Freedom of Religion in India

1. Throughout India's history religion has been an important part of the Country's culture and the Indian sub-continent is the birth place of four of the world's major religion, Hinduism, Buddhism, Jainism and Sikhism. For this reason Swami Vivekananda who is considered by many to be the person responsible for propagating modern Hinduism across the world, used to emphasise that spirituality and hence religion is the very backbone of India, He was fond of stating that every nation has a particular ideal running through its whole existence, forming its very background. Vivekananda said that India has religion and religion alone for its backbone, for the bedrock upon which the whole building of its life has been based.
2. In 1947 just after Independence and partition, India had over 330 million inhabitants. Out of this, followers of the Hindu religion numbered 280 million approximately, followers of the Islam faith accounted for approximately 30 million inhabitants, Christians accounted for 7.6 million and Sikhs numbered approximately 6.25 million. There were 2.3 million Buddhists and 1.3 million Jains in India
3. Since the Constitution of India was a document which was designed to provide the principles which would govern the participation of different

citizens in their lives, the Constitution makers believed that the only option before them was to provide a secular constitution. This they did by incorporating Articles 25 to 30. Out of the said Articles, Article 25 to 28 is expressly bunched together under the heading Right to Freedom and Religion and Articles 29 and 30 are under the heading Cultural and Educational Rights. Without going into the details, the Constitution stated that all persons were equally entitled to freedom conscience and the right to freely profess and practice and propagate religion.

4. In the landmark judgement of the Supreme Court of India in Keshavananda Bharati vs. State of Kerala, the Supreme Court in 1973 held that there were basic features of the Indian Constitution which could not be removed by way of amendment of the Constitution. By way of example it held that by enacting Articles 25 to 30, the Constitution had already indicated that secularism was a basic feature of the Indian Constitution. In 1976 the preamble of the Constitution was amended to specifically state that India is a secular republic. This only emphasizes what had already been hld by the Supreme Court that the Constitution from its inception was a secular constitution which expressly allowed all persons the freedom to practice their religion.

5. The right to practice one's faith is, therefore, irrevocably guaranteed by the highest law in the Country namely the Constitution of India.
6. Like all rights, however, such right too cannot be completely unfettered. Therefore, the right to practice one's faith is subject to various heads of restrictions namely public order, morality, and health. It is subject to other fundamental rights recognized by the Constitution. And, in a multicultural, multiethnic nation, the exercise of one persons freedom to practice his religion must necessarily be subject to another persons right to practice his religion.
7. In order to minimize conflict arising out of the practice of different religions , two crucial aspects of this right have been emphasized by the Supreme Court in different judgments from the very outset.
8. Firstly, that the **concept of religion** is not confined to a doctrinaire beliefs. It is not even theistic. This is because there are well known religions in India like Buddhism and Jainism which do not believe in God or in any Intelligent First Cause. It comprises of a core of ethical rules for its followers which may include diverse practices such as ritual, ceremonies and modes of worship and could extend even to matters of food and drugs. This stand which was first adopted in 1954 judgment in Commissioner, Hindu Religious Endowment Madras vs. Lakshmindra Thirtha Swamiyar of Shri

Shirur Mutt by a bench of 7 judges, making it the seminal judgment on the fundamental right to practice ones faith.

9. The other significant aspect also emphasized in the Shirur Mutt case and followed since then is that what is protected under the Indian Constitution is the **essential part of the religion** and not each and every part of practice thereof. Elaborating further it had been held what constitutes the essential part of a religion is primarily to the ascertained with reference to the doctrine of that religion itself.

10. The Indian Constitution then goes on to make critical distinction which is crucial for many purposes between **religious practices** secular activity associated with religious practice. This emerges from Article 25(2)(a) which protects the operation of any existing law (law existing at the time the Constitution came into force) or allows the State to make any law regulating or restricting economic, financial, political and other secular activities associated with religious practice.

11. To illustrate this distinction, one may refer to the case of Pannalal Bansilal Pitti vs. State of Andhra Pradesh, 1996 judgment where the Supreme Court held that the administration of a religious institution or endowment is a secular activity and is not an essential part of a religion and, therefore, the legislature is competent to enact laws regulating administration and

governance of religious or charitable institutions or endowment. Therefore, a legislation which seeks to supersede a hereditary trustees of an institution does not violate a person's right to practice his or her religion.

12. This distinction is important as we have in this Country very rich and old religious institutions to which people contribute a substantial portion of their wealth and which plays an important role in the life of the population of India. If, as has been found from time to time, corrupt or unhealthy practices are adopted by the management of such institution, the State must be in a position to intervene in the public interest.. This has led from time to time to legislation to regulate the administration of religious institutions which have been found to be run in a manner inimical to the public good. Such state action has now come under criticism from religious organizations which believes that the State should not interfere with the administration of religious institutions at all. But given the spiritual nature of the Indian population which has resulted in development of massive religious institutions which affect the public interest, a proposition that the State must stay idle when the interest of the public is affected by maladministration of religious institutions surely cannot be countenanced.

Faith based discrimination in employment, accommodation and other services.

13. By and large the Constitution has expressly provided that there cannot be any faith based discrimination in employment, accommodation or other services except education.

14. To this end Article 14 of the Constitution provides equality before law in general and states that States shall not deny to any person equality before the law or the equal protection of the laws within the territory of India.

15. It then goes on in Article 15 to prohibit discrimination inter-alia on the ground of religion. It goes on to specify that no citizen shall on the ground only of religion be subject to any disability, liability, restriction or condition with regard to access to shops, public restaurants, hotels and places of public entertainment or the use of well, tanks, bathing ghat, roads and places of public resort maintained wholly or partly out State funds or dedicated to the use of general public.

