

AN ACT OF COLOURABLE LEGISLATION

Relevant for: Indian Polity | Topic: Judiciary in India: its Structure, Organization & Functioning, Judges of SC & High Courts, Judgments and related Issues

In his article, [*The needless resurrection of a buried issue*](#) (*The Hindu*, March 29, 2021), Dushyant Dave, senior advocate of eminence, has articulated why he opposes the challenges on constitutional grounds to the [Places of Worship Act, 1991](#), now before the Supreme Court.

We have by way of a public interest litigation (PIL) in the Supreme Court (WP(C) 619 of 2020, which was filed earlier but notice was issued later *vide* order of the Supreme Court dated March 26, 2021), challenged Sections 3 and 4 of the Places of Worship Act, 1991 being unconstitutional, *void ab initio*, and against the Basic Structure of the Constitution of India.

Mr. Dave has relied mainly on the Supreme Court's observation in the [Ram Janmabhoomi Case of November 9, 2019](#) (*M. Siddiq vs. Mahant Suresh Das*) [with respect to the Places of Worship Act, 1991](#). However, there was no application of the provisions of the Places of Worship Act, 1991 to the case (Shri Ram Janmabhoomi dispute).

Section 5 of the Places of Worship Act, 1991 clearly states that nothing in the Act shall apply to any suit, appeal or other proceedings relating to the said place or place of worship, i.e. the Ram-Janmabhoomi-Babri Masjid situated in Ayodhya, in the State of Uttar Pradesh. Thereby, the 2019 judgment of the Supreme Court's (Shri Ram Janmabhoomi dispute (2020 1 SCC 1)) observation(s) with respect to the Places of Worship Act, 1991 lacks any precedential value.

The pith and substance of the Act of 1991 is that it is *ultra vires* the fundamental rights enshrined in the Constitution since it bars the jurisdiction of the Supreme Court and furthermore nullifies the Fundamental Right(s) guaranteed by the Constitution of India as elucidated in Article 32 of "enforcement of fundamental rights" which cannot be suspended except as otherwise stated in the Constitution.

This importance of Article 32 can be understood by the words of the Chairman of the Constitution Drafting Committee, B.R. Ambedkar who asserted, *inter alia*, that Article 32 is the very soul of the Constitution and the most important Article in the Constitution.

Under Article 32 of the Constitution of India, the Supreme Court has the power to issue writs appropriate for enforcement of all the Fundamental rights conferred by Part III of the Constitution.

The top court, on various instances, ruled that in view of the constitutional scheme and the jurisdiction conferred on the Supreme Court under Article 32 and on the High Courts under Article 226 of the Constitution that "the power of judicial review being an integral part of the basic structure of the Constitution, no Act of Parliament can exclude or curtail the powers of the Constitutional Courts with regard to the enforcement of fundamental rights".

The Act of 1991, is appropriately called an Act of colourable legislation. As the Courts have held, "you cannot do indirectly which you are prohibited from doing directly".

The Preamble in the Constitution gives prominent importance to liberty of belief, faith and worship to all citizens, and the same is sought to be weakened and effectively nullified or severely damaged by the enactment of the Act of 1991 in its current format.

The concepts of faith, belief and worship are the foundations of Articles 25 and 26 of the Constitution of India. Therefore, prohibiting citizens from approaching appropriate courts with respect to suit or any other proceedings to handover the land of any temple of certain essential significance (such as being the birthplace of Lord Rama in Ayodhya and Lord Krishna in Mathura or Lord Shiva sending his fiery Jyotirlinga in the Gyanvapi premises of Varanasi), is arbitrary, unreasonable and *mala fide* in the context of the fundamental rights to pray and perform religious practice as guaranteed by Articles 25 and 26 of the Constitution of India. The intent of the Act of 1991 under Section 5, i.e. exception extended to the “Ram-Janmbhoomi matter” identifies the need and importance of resolution of such a controversy and settling long on-going disputes before the courts. But such an exception should be made for other two matters of dispute stated above.

The exclusion of the Mathura and Varanasi disputes as being additional exceptions from the Act of 1991 is wholly unacceptable and against what is given by the people of India to the makers of the Constitution, enshrined in the Preamble, which is part of the Basic Structure of the Constitution.

Those who rely on the Act of 1991 to avoid the settlement of the dispute in Varanasi Mathura have failed to anticipate the legal principles enunciated in the judgment of the top court (in *Ismail Faruqui vs. Union of India* (1994 6 SCC 360)), on the religious significance of mosques and temples. Even in countries like Saudi Arabia, only Mecca and Medina have the immutable religious protection from demolition. And only authorised demolition is permitted.

Section 4 (1) of the Act declaring that religious character of a place of worship existing on the 15th day of August, 1947 shall continue to be the same as it existed on that day, is no longer good law after this Court’s judgment in ((1994) 6 SCC 360) which held that a mosque is not an essential part of the practice of the religion of Islam and *namaz* (prayer) by Muslims can be offered anywhere, even in the open *maidan*, on the road, railway platforms or airports.

Ultimately, students of law are also students of history and we must not lose sight of the past. We must learn from it. But we accept one sentiment of Mr. Dave — that we cannot open the flood gates of rebuilding all 40,000 temples which were demolished on *firman*s of the Mughal emperors.

Yet, where by faith Hindus believe there was a forcible demolition of an irreplaceable non-shiftable temple, it has to be rebuilt. There are only two more such temples in the list of 40,000 — the Gyanvapi Kashi Vishwanath Temple in Varanasi and the Krishna Janmabhoomi Temple in Mathura.

Hence, by the doctrine of *casus omissus*, the Supreme Court can in an appropriate case before it order that the number of exceptions in Section 5 of the Places of Worship Act, 1991, be three as an alternative solution. The Supreme Court under Article 142 of the Constitution can pass any order to carry out for doing complete justice being in the public interest, while upholding the Constitution of India.

Dr. Subramanian Swamy is a Member of Parliament and former Union Minister for Law and Justice. Satya Sabharwal is an advocate practising before the Supreme Court and High Courts

Please enter a valid email address.

To reassure Indian Muslims, the PM needs to state that the govt. will not conduct an exercise like NRC

END

Downloaded from **crackIAS.com**

© **Zuccess App** by crackIAS.com

crackIAS.com