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Science**

*Rethinking the Secular State: Perspectives on
Constitutional Law in Post-Colonial India*

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Declaration

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Abstract

This thesis examines the role of the secular State in the making of modern constitutional government in India and argues that the practice of constitutional secularism is an unrealised pedagogical project whose goal is the transformation of Indian society and its politics.

Toleration is the core value defended by the liberal secular State and the Indian State is no exception; however, its institution in the Indian Constitution compels religious groups to reformulate their traditions as doctrinal truths. Through decisions of Indian courts I demonstrate that this is an odd demand made on non-Semitic traditions like Hinduism because even up the contemporary moment it is difficult to cast these traditions in terms of doctrinal truths.

Though reformulated religious identities are occluded descriptions of Indian religious traditions, I argue that they have gained considerable force in contemporary India because they were drawn into constitutional government as the problem of accommodating minority interests. Accommodating minority identities was part of an explicitly stated pedagogical project through which the British colonial government was to steward what they supposed to be irreconcilably fragmented ‘interests’ that comprised Indian society towards a unified polity. Though the Indian Constitution reworked the politics of interests toward the amelioration of social and economic ‘backwardness’, I argue that the rights granted to the Scheduled Castes, Other Backward Classes, and Minorities continue to mobilise these groups as reformulated religious identities with associated interests.

Thus as recognisably occluded accounts of Indian society, I demonstrate that reformed religious identities and indeed the practice of secular constitutionalism functions like a discursive veil that screens off Indian social experience from the task of generating solutions to legal and institutional problems.

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Introduction: The Problem of the Secular State in India

In this thesis I examine the role played by the liberal secular State in the making of constitutional government in modern India. I will argue that constitutional secularism is structured as a pedagogical project whose goal, though largely unrealised, is the reformulation of Indian society and its politics. The claim that the secular State is an agent of social and political reform might seem at odds with liberal constitutional theory within which the secular State is understood to be an institutional form that imposes normative restraints on government. Nonetheless I demonstrate that social and political reform is at the heart of the institution and practice of liberal secular government in India. As an unrealised and perhaps even unrealisable project of social and political reform, I also demonstrate that the secular State operates as a discursive veneer that screens off Indian social experience from constitutional debates about Indian society. In this chapter I introduce the contours of my problem by setting the challenge of Indian secularism both within contemporary global debates on the secular State as well as its practice in Indian constitutional history.

i. On the Nature of the Secular State

Debates on the nature of the liberal secular State present a sizeable body of literature that elaborates a highly contested terrain whose detail I cannot outline in this introductory chapter. Nonetheless to commence my enquiry I will proceed on the assumption that the central problem that the liberal secular State seeks to address is the manner in which contending ideas of what many liberals call the ‘good life’ or ultimately cherished values can be tolerated in a neutral or secular public sphere.¹ The task of managing and regulating a tolerant public sphere is cast on States who are charged with instituting and defending a form of government which is capable of tolerating diversity without establishing or overtly

¹ Though secular constitutionalism is commonly associated with the toleration of religious difference, contemporary liberals draw on this model to deal with all kinds of cultural difference. I deal with this extension of the secular State in my discussion of the debate on multiculturalism in section ii of this chapter. See for instance Charles Taylor, *Multiculturalism: examining the politics of recognition*, ed. Amy Gutmann (Princeton, N.J.: Princeton University Press, 1994).

associating with any particular sectarian position. That is, the secular constitutional State is one that strives to be neutral and tolerant among contending ideas of the good life.²

Legally and constitutionally the task of liberal toleration has been made possible by imposing restrictions on the behaviour of the State through three normative propositions. First, the State is to ensure the unimpeded exercise of personal *liberty*, especially the freedom of religious belief and practice. Second, the State is required to maintain *equality* of treatment to its citizens irrespective of their religious or other parochial affiliations. Third, the State is to deal with all religious and parochial groups in an even-handed or *neutral* manner. In other words the State is to shape public institutions so that it favours no one group over others.³ However, the toleration and protection of sectarian and even extreme sectarian opinions is critically dependent on the manner in which different States understand and interpret these normative propositions.

