship?[54] We conclude by reflecting and analysing the implications of this result in the *Mohd. Ismail Faruqui*.[55]

The Crucial Four Issues

Worship raises at least four general issues. First, there is the analysis of the concept of worship. What is it to worship something? To what degree is worship cognitive attitude? In what ways is it related to attitudes such as admiration, respect, and awe? Can worship be reduced to these notions, or is it sui generis? Second, what are the appropriate objects of worship? Is worship an attitude that it is permissible to adopt only with respect to God, or can the theist allow that the worship of entities other than God is permissible? A third issue is epistemological: what reasons do we have for thinking that God is worthy of worship? A fourth issue concerns the grounds of worship. What kinds of properties could make it reasonable to worship God? What kinds of properties might make it obligatory to worship God? Might worship have multiple grounds, or is there a single property in virtue of which it is reasonable and/or obligatory to worship God.

The authors would like to examine the above-mentioned issues from the perspective of analysis of the judgment of *Mohd. Ismail Faruqui* v. *Union of India*.[56] In this particular judgment the Constitutional bench of the Supreme Court held that a mosque which does not form an essential part of Muslim religion can be acquired by the State under its sovereign powers in the interest of public safety because, it does not fall under the ambit of 'essential practice of the religion', covered under Article 25[57] of the Indian Constitution. However, according to the authors, such findings tend to prejudicially affect the 'Right to belief in one's own religion'. The implications of such judgments are huge; it derecognizes the constitutional protection of mosques, which is an essential part of the freedom of religion. These statements devalue the constitutional right of prayer to a person. Belief and worship in a sense can be called as synonymous with each other. Richard Hooker[58] states, 'The discussion of religious duties begins with belief and worship' meaning thereby no worship can take place if there is no belief. The Act which protects the status of the existing religious denominations cannot be taken away by means of such judicial pronouncements. The act protects and secures the fundamental values of liberty of thought, belief, faith, worship and expression. While holding that mosques are not required to offer Namaz, the bench made an error by not recognizing the fact that such judicial pronouncements may open the doors for sabotaging the

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[54] Tim Bayne & Yujin Nagasawa, *The Grounds of Worship,* 42 RELIG. STUD. 301 (2006).

[55] *Supra* note 5.

[56] *Supra* note 5.

[57] *Supra* note 3.

[58] Richard Hooker, OF THE LAWS OF ECCLESIASTICAL POLITY 200 (1st edn., 2013).

general belief of the community attached to the mosques, which can be construed from the *obiter dicta* of Justices Ahmadi and Bharucha in *Ismail Faruqui*,[59] where they held:

> 'If significance of the place of the religious worship viz. the mosque is such that its acquisition would result in extinction of right to practice religion itself, then only acquisition would be invalid where members of majority community make claim upon place of worship of minority community and create public disorder, State acquisition of the place of worship to preserve public order, in the circumstances would be against the principle of Secularism'.[60]

The worshipper regards the object of worship as greater, in some sense, than him and that is what may be termed as belief, which appears to get undermined with this ratio of law. Even if it presumed that Mosque does not form an essential part of the religion, still this presumption cannot defenestrate the ideology of belief which Muslim community has towards the Mosques. Historian Farhan Hassan states that though it is true that it is not obligatory for a Muslim to pray in a mosque and that a Muslim can pray anywhere. However, historically a mosque has been a central site for congregational prayers. In any religion, there is always a component that is deeply personal, but another is social and mosque caters to the communal aspect of social life.[61]

Worship is undoubtedly a complex practise that defies easy explanation. The ability to provide a reductive account of what it means to idolise anything is, in fact, not at all evident.[62] However, by locating worship in its conceptual neighbourhood, we may highlight the connections between it and associated attitudes. Worship does not seem to be a propositional attitude, as has frequently been observed. When someone is worshipped, one is not connected to a message or idea, but rather to an intended object (which might not exist)[63] and this where a Mosque stands in Islam. But even though it is not a propositional attitude in and of itself, worship appears to be closely linked to propositional attitudes. Typically, when someone worships anything, they do so with certain beliefs in mind. For instance, worshippers frequently believe that the object of worship is morally superior to them.[64]

To worship something seems to involve judging that the object of worship is more powerful in some respect than oneself. It is not obvious that the power in question need be a power over oneself, but it is a power that one lacks. Also internal to the attitude of worship is reverence – a form of humility and respect. The worshipper

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[59] *Supra* note 5.