16. It then goes on in Article 16 to expressly provide that there will be equality of opportunity for all citizens in matters relating to employment or appointment to any office under the State and that no citizen shall on the ground only of religion be ineligible for or discriminated against in respect of any employment or office under the State. So, therefore, faith based discrimination is in general completely prohibited at least as far as the public sector is concerned in India.

17. The only area in which a certain amount of positive discrimination is permitted is in the area of **education**.

18. For this we have to refer to two Articles, firstly Article 26 of the Constitution confers the right to every "religious denomination" to establish and maintain institutions for religious and charitable parties.

19. The second is the right granted under Article 30 of the Constitution to minorities to establish and administer educational institutions of their choice.

20. This confers upon two groups namely religious denominations of any religion and minorities, limited protection against State interference with educational institutions run by them. I do not enter into a discussion of how a religious denomination has to be defined or identified as it involves details which may not be of interest to a gather of this nature. It is, however, important to point out that by reason of a series of judgments the extent of protection has to some extent been limited, for instance, in regulation which deals with educational standards which are to be maintained may be made applicable to such educational institutions. Though in general such institutions are allowed to chose teachers and students, here also merit cannot be ignored completely and some amount of regulation is permissible.

21. This brings us to the important question as to what happens when the religion or religious institutions itself makes a distinction between its

followers on the basis of gender identity, sex orientation or some other characteristics.

22. Without meaning any disrespect to any particular religion it is well known that for reasons which may appeal to some and not to other, various religion have made rules and practices which might differentiate between their followers. Example which have arisen for debate in the courts include the practice of exclusion of certain members of the community from worshipping in a particular temple. This was a matter of enormous importance at the time of independence since by and large among Hindus there was a rigid caste system which led to the exclusion of lower caste from entering into places of worship.

23. The Indian Constitution was not just a charter of rules which was also reformative and forward looking in nature. While granting freedom to practice religion to people of India it could not have tolerated widespread discrimination which would result in large parts of the population being excluded access from significant places of worship. It sought to do this in a variety of ways.

24. An overriding provision which deals with this situation is Article 17 of the Constitution which totally abolishes untouchability and makes the practice of untouchability in any form an offence punishable in accordance with law.

Since the practice of untouchability was one of the main grounds on which entry into temple was prohibited for large section of Indian population, the abolition and criminalization of such practice has no doubt on its own had the effect of removing an obnoxious method of excluding people from the right to worship.

25. Secondly, it provided in Article 25(2)(b) that the right to freedom of religion would not affect the operation of any existing law or prevent the State from making any law providing for social welfare and reform or the throwing opening of Hindu religious institutions to all classes and sections of Hindus. The significant explanation to this sub-article stipulates that the reference to Hindus shall be construed as including reference to persons professing Sikhism, Jainism or Buddhist religion

26. This sub-article is of enormous importance and demonstrates reformatory and forward looking nature of the Indian Constitution which envisages legislation to achieve the object of social welfare and reforms against existing religious practices.

27. Following the enactment of the Constitution almost every State in the Country has enacted legislation to make it obligatory on the part of the religious institutions of public character to throw open their doors to all classes and sections of the religion. The Supreme Court of India has on the

very beginning supported the throwing open of public institutions to people hitherto excluded from such temples. An early example of this can be found in the celebrated 1958 judgment in Venkatarama Devaru vs. State of Mysore..

28. The same question has arisen in the case of Sabarimala temple in the State of Kerala which for doctrinaire reasons excludes women between the ages of 10 and 60 from entering the hill top temple of Lord Ayyappa at Sabarimala. The question which has been raised is whether in the light of the fact that from the early 1950s, the State of Kerala has enacted a law in line with Article 25 (2) (b) which stipulate that all Hindu temples of public character in the State of Kerala shall allow all classes and sections of Hindus into the temple for worship, whether women between the ages of 10 and 60 who are undoubtedly a section or a class of Hindu can be excluded from entry into the temple. The question is still awaiting adjudication.

29. A third aspect is found in Article 15 (2)(b) which prevents any discrimination in the use of wells, tanks, bathing ghats and roads and places of public resort which are dedicated to the use of general public. Many places of worship in this country include wells, tanks and bathing ghats and places of public resort.

30. Another provision of the Constitution which deals with this aspect is Article 13 of the Constitution which states that all laws in force which are in consistent with the provisions of the Chapter on fundamental rights would to the extent of such inconsistency be void and includes within the phrase "law" any custom or usage having in the territory of India the force of law. The custom of excluding women from the Sabarimala Temple has been challenged on the ground that it is a custom inconsistent with Article 14 of the Constitution and other provisions of the said part and is currently pending adjudication.

31. Finally, it must be pointed out that these reformatory provisions in the Indian Constitution do not on the face of it apply to the followers of Islam. Indeed women are excluded from worship in many places of worship associated with that religion. In some such institution the followers of the faith have voluntarily removed such restriction but whether either through legislation or by the application of Constitutional principles such institutions can also be thrown open to women is a matter that is pending decision before the Supreme Court of India.

32. If there is any truth in the idea that India is the spiritual heart of the world then it must follow that we should be able to lead world thought on how to protect everybody's right to practice their faith and to minimize conflict

arising between different faiths and denominations. In my humble opinion the Indian Constitution and the interpretation given to it by Indian Courts is one viable model for achieving this goal.