It is important to note that within the liberal democratic tradition the normative commitments to liberty and equality (neutrality being understood as a proposition that derives from equality) are understood to be constitutively in tension with each other.⁴ In contemporary history one of the most dramatic instances of tension between these values was witnessed in the cold war conflict between the North Atlantic alliance and the erstwhile Soviet Union.⁵ However, even at a more prosaic level most liberal democracies have

² For an interesting discussion the challenge of defending liberal toleration See Bernard Williams, "Toleration: An Impossible Virtue?," in *Toleration an elusive virtue*, ed. David Heyd (Princeton, NJ: Princeton University Press,, 1996), 18-27.

³ For a classic defence of these values See Robert Audi, "The Separation of Church and State and the Obligations of Citizenship," *Philosophy and Public Affairs* 18, no. 3 (Summer 1989): 259-296.

⁴ This point is considered in considerable detail in Berlin's much celebrated essay on liberty. Isaiah Berlin, "Two Concepts of Liberty," in *Four essays on liberty* (London: Oxford U.P, 1969). Similarly Rawls following Constant characterises this as the contending implications of the two strands of the democratic tradition defined by Locke and Rousseau respectively. John Rawls, *Political Liberalism*, 2nd ed. (Columbia University Press, 2005), 4-5.

⁵ This ideological conflict also brings to notice the fact that the secular state is not only found in liberal democracies but could also be found in communist states and perhaps many other kinds of states. However, I

assigned different weights to these norms resulting in very different historically located instances of the secular State. Thus there are material historical differences between secular States in Europe, most having had or continuing to have established churches, and the secular model established in the United States. Similarly even within a national legal jurisdiction it is perhaps possible to conceive of different weights being accorded to different liberal norms over time.⁶ Nonetheless, it is this normative defence of religious liberty and equality that is at the heart of the contemporary project to fashion secular States.

As a normative institutional scheme designed to tolerate religious and cultural difference, the commitment to the secular State has often been framed as a universal model applicable in all social and cultural contexts. This has undoubtedly allowed the secular State and liberal constitutionalism to emerge as contemporary common sense not just in North Atlantic countries but in large parts of the contemporary world. However, challenges arising out of the export of this model to contexts outside Western Europe as well as the explosion of cultural difference in Western democracies have raised doubts about the ability of the secular State to cope with such differences. Addressing this challenge liberal debates on multiculturalism have made a formidable attempt to save what many critics assert is the inability of the liberal secular State to recognise or tolerate difference. Thus I commence my discussion on the secular State by discussing the adequacy of liberal multiculturalism to explain the universal significance of the secular State and especially its relevance in non Western contexts.

ii. The Limits of Contemporary Multiculturalism

Through the debates on liberal multiculturalism Western democracies have considered the

will focus only on the liberal model of the secular state simply because it is the most dominant model currently available to deal with the problem of sectarian conflict.

⁶ Thus the United States Supreme Court has strongly defended state neutrality toward religion or the thesis advocating the erection of a wall of separation between the church and the state as exemplified by cases such as *Everson v. Board Of Education Of Ewing* 330 US 1 (1947). Similarly in cases like *Wisconsin v. Yoder* 406 U.S. 205 the court defended liberty to the extent that it almost equated the customs of the Amish as constituting a plural legal order.

problem that radical social difference poses to the liberal secular State. Multiculturalism modifies the framework of the secular State to recognise the rights of various identity groups, especially migrants and minorities. The multiculturalism debate addresses the following problem – despite being an institutional frame designed to deal with cultural diversity, the only identity that liberal democracies seem to recognise are citizen identities within nation states. That is, liberal democracies have been uncertain in their responses to demands for various kinds of recognition stemming from sub-nationalisms, federalisms, supra-national associations, linguistic and ethnic minorities, feminisms, aboriginal communities and so on.⁷ Thus grappling with this problem liberal multiculturalism asks the question – what role do particular identities have in the conduct of politics and public affairs in nation states committed to notions of equal democratic citizenship?