[60] *Id*.

[61] Adrija Roychowdhury, *What is the role of the mosque in Islam?* (THE INDIAN EXPRESS 29 Sept., 2018), *available at*: https://indianexpress.com/article/research/ayodhya-verdict-babri-masjid-what-is-the-role-of-the-mosque-in-islam-5376988/. (last visited 10 Oct., 2022).

[62] Robert Merrihew Adams, FINITE AND INFINITE GOODS (2002).

[63] *Id*.

[64] *See generally,* G.S. Kirk, et.al., THE PRESOCRATIC PHILOSOPHER (1983).

regards the object of worship as greater, in some sense, than herself. In many religious traditions worship is also taken to involve more straightforward emotional attitudes, such as love. It is this crucial point which the court failed to appreciate not only in *Mohd. Ismail Faruqui case* but also in the subsequent judgments and this failure is now giving rise to another *Ayodhya Dispute* (in form of *Kashi* and *Mathura*).

The protection of belief- An analysis from the perspective of the First Amendment of the US Constitution

The First Amendment to the US Constitution prescribes that 'Congress shall make no law respecting an establishment of religion or….Prohibiting the free exercise thereof'. This clause guarantees two things: It not only (a) forestalls compulsion by law of the acceptance of any creed or the practice of any form of worship (also known as Anti-Establishment Clause), but also (b) safeguards the free exercise of the chosen form of religion (also known as Free Exercise Clause).[65]

The scope of the First Amendment was considered in *Davis* v. *Beason*,[66] wherein it was observed:

> 'The term *religion* has reference to one's view of his relation to his Creator and to the obligations they impose of reverence for his being and character; and of obedience to his will. It is often confounded with the cultus or form of worship of a particular sect, but is distinguishable from the latter. The First Amendment of the Constitution in declaring that Congress shall make no law respecting the establishment of religion or forbidding the free exercise thereof was intended to allow everyone under the jurisdiction of the United States to entertain such notions respecting his relations to his Maker and the duties they impose as may be approved by his judgment and conscience and to exhibit his sentiments in such form of worship as he may think proper, not injurious to the equal rights of others and to prohibit legislation for the support of any religious tenets or the mode of worship of any sect'.

In simpler terms a man's relation to his Maker and the obligation he may think they impose and the manner in which an expression shall be made by him of his belief are matters personal to the individual or the sect writ large and on those subjects, no interference can be permitted. The method of protecting freedom of worship and freedom of conscience in religious matters is quite the reverse. In religious debate, or expression, the Government is not a prime participant, for the framers deemed religious establishment antithetical to the freedom of all.[67] The Free Exercise Clause embraces a freedom of conscience and worship that has close parallels in the speech provisions of the First Amendment, but in the Establishment Clause, there is a specific prohibition in forms of State intervention in religious affairs with no precise

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[65] *Cantwell* v. *Connecticut*, (1940) 310 U.S. 296.

[66] (1890) 133 U.S. 333.

[67] D.D. Basu, COMMENTARY ON THE CONSTITUTION OF INDIA 498 (2015); M.P. Jain, INDIAN CONSTITUTIONAL LAW (2018).

counterpart in speech provision. It was observed that a State created orthodoxy puts a grave risk that freedom of belief and conscience which are the sole assurance that religious faith is real and not imposed. The court ruled that the practice violated the Establishment Clause.[68]

The established law that Mosques do not constitute the essential practice of Islam might not hold well if such established law becomes a political whip, such act would only project State as a conformist which in turn would make difficult for the adherents of site-specific religion to practice their faith.[69] The concept of secularism is one aspect of the right to equality woven as golden thread in the fabric of the scheme in our Constitution.[70] Therefore, the court erred in not recognizing the faith of the Muslims attached to the mosques because protection to religious faith is an integral part of Article 25 of the Indian Constitution.[71]

V

Recent Controversy: An Indent to the Cherished Principles of Secularism

On March 12, 2021, the Supreme Court issued notice to the central government on a petition that was filed challenging the validity of certain provisions of the Act.[72] The petition was filed to set aside sections 2, 3, and 4 of the Act. It is contested by the petitioners that this act validates the illegal occupation of the places of worship by the barbaric invaders. As Dushyant Dave observed:

> 'From 1192- 1947, the invaders not only damaged and destroyed the places of worship and pilgrimages but also occupied the same under military power. Thus, section 4 is a serious setback on the cultural and religious heritage of India'.[73]

The order of the Supreme Court in seeking a reply from the centre is deeply disturbing on many accounts. It puts an enduring blot on the fabric of secularism, which is an integral part of our Constitution.

The vision of Secularism enunciated in the ancient Sanskrit sloka – *sarva dharma sambhava*, i.e., the toleration for all religions has always been a part of Indian

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[68] *Sante Fe Independent School District* v. *Doe*, (2000) 530 U.S. 290.

[69] *Lyng* v. *North West Indian Cemetery Protection Assn.*, (1988) 458 U.S. 439.

[70] M.P. Jain, INDIAN CONSTITUTIONAL LAW 587 (8th ed., 2019).

[71] *Indian Young Lawyer Association* v. *State of Kerala*, (2019) 11 S.C.C. 1.

[72] *Supra* note 6.

[73] Dushyant Dave, *The needless resurrection of a buried issue*, THE HINDU (Mar. 19, 2021), *available at:* https://www.thehindu.com/opinion/op-ed/the-needless-resurrection-of-a-buried-issue/article34184959.ece (last visited 16 Oct., 2022).

tradition. It has its roots in the *Yajur Veda*, *Athrava Veda*, *Rig Veda*, and Akbar's *Din-e-elahi*.[74] India has upheld the concept of tolerance and equal respect for all religions since ancient times. Mutual respect for one another is its cardinal principle. This spirit of tolerance later on came to be known as Secularism.

The word 'secular' was neither defined nor explained under the Constitution either in 1950 or in 1976, when (latter) it was made a part of the Preamble. According to D.E. Smith, one of the finest scholars of secularism: [75]

> 'A secular state is one that guarantees individual and corporate freedom of religion; deals with individuals as citizens irrespective of their religion; is not institutionally connected to a particular religion; nor seeks either to promote or interfere with religion'.

However, the recent controversy surrounding the Act raises a question of great constitutional importance; to what extent can one say that India is really a secular country? It would not be wise and proper to open the old wounds (*Ayodhya* Dispute).[76] However, it appears that the Pandora box has already been opened and as a consequence, constitutional disarray does not look very distant.

Article 25[77] of the Indian Constitution which protects ones 'Right to belief' cannot be hampered by State's action or by judicial activism. The question is not whether a particular religious belief or practice appeals to our reason or sentiment, but whether the belief is genuinely and conscientiously held as part of the profession or practice of religion. 'Our personal views and reactions are irrelevant. If belief is genuinely and conscientiously held, it attracts the protection of Article 25'.[78]

In the *Ismail Faruqui case*,[79] the evidence produced before the court was not Islamic scriptures. The declaration that mosques do not form an integral part of Islam cannot be truly accepted as this deduction was based on the Indian Limitation Act, 1908 rather than a Mahomedan Law. This clearly infringes the basic test for determination of 'essential practices' laid down in the landmark case of *The Commissioner, Hindu Religious Endowments, Madras* v. *Sri Lakshmindra Thirtha Swamiar*.[80] In this case it was held that what constitutes an essential religious practice must be ascertained with reference to the doctrines of the religion in the question itself. But it was not the case here because the Islamic scriptures were not studied

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[74] Gil Anidjar, *Secularism,* 33 U. CHI. L. REV. 58 (2006).

[75] Rajeev Bhargava, SECULARISM AND ITS CRITICS 178 (1st ed., 1999).

[76] *Supra* note 7.

[77] *Supra* note 3.

[78] *Jamshedji* v. *Soonbhai*, I.L.R. (1909) 33 Bom 122; *Bijoe Emmanel* v. *State of Kerala*, (1986) 3 S.C.C. 615.

[79] *Supra* note 5.

[80] 1951 S.C.C. OnLine Mad. 384.

for the deduction of 'essential religious practices' and the placement of mosques in this frame.

Just as most religions have a place of worship, for Muslims it is the mosque. A brief study of the *Quran* (immediately) highlights the importance of mosques in Islam.[81] They serve for prayers, for congregation during the holy month of Ramadan, for imparting education and social welfare.