Granting that cultural location is constitutive of identity, many liberals have argued for some form of compensation for morally arbitrary disadvantage.⁸ However, granting these rights to communities raises a further set of questions. For instance, does the grant of group rights imply a violation of liberal principles, especially the protection of illiberal practices? Similarly there is also the question whether dissenting members of a group should have the right to exit the group?⁹ These questions demonstrate the ease with which a consideration for particular identity can slide into a cultural relativism, from which liberals have tried to recuperate liberal values by granting particular claims but only within a broader framework

⁷ The classic liberal response has been the assertion of neutrality in the public sphere to remove issues that produce deep and fundamental division from public debate. Thomas Nagel, “Moral conflict and political legitimacy,” *Philosophy and Public Affairs* 16, no. 3 (1987): 215-240; John Rawls, “The Priority of Right and Ideas of the Good,” *Philosophy and Public Affairs* 17, no. 4 (October 1, 1988): 251-276. However Many liberal thinkers are deeply uncomfortable with this thin and procedural conceptual of the public sphere. For instance See Amy Gutmann, “Religion and State in the United States: A Defense of Two-Way Protection,” in *Obligations of Citizenship and the Demands of Faith*, ed. Nancy L. Rosenblum (Princeton University Press, 2000), 127-64.

⁸ Will Kymlicka, *Liberalism, community and culture* (Oxford, 1989).

⁹ These issues are discussed in a classic exchange between Chandran Kukathas and Will Kymlicka. Chandran Kukathas, “Are There Any Cultural Rights?,” *Political Theory* 20, no. 1 (February 1992): 105-139; Will Kymlicka, “The Rights of Minority Cultures: Reply to Kukathas,” *Political Theory* 20, no. 1 (February 1992): 140-146.

of universal rights.¹⁰

Multiculturalism therefore seems delicately poised between un-reconciled and opposing commitments to universal citizenship on the one hand and the specific or relative claims of specific groups on the other. Addressing this challenge and especially the problem that relativism poses for the secular State, Akeel Bilgrami restates the problem I have outlined above in the following manner:

Classical arguments for secular liberalism have assumed that there are reasons that all rational people should be bound by, and these reasons justify basic secular and liberal ideals. But there are no such reasons. The only reasons there are for secular liberalism are reasons that appeal not to something that all rational people will find compelling, just in virtue of their rationality, but rather reasons that appeal to substantive value commitments that some may hold but others may not. If that is right, then the task of achieving secular ideals in a world in which there are strong religious and cultural identities becomes distinctly more demanding. One is now required to look for reasons that will appeal even to those with these identities.¹¹

Bilgrami therefore pitches his essay as an attempt to save the commitment to secular liberal values from the loss of universal reason. I am less concerned with his attempt to recuperate secularism than with the manner in which he defines the nature of this condition.

An important distinction on which Bilgrami's account of the loss of universal reason rests is the distinction he draws between internal and external reasons. The philosopher Bernard Williams, from whom Bilgrami draws this distinction characterises it as the difference between reasons offered from a first person perspective and a third person perspective respectively.¹² According to Bilgrami the challenge of the multicultural secular State is to

¹⁰ Taylor, *Multiculturalism: examining the politics of recognition*.

¹¹ Akeel Bilgrami, "Secularism and Relativism," *boundary 2* 31, no. 2 (2004): 175.

¹² Williams characterises this distinction in the following manner

Sentences of the forms 'A has a reason to ϕ , or 'There is a reason for A to ϕ , (where ϕ stands in for some verb of action) seem on the face of it to have two different sorts of interpretation. On the first,

be able to defend secular norms from the first person perspective or that of internal reasons.¹³ However, this is a task which I bracket in order to focus on the manner in which he argues the impossibility of defending secularism through external reasons. That is, the manner in which he outlines the condition in which external reasons no longer holds sway.

To understand the nature of the condition against which Bilgrami argues his case it is useful to ask the question – what are the external reasons that the liberal State offers in its defence? Bilgrami formulates these reasons through what he calls liberalism’s most time honoured slogan – ‘Individual citizens should be left unimpeded to pursue the good life’. He analyses this sentence by dividing it into two parts. The first, which asserts that ‘individual citizens must be left unimpeded’, deals with a normative commitment to non-interference in the lives of individual citizens especially though not exclusively by the State. The second half of the sentence deals with dispositions of citizens to pursue their notions of the good life which could perhaps range from their deepest religious convictions to those that relate to their more everyday life preferences. However, this is nothing but the liberal defence of toleration which, in constitutional legal terms, would imply a neutral State committed to the defence of individual citizen liberty.¹⁴

Thus if Bilgrami is right then the loss of external reason threatens to reduce the secular State itself to a relativist creed that only those who subscribe to liberal reasons can value and defend. In other words, in sharp contrast to its self image as a universal doctrine that

the truth of the sentence implies, very roughly, that A has some motive which will be served or furthered by his ϕ -ing, and if this turns out not to be so the sentence is false: there is a condition relating to the agent’s aims, and if this is not satisfied it is not true to say, on this interpretation, that he has a reason to ϕ . On the second interpretation, there is no such condition, and the reason-sentence will not be falsified by the absence of an appropriate motive. I shall call the first the ‘internal’, the second the ‘external’, interpretation Bernard Williams, “Internal and External Reasons,” in *Moral Luck* (Cambridge University Press, 1982), 101.