Historian P K Yasser Arafath discusses the importance of mosque in the following words – 'Never in history, have mosques remained purely as stations of rituals or theological observances. Rather, in the past as well as present, they function as centre of learning and theological engagements'.[82] Thus, any act to convert a place of worship is an infringement of the Article 25[83] of the Indian Constitution. In the case of, *Hasanali* v. *Mansoor Ali*[84] the High Court of Bombay held that Articles 25 and 26 of the Indian Constitution not only prevent doctrines or beliefs of religion but also prevents acts done in pursuance of the religion.

Any attempt by the government or by the judiciary to restrict the right of a person to believe and to practice his religion is in contrast with Article 25[85] of the Constitution. Whether or not mosques form an 'essential religious practice' of Islam, may for the sake of debate be considered as contentious issues but they certainly form an important part of 'Islamic Belief'. A reading of *Quran* and authentic traditions of the Prophet makes the significance of a mosque clear in Islam. Prophet Mohammad was the one who helped in laying the foundation of the first mosques in the city of Medina, as an attempt to define a place of worship for the Muslims.[86] The indispensability of mosques in Islam can be understood by referring to Sahih Bukhari and Sahih Muslim, where the prophet was quoted saying – 'Prayer in a congregation is 27 times more fruitful than praying individually'.[87] This in essence, depicts the essentiality of Mosques, which by virtue of being a time-immemorial belief, are protected by Article 25[88] and 26 of the Indian Constitution.[89]

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[81] Falah Shams & Naib Amir, *Roles of Mosques in Islam,* (AL ISLAM ,26 Dec., 2016), *available at:* https://www.alislam.org/articles/role-of-mosques-in-islam/ (last visited 20 Oct., 2022).

[82] *Supra* note 42.

[83] *Supra* note 3.

[84] (1948) 50 BOMLR 389.

[85] *Supra* note 3.

[86] Adrija Roychowdhury, *What is the role of Mosque in Islam,* (THE INDIAN EXPRESS 20 Sep., 2022), *available at:* https://indianexpress.com/article/research/ayodhya-verdict-babri-masjid-what-is-the-role-of-the-mosque-in-islam-5376988/ (last visited 22 Oct., 2022).

[87] *Supra* note 83.

[88] *Id*.

[89] A. Faizur Rehman, *The essentiality of Mosques*, (THE HINDU 07 Aug., 2018), *available at*: https://www.thehindu.com/opinion/op-ed/the-essentiality-of-mosques/article24617384.ece. (last visited 22 Oct., 2022).

There is no doubt that if there is a question of public safety acquisition of any place of worship is justified. However, history shows that such acquisitions have always been triggered by some religious zeal. What is done cannot be undone. What is lost cannot be retreated. There is no point in turning back the pages of History. If our Preamble defines us as Secular nation then such act and proxy litigation must be condemned.

Critiquing the test of Essential Practice of Religion

Despite religion being of such importance, India has successfully been able to retain its secular character.[90] However, a trend has gained prominence wherein, though India appears to be secular from the outside where all religions are freely practised, it is upon the courts of law to decide what practices constitute religion, and consequently, what is protected which is called the test of the Essential Practice of the Religion (hereinafter referred to as 'The Test'). This test was coined by the apex court in *Shirur Mutt case* in 1954.[91] The court held that only those beliefs and practices which are integral to the religion would be protected by Article 25 of the Constitution. Though, the courts have held that Mosques do not form an essential part of the Muslim religion. However, they have failed to appreciate the belief of the Muslims attached to the Mosques, in this regard Derrett, while discussing relationship of courts and religion in India in his treatise, states: [92]

> 'The courts can discard as non-essentials anything which is not proved to their satisfaction… and they are not religious leaders or in any relevant fashion qualified in such matters…to be essential, with the result that it would have no constitutional protection'.

It might be true that Mosques are not required to offer *Namaz*, because they do not constitute an essential practice.[93] However, they still enjoy special religious status and this has been one of the biggest problems of this test, it fails to recognize one very important fact that these Mosques are the places where the Muslim community feels attached to their cosmos and this special characteristic is protected by the Act. However, the approach taken by the court has reduced this Act to a mere legally enacted document.

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[90] Ranbir Singh & Karamvir Singh, *Scularism in India: Challenges and its Future*, 69 INDIAN J. POL. SCI. 597, 603 (2008).

[91] *Commissioner, Hindu Religious Endowments, Madras* v. *Sri Lakshmindra Thrita Swamiar of Shri Mutt*, A.I.R. 1954 S.C. 282.

[92] J. Duncan M. Derett, RELIGION, LAW AND THE STATE IN INDIA 447 (1999).

[93] Hilal Ahmed, *Do Muslims need Mosques to offer Namaz: How the VHP, and a BJP Chief Minister, helped shapes this debate,* (DAILY BETA 09 Oct. 2019), *available at:* https://www.dailyo.in/politics/supreme-court-ayodhya-verdict-ismail-faruqui-case-mosque-namaz-essential-practice-islam-27127 (last visited 25 Oct., 2022).

Articles 25 and 26 of the Constitution, in outlining the freedom of religion, inherently embody the concept of secularism. However, they lay out an ambiguous framework for the exercise of religious freedom. For instance, they do not indicate the extent of judicial powers in determining social welfare or reform, or the extent to which legislations may override religious freedoms. Similarly, there is little to suggest what happens in cases where a sect is not Hindu and is therefore not subject to the social reform exception under Article 25(2)(b), or where a particular temple claims not to have 'public character'.[94]

The question regarding religion is more a matter of theology than of judicial adjudication/ intervention. There is no strait-jacket formula to ascertain what is essential to religion. The judiciary cannot turn a blind eye to the relativity and subjectivity that comes along with religion. As soon as we start attempting to categorize beliefs into compartments of right and wrong, we start to ignore the grey areas and the possibilities that come with the diversity that exists in India. The assortment of beliefs, values and cultures is what makes India a country of such uniqueness. Simply because there is a group of people who dissent and disagree with such a belief, the court cannot test specific practices on a general understanding of religious norms.

Thus, everything boils down to the bottom line that religion is relative. The words, right and wrong, fair and unfair, have no place where religion is concerned. The Test not only limits the scope of belief in this case but also limits the scope of natural reformation of religion. In authors' view if any particular object accords the belief of any particular community, then such objects must be an essential part of the religion. The courts have erred in stating that to offer Namaaz there is no need for a Mosque. However, the authors contend, at the cost of reiteration, that Mosques are the place where they find connection with the almighty and this is what must be protected under 'Right to belief'. In this regard the courts must look to the precedent set by other South-East Asian nation, Sri Lanka, where the Supreme Court held in the case of *Premalal Perera* v. *Weerasuriya*: [95]

> 'The Court would consider only whether the professed belief is rooted in religion and whether the claimant honestly and sincerely entertained and held such belief'.

The religious freedom guaranteed by Articles 25 and 26 is intended to be a guide to a community of life and ordain every religion to act according to its cultural and

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[94] Gautam Bhatia, Individual, *Community, and State: Mapping the terrain of religious freedom under the Indian Constitution,* IND. CONST. L. & PHIL. (Feb. 7, 2016), *available at*: https://indconlawphil.wordpress.com/2016/02/07/individual-community-and-state-mapping-the-terrain-of-religious-freedom-under-the-indian-constitution/ (last visited on 28 Oct., 2022).

[95] (1956) 2 Sri L.R. 177.

social demands to establish an egalitarian social order. The protection of Articles 25 and 26 of the Constitution is not limited to matters of doctrine. Articles 25 and 26 strike a balance between the rigidity of right to religious belief and faith and their intrinsic restrictions in matters of religion, religious beliefs and religious practices and the guaranteed freedom of conscience to commune with his Cosmos, Creator and realise his spiritual self[96] and this is where this test fails to realize the actual impact of a Mosque in Islam. However, this position now seems to be changing. First, the *Mathura* Court orders then the *Varanasi* Court orders. These orders have now caused rifts and given those seeking to foment similar disagreements across the nation of a legal justification and it is sad to see that such a great nation is again moving towards communal disharmony.

Therefore, we would like to state that not only the future of these mosques and the Act is uncertain but also the principle of Secularism looks uncertain and constitutional disarray does not look distant.

VI

Conclusion

Religion can best be understood as a primary element of human nature, suppression of which would be comparable to suppression of any other need like air, water, or sex. Therefore, the idea of protection of religion is akin to the protection of our natural rights. Farr, in his treatise *World of Faith and Freedom*,[97] mentions that the assertion of religious freedom is the affirmation of the claim of human nature on behalf of human beings.