¹³ A task Bilgrami regards as considerably more difficult in multicultural conditions because agreement in contentious issues ought to be secured through internal reasons. Bilgrami, “Secularism and Relativism,” 175.

¹⁴ Ibid., 176-82.

shines forth like the light of day, the liberal State has no external reasons to offer to those who do not share its fundamental commitments. As Bilgrami himself states, it is only an evaluative stance that makes for the secular liberal confidence “that disputes in identitarian contexts with illiberal tendencies need not ever produce the despondency of saying that perhaps both sets of principles (liberal and illiberal) may have their own sort of right on their side.”¹⁵

The loss of external reasons however does not imply that there are no reasons to defend the current commitment to the values of the secular State. Accordingly important strands of liberal scholarship have tried to arrive at the grounds on which liberal values might be rendered plausible. Thus Charles Taylor argues for a ‘politics of equal dignity’ which allows for all citizens an equal set of rights and privileges that run along with a politics of difference;¹⁶ scholars like Rawls have elaborated a scheme of reasonable pluralism where only reasonable sectarian positions are deemed worthy of recognition;¹⁷ while yet others like Bilgrami argue that liberalism could be defended through historical dialogue and backed by a conception of humanism.¹⁸ However, it is important to note that all these defences of liberal values seem to have conceded that the defence of secular liberal values in a multicultural world is only possible by appealing to internal reasons.

If internal reasons are all there are to defend the secular State then the implications of this normative framework for non-Western parts of the world are much less clear. In this regard it is also important to note that the multiculturalism debate as I have recounted it is one that is internal to liberalism and has arisen largely out of the recent problems posed by the rise of identity politics in many north Atlantic countries. Understandably therefore it is a debate that has primarily implied the reiteration of liberal secular norms so as to make them plausible to different groups (often immigrants and indigenous people) inhabiting these

¹⁵ Ibid., 195.

¹⁶ Taylor, *Multiculturalism: examining the politics of recognition*.

¹⁷ Rawls, *Political Liberalism*.

¹⁸ Bilgrami, “Secularism and Relativism.”

societies.¹⁹ In other words liberal multiculturalism is a project to legitimise and make plausible contemporary institutions and principles that deep roots in the intellectual and political history of Western Europe, especially as it has evolved out of problems such as the conflicting relations between the church and the state and the problem of tolerating heretical sects after the Protestant reformation broke the hegemony of the Catholic Church.

Thus despite being an account that defends the secular State in the face of cultural difference, multiculturalism cannot perhaps account for the manner in which the secular State acquires significance in non-Western contexts like India. It is in this context that I turn to the 'secularisation thesis' which claims to offer a sociological account for the globalisation of the secular State.

iii. Secularisation and Change in Modern Politics

As one of the most influential contemporary explanations of the globalisation of the secular State, the 'secularisation thesis' owes in large measure to the scholarship of Max Weber.²⁰ In its contemporary form this theory claims to explain the diminished role that religion has come to play in Western European democracies and marks these societies by the following three features. First, the structural differentiation of society resulting in the separation of religion from secular fields like politics, economy and science; second, the privatization of religion; and third, the declining social significance of religious belief and institutions.²¹ As a part of theories on Western modernity, it was believed that the history of Western Europe bore out the truth of the secularisation thesis²² and it was believed that the history of the

¹⁹It is perhaps also important to note that Multiculturalism is one kind of liberal response to the problem of identity politics. There are also strands of liberalism that believe that multiculturalism harms the liberal concern for liberty and justice. For an important discussion of this point See Brian Barry, *Culture and equality: an egalitarian critique of multiculturalism* (Harvard University Press, 2002).

²⁰ In particular See Max Weber, *The Protestant ethic and the spirit of capitalism*, ed. Talcott Parsons, 2nd ed. (London: Routledge, 1992).

²¹ José Casanova, *Public religions in the modern world* (University of Chicago Press, 1994), 19-39.

²² For example See Casanova, *Public religions in the modern world*.

rest of the world would confirm it.²³

All aspects of the secularisation thesis are however in crisis across the world. José Casanova describes this crisis through what he calls the rise of public religion or the increasing tendency of religious movements to play a determining role in contemporary politics. As a key theme in Western debates on politics there is an enormous literature on the problem of secularisation which I will not review in this introductory chapter. Instead I frame my discussion of the subject by sifting through a debate between Talal Asad and José Casanova that discusses the possibilities of recuperating the secularisation thesis in the face of challenges mounted by the resurgence of religion in the public sphere.

Casanova and Asad represent two ways of thinking about the impact of the secularisation thesis on contemporary politics. Both recognise that the secularisation thesis has had profound transformative effects on modern politics but differ in the manner in which this transformation is to be characterised. Casanova defends the secularisation thesis as a sociological explanation of the modern condition while Asad emphasises secularisation as an aspect of contemporary political practices.

Casanova situates his defence of secularisation against what he considers a debilitating debate between European and American sociologists on the truth of the secularisation thesis. As he reconstructs this debate, the European scholars make a case for the truth of the secularisation thesis by arguing that contemporary Europe, and especially Western Europe, presents empirical evidence verifying the three features that mark out modern secular societies. That is, the differentiation of the religious and secular spheres, privatisation of religion and the decline of religion. On the other hand the American scholars view evidence of the vibrancy of religion in public life in the United States to contest the European claim that secularisation produces the decline of religion or its necessary privatisation. On these

²³ This was a position advanced by modernisation theories and Deshpande's review essay on modernisation is a good example of the Indian debate on the subject. Satish Deshpande, "Modernisation," in *The Oxford India companion to sociology and social anthropology*, ed. Veena Das (Oxford University Press, 2003).

grounds the American scholars have dismissed the secularisation thesis itself as a as a European myth.²⁴ In addition some of these scholars even go so far as to argue that the paradigmatic model of model of secularisation is represented by constitutional practice of the United States which is based on a public sphere marked by open free competitive and pluralistic religious markets and high levels of individual religiosity.²⁵

As Casanova points out, the nub of the disagreement between the sparring parties does not extend to all the three features that define modern secular societies but only to the truth of the ‘privatisation’ and ‘decline of religion’ theses. A conception of secularisation premised on the eventual privatisation and the decline of religion in modern societies necessarily implies a commitment to a teleological conception of history whose ends are already known. Casanova resists the universal history implied by this teleology but argues that it is possible to defend and recuperate the secularisation thesis in terms of the differentiation of society as it occurred in Europe resulting in the modern separation of religion from politics, economy, science, arts and so on. Defending the secularisation thesis in this manner is crucial to Casanova because he argues that it is “interwoven with all the theories of the modern world and with the self-understanding of modernity”.²⁶

Casanova therefore pins the burden of defending the secularization thesis on the process of social differentiation of the various social spheres that occurred in modern Europe. Through

²⁴ For instance the positions of Rodney Stark and William Sims Bainbridge, *The Future of Religion: Secularization, Revival and Cult Formation*, 1st ed. (University of California Press, 1986); Andrew Greeley, *Religious Change in America* (Harvard University Press, 1996). These arguments are in contrast to those of Bryan Wilson and Karel Dobbelaere who continue to defend the secularisation thesis. Karel Dobbelaere, *Secularization: A multi-dimensional concept* (Sage Publications, 1981); Bryan Wilson, “Secularization: The Inherited Model,” in *The Sacred in a secular age: toward revision in the scientific study of religion*, ed. Phillip E. Hammond (University of California Press, 1985).

²⁵ José Casanova, “A Reply to Talal Asad,” in *Powers of the secular modern: Talal Asad and his interlocutors*, ed. David Scott and Charles Hirschkind (Stanford University Press, 2006), 19; Rodney Stark and Laurence R. Iannaccone, “A Supply-Side Reinterpretation of the ‘Secularization’ of Europe,” *Journal for the Scientific Study of Religion* 33, no. 3 (1994): 230-252.

²⁶ Casanova, *Public religions in the modern world*, 19.

this process modern European societies are supposed to have emerged as fundamentally distinct from medieval societies in which most aspects of social life were defined against and through the unity of the Catholic Church. That is, spurred by developments such as the Protestant reformation, the modern absolutist state, the capitalist form of economic organization, and the modern scientific project, the authority of the Catholic Church was displaced and the secular spheres were gradually but distinctly differentiated from the determining influence of the Church. I do not pursue these claims as an aspect of the history of Western Europe but draw on Talal Asad to demonstrate that Casanova's defence of the secularisation thesis is not entirely tenable.

Casanova argues for the recuperation of the secularisation thesis by emphasising that the social differentiation of spheres in modern Europe is compatible with the presence of politicised religion in the secular public sphere. That is, he concedes that de-privatisation and the contemporary explosion of religious influence in the public sphere do not necessarily rule out the significance of the secularisation thesis. Asad attacks this line of argument by contending that if religion is an important aspect of modern politics, then the secular spheres of the economy, the sciences, and the arts cannot be kept insulated from religious argument. Therefore he raises the issue of the manner in which a politically involved religion can be said to be compatible with the differentiated secular public sphere.

Asad locates his response to the challenge of public religion within the practices of modern politics. He demonstrates that the only way in which Casanova can defend his contention is by arguing for a rational and tolerant conception of public religion that accords with the demands of liberal politics. However, Asad demonstrates that the implications of a public religion compatible with liberal politics only suggests further interpenetration of the spheres which he demonstrates by posing three questions. First, he shows that opinions and experiences of religion in the private sphere serve as the interpretative background to foreground political principles in the public sphere. Thus demands to confine religion to particular rational and tolerant forms could very easily entail many other demands on the kinds of private religious practices and opinions that ought to be encouraged or discouraged. Second, when articulating their positions in the public sphere religious

opinions are extremely unlikely to inhabit existing practices without some disruption of existing beliefs and practices. In this context Asad asks if these challenges to the practices of the secular public sphere can be said to be rational and tolerant. Lastly, Asad asks how the proponents of a deprivatised religion can appeal to those who do not share its values and persuade them about issues of religious and moral significance. As he points out the only option that religious leaders have in such situations is to act as secular politicians in liberal democracy. That is, they seek to manipulate the conditions in which citizens act by using instruments of propaganda and mobilization that play on the desires and anxieties of citizens.²⁷

Asad does not go on to dismiss the secularisation thesis as nonsense but argues that

... the secularisation thesis seems increasingly implausible ... not simply because religion is now playing a vibrant part in the modern world of nations... If the secularisation thesis no longer carries the conviction it once did, this is because the categories of “politics” and “religion” turn out to implicate each other more profoundly than we thought,²⁸

That is, he argues that secularisation is a constellation of effects produced by modern political practices which reveal the interpenetration of the spheres. More significantly Asad argues that this interpenetration is historically constituted, carried out through “accidental processes bringing together a variety of concepts, practices and sensibilities” and most importantly “in modern society the law is crucially involved in defining and defending the distinctiveness of social spaces – especially the legitimate space for religion.”²⁹

Commenting on Asad’s characterisation of secularisation as a set of political practices, Partha Chatterjee notes that it enables him to “cut through the make-believe discursive

²⁷ Talal Asad, *Formations of the Secular: Christianity, Islam, Modernity*, 1st ed. (Stanford University Press, 2003), 185-87.

²⁸ *Ibid.*, 200.

²⁹ Talal Asad, “Responses,” in *Powers of the secular modern: Talal Asad and his interlocutors*, ed. David Scott and Charles Hirschkind (Stanford University Press, 2006), 209.

screens of analytical philosophy and multicultural ethics to reach the stark facts of power that underlie and surround the entire process of secularization.”³⁰ As Chatterjee notes

... secularization has been a coercive process in which the legal powers of the state, the disciplinary powers of family and school, and the persuasive powers of government and media have been used to produce the secular citizen ... Sometimes this has been done by putting external and forcible constraints on the public political presence of religion, as in the Jacobin tradition of *laïcisme*, or in the Soviet Union and contemporary China, or in Kemalist Turkey. More compatible with liberal political values, however, and in many ways the more successful process has been the secularization resulting from an internal reform of religion itself. Thus, secularization in England and France gained decisively in the late nineteenth century from Tractarianism and Ultramontanism, respectively – both religious movements seeking to extricate the church from its dependence on the state.³¹

Chatterjee’s suggestion that European countries have engendered religious and social movements that have made their peace with the coercive demands of secular State practices is not relevant for present purposes.³² On the other hand I am particularly concerned with what Chatterjee calls the coercive practices of secularisation, especially the manner in which these practices have unfolded in Indian constitutional law.

Thus following scholars like Asad and Chatterjee I argue that secularisation in India is a project that is managed by the law and is defined by the challenge of having to demarcate the legitimate space for religion. More importantly, I also argue that the constitutional processes which determine the appropriate role of religion also envisions very significant

³⁰ Partha Chatterjee, “Fasting for Bin Laden: The Politics of Secularization in Contemporary India,” in *Powers of the secular modern: Talal Asad and his interlocutors*, ed. David Scott and Charles Hirschkind (Stanford University Press, 2006), 60.

³¹ *Ibid.*

³² Charles Taylor’s recent book on the modern secular age is perhaps one of the most important recent contributions on the role that secularisation has played in the transformation of Western attitudes to religion ever since the enlightenment. See Charles Taylor, *A Secular Age* (Belknap Press, Harvard University Press, 2007).

‘reform’ or transformation of Indian social and religious practices whose detail I will elaborate in the course of this thesis. However, before I commence my discussion of the reforming effects of secular constitutionalism in India, I first outline the socio-historical context in which the secular constitutional project of reform is set, and its implications for Indian religious and social traditions.

iv. The Challenge and Legacy of Socio-Religious Reform in India

The problem of ‘reform’ in the history of the modern Indian nation traces back to attempts made by Indian elites in the 19th century to come to terms with the dramatic changes that were ushered in by British colonial government. Dealing with issues such as the emancipation of women, attacks on certain social customs, religious rituals, and caste restrictions, ‘reform’ was a complex project that attempted to reject aspects of the Indian social structure.³³ However, towards the latter part of the 19th century following the rediscovery of India’s ancient past by Orientalist scholars like Max Muller and also the emergence of a nascent conception of the Indian nation, the process of ‘reform’ was also animated or influenced by the revivalist reformulation of Indian traditions as well as the desire to protect Indian traditions from colonial interference. Thus while the movement leading up to the abolition of Sati represented one face of ‘reform’, the strong indigenous opposition to the increase in the age of consent for consummation of marriage at the end of the nineteenth century is another face of the process of ‘reform’.³⁴

Sumit Sarkar argues that the process of social reform that commenced in the early part of the 19th century was of a qualitatively different kind from what he calls traditional social reform, which was marked by features such as the absence of a secular or rationalistic

³³ Sumit Sarkar, *Bibliographical Survey of Social Reform Movements in the Eighteenth and Nineteenth Centuries* (New Delhi: Indian Council of Historical Research, 1975), 1.

³⁴ Sarkar suggests that the rejection of social practices and the revivalism in relation to certain other practices are part of a continuum that identified the phenomenon of reform. Sumit Sarkar, *Modern India, 1885-1947* (Macmillan India, 2002), 70-76.

outlook, other-worldliness and guru-worship, and a tendency to develop into isolated sects or sub-castes, which get absorbed into the traditional socio-religious structure.³⁵ In contrast modern social reform was thought of as very distinct from all previous and traditional efforts to bring about social change and by the end of the 19th century modern reform exerted a commanding influence on various elites imagining the social and institutional task of a future nation.³⁶ Arguably no other scholar has exerted as profound an influence on the significance of reform for the modern Indian nation as Partha Chatterjee.³⁷ Therefore I will frame my account of the Indian secular State against Chatterjee's path-breaking work on Indian nationalism and the manner in which it is implicated in the history of 'reform'.

Chatterjee's work seeks to demonstrate that the nationalism as it developed in Western Europe, the Americas, and Russia did not set the modular form of the phenomenon as it was adopted by elites in India or indeed other countries in Asia and Africa. That is, he has argued that the history of nationalism in the non-western world is not 'part of the universal history of the modern world' but that these nationalisms were constitutively different from nationalism as it developed in the modern West.³⁸ Making this argument in the Indian instance involved challenging the linear account of nationalism or Indian modernity which was said to have entirely derived from the history and influence of British colonial institutions in India.³⁹ In its place he offers a different account of the career of European

³⁵ Sarkar, *Bibliographical Survey of Social Reform Movements in the Eighteenth and Nineteenth Centuries*, 5.

³⁶ For a sense of the range of movements and their influence on the late 19th century India See Kenneth W. Jones