Secular Ethos of the Nation

Democracy and secularism do not exist in vacuum. Both of them have a historical context. The idea of secularism as we perceive today was subjected to incessant conundrum in the legislature and judiciary before taking its current shape. Neither the Constitution nor the judicial precedents have defined secularism in abstract form, it is applied subjectively. Even though not defined *stricto sensu*, the idea of secularism is an inevitable part of the basic structure. In the context of the recent controversy as mentioned above, any act influenced by the idea of the majoritarian view may cause a huge blow to the idea of secularism. The legislature, executive

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[96] *A.S. Narayana Deekshitulu* v. *State of A.P.*, (1996) 9 S.C.C. 548.

[97] *See generally*, Thomas F. Farr, WORLD OF FAITH AND FREEDOM: WHY INTERNATIONAL RELIGIOUS LIBERTY IS VITAL TO AMERICAN NATIONAL SECURITY (2008).

and judiciary must collectively endeavour to protect, preserve and pursue secularism in India.

Justice Thakur, in 2017, while dealing with the question of Representation of People's Act, 1951, stated:[98]

> 'While interpreting a legislative provision, the court must remain alive to the constitutional provisions and ethos. The relationship between man and God and the means which humans adopt to connect with the almighty are matters of individual choices and preferences. The state is under an obligation to allow complete freedom for practicing, professing and propagating religious faith'.

The most disturbing thing with respect to the Secular character of India has been the lack of liberal approach. On multiple occasions, the courts have tried to interpret religion to suit their own whims. In *Shastri Yagnapurushdasji* v. *Muldas*[99] a group claimed recognition as an independent denomination following the teachings of Swaminarayan. The court, in this case, stated that this claim was '…founded on superstition, ignorance and a complete misunderstanding of the true teachings of the Hindu religion and of the real significance of the tenets and philosophy taught by Swaminarayan himself'.[100]

No matter how misguided the followers were, it is not within the scope of the court's authority to grant or restrict any person's beliefs unless it contradicts the requirements of Article 25. There have been numerous instances where the courts have decided matters in a similar fashion, whether it be the essential practice of keeping the beard for a Muslim man[101] or whether the *Tandava* dance merits protection.[102] The court in such cases attempts to dictate to a group of people what their religion in reality propagates. The real problem is with the courts explaining whether one should believe in something or not, rather than protecting those beliefs, thus defeating the entire purpose of incorporating Article 25 in the Constitution of India[103]. Sadly, the same has happened in our case, which in turn sabotages the secular ethos of the Nation.

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[98] *Abhiram Singh* v. *C.D. Commachen,* (2017) 2 S.C.C. 629.

[99] (1966) 3 S.C.R. 242.

[100] *Id*.

[101] *Mohd. Zubair Corporal* v. *Union of India*, 2016 S.C.C. OnLine S.C. 1472.

[102] *S.P. Mittal* v. *Union of India*, (1983) 1 S.C.R. 729.

[103] Rajat Sinha & Stuti Bhargava, *Does your God Satisfy the Constitutional Test? - Analysing the 'Essential Religious Practices Doctrine' in light of the Sabrimala Verdict,* 8 (2) NLIU L. R. 210 (2019).

Defilement of Constitutional Morality

Constitutional morality refers to the respect, reverence, and internalization of the 'form' as well as the spirit of the Constitution.[104] In *Indian Young Lawyers Association* v. *Union of India*,[105] (*Sabrimala case*) the Supreme Court held:

> 'Constitutional morality is the founding faith upon which the Constitution is based, it must have a value of permanence which is not subject to the fleeting fancies of time and age'.

'Religion in development is man in search of God' observed Justice K. Ramaswamy in *A.S. Narayana Deekshitulu*.[106] Freedom of religion is quintessential to the protection of the diversity of beliefs. Freedom of religion, in essence, allows the diversity of faiths and differential beliefs within a faith to flourish in a conducive environment.[107] As Heiner Bielefeldt puts it, not only in the modern world is diversity an irreversible fact, it should also be appreciated as a manifestation of the potential of human responsibility and therefore as intrinsically something positive.[108] Human diversity is itself a sign of moral earnestness.[109] The respect that we serve for the beliefs that we do not find true or reasonable is the normative denominator of our peaceful co-existence.[110]

In *Sabrimala Case*, Justice Indu Malhotra writes:[111]

> 'Constitutional morality in a pluralistic society and secular polity would reflect that the followers of various sects have the freedom to practise their faith in accordance with the tenets of their religion. It is irrelevant whether the practice is rational or logical. Notions of rationality cannot be invoked in matters of religion by courts'.

Further, in case of *A.S. Narayana Deekshitulu*,[112] Justice Ramaswamy held: [113]

> 'The religious freedom guaranteed by Articles 25 and 26, therefore, is intended to be a guide to a community-life and ordain every religion to act according to its cultural and social demands to establish an egalitarian social order'.

The assortment of beliefs, values and cultures is what makes India a country of such uniqueness. Simply because there is a group of people who dissent and disagree

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[104] Latika Vashist, *Re- Thinking Criminalisable Harm in India: Constitutional Morality as a Restraint on criminalisation,* 55 JILI 73, 71, 85 (2013).

[105] *Supra* note 73.

[106] *Supra* note 98.

[107] *Supra* note 99.

[108] Heiner Bielefeldt, *Freedom of Religion or Belief: A Human Right under Pressure*, 1 O.J.L.R. 15, 35 (2012).

[109] Heiner Bielefeldt, *Misperceptions of Freedom of Religion or Belief*, 35 HUM. RTS. Q. 33, 68 (2013).

[110] *Id.*

[111] *Supra* note 73.

[112] *Supra* note 98.

[113] *Id.*

with such a belief, religious persecution cannot be permitted. The courts and legislators are vested with the moral duty to protect the rights of the people and if such rights are threatened then constitutional disarray does not look distant.

Under Constitutional scheme every person has a fundamental right not merely to entertain the religious belief of their choice but also to exhibit this belief and ideas in a manner which does not infringe the religious right and personal freedom of others. Freedom guaranteed under Article 25 of the Constitution is such freedom which does not encroach upon a similar freedom of others.[114] It is not wrong to state that what happened in the past was wrong but in the present time turning the clock back again is not only morally wrong but also encroaches on the freedom guaranteed under Article 25.

Senior Advocate Mr. Dushyant Dave has argued that being a Secular nation it is the moral duty of the Courts and the Legislators to protect the belief of the people attached to the places of worship.[115] Constitutional morality is not a term which is limited to the academic discussion but it goes way beyond that. It is the internal form of realisation of the Constitutional spirit.[116] Therefore, the recent events surrounding the Act not only shatters the belief of the people but also sabotages the spirit of the Constitution.

Freedom of Religion in Indonesia

Places of worships have often been the target of religiously motivated attacks in Indonesia. Although such religious conflict is not a new occurrence, however, certain intensification of attacks on places of worship of religious minorities is alarming.

In 2005, around 50 Churches in West Java were vandalised,[117] around 11 Ahmadiyah Mosques were damaged or forced to closed by radical Islamic group.[118] In 2002, several Hindu temples were vandalised in Bali.[119] Till the introduction of the Joint

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[114] *Lily Thomas* v. *Union of India*, (2006) 6 S.C.C. 224.

[115] *Supra* note 50.

[116] Neha Bhandari & Shreshth Srivastava, *The Government of National Capital Territory of Delhi Amendment Act, 2021: Against the principles of the Constitution*, CLC (Apr. 25, 2021), *available at:* https://clcnusrl.blogspot.com/2021/04/the-government-of-national-capital.htm (last visited 30 Oct., 2022).

[117] Elaine Pearson, *In Religion's name: Abuses against Religious minorities in Indonesia,* (HUMAN RIGHTS WATCH 28 Feb., 2013), *available at:* https://www.hrw.org/report/2013/02/28/religions-name/abuses-against-religious-minorities-indonesia (last visited 30 Oct., 2022).

[118] *Id*.

[119] Neil Chatterjee & Trisha Sertori, *Indonesia's Bali recalls horror of bombs 10 years on,* CHICAGO TRIBUNE (Oct. 11, 2012), *available at:* https://www.chicagotribune.com/nation-world/ct-xpm-2012-10-11-sns-rt-us-indonesia-balibre89b05d-20121011-story.html (last visited 16 Oct., 2022).

Ministerial Regulation on Places of Worship in March 2006,[120] which replaced the old ministerial regulation[121] which has been criticised for religious atrocities against minorities continued.[122] Even with the introduction of this new regulation, religious atrocities against the minorities continued[123] which has further undermined the concept of 'Right to freedom of religion'.

The preamble of the new regulation states 'to facilitate for the development of religion in a harmonious environment' however, the same has only become rhetoric. The similarity between the situations in India and Indonesia highlights two situations (i) State has become ignorant towards such issues and (ii) the rights of minorities have been subdued by the majority. The responsibility of maintaining communal harmony is upon the religious groups and the national government. However, what one can infer from the situations of these two countries is that because of the disruption of communal harmony a constitutional disarray does not look distant.

Minority Rights and Communal Harmony

One of the main purposes for enforcing the Act was to ensure that the religious rights of all the sections of the society are protected, irrespective of their strength. The reason for freezing the status of places of worship as they were on 15th August, 1947 was to ensure that these institutions are protected from the influence of majoritarian rule. The government at power must not under any circumstances be able to overshadow the other religious communities. Now that the powers are in the hands of the majority, it cannot be claimed that *Kashi* and *Mathura* must be reinstituted as they were five centuries ago. The apex court must not be used as a tool to further the political ideology of the ruling party.

The minorities have equal rights of protection, propagation and practice of their religion and even the issuance of a reply (from the centre) may create fear in their minds. The fear is deep rooted; it is the fear of losing one's right to worship, right to believe and the right to practice religion. Eventually, this fear culminates into losing one's own identity. The petitioners challenging the validity of the act have repeatedly invoked the rights of Hindus, Jains, Sikhs and Buddhists excluding Muslims and Christians. This aims to build a false narrative that Muslims and

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[120] MINIST. DECS. NO. 9/2006.

[121] MINIST. DECS. NO. 1/1969.

[122] Mun'im Sirry, *Religious freedom and Places of Worship in Contemporary India,* (RELIGIOUS FREEDOM INSTITUTE 19 Jul., 2016), *available at:* https://www.religiousfreedominstitute.org/cornerstone/2016/7/19/religious-freedom-and-places-of-worship-in-contemporary-indonesia/ (last visited 16 Oct., 2022).

[123] *Supra* note 97.

Christians are invaders and lesser part of this community than the others.[124] Even though in the past, the capture and conversion of places of worship by the rulers was a norm but today this method cannot be used as a process to correct the occurrences of the past.

The act of the ruling Government and proxy-litigation has the tendency to disrupt the communal harmony. History has been the witness that such acts have always disrupted the communal harmony.[125] The framers of the Constitution had intended our nation to be a secular one. It was envisaged that unlike the Western concept of secularism, the Indian state would not be indifferent, but equally respectful towards all the religions.

This conception of Secularism is peculiar to India, and so is the phenomenon of communalism. This *Communalism-Secularism dichotomy* is viewed as a major force in sustaining this phenomenon in the country. Communalism is a feeling of antagonism between various communities, usually along religious lines. Communalist sentiments may manifest themselves in a silent and imperceptible manner, and also in the extreme form of violence and riots. India has been the site of one of the worst communal riots that the world has ever witnessed.[126]

Article 25[127] is an article of faith in the Constitution incorporated in recognition of the principle that the real test of a true democracy is the ability of even an insignificant minority to find its identity under the country's Constitution. In *Sindhi Education Society* v. *Government (NCT of Delhi)*,[128] the court observed:

> 'Under our Constitution, where secularism is a basic feature, that there can be no presumption of inimical attitude towards one community by another and such a presumption is impermissible'.

Therefore, the time has come that such acts must not only be heavily condemned but also needs be stopped in order to conserve the *plurality and diversity* of this country which act as a glue that bind the societies and make them tolerant towards other faiths.

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[124] Ritika Jain, *Explained: The Places of Worship Act and the Pleas Around it*, (BOOM LIVE 20 Mar., 2021), *available at:* https://www.boomlive.in/law/places-of-worship-act-supreme-court-12432 (last visited 30 Oct., 2022).

[125] Prathama Banerjee, *Are Communal Rights a new thing in India? Yes, and it started with the British,* (THE PRINT 03 Mar., 2020), *available at:* https://theprint.in/opinion/are-communal-riots-a-new-thing-in-india-yes-and-it-started-with-the-british/374458/ (last visited 16 Oct., 2022).

[126] *Id.*

[127] *Supra* note 3.

[128] (2010) 8 S.C.C. 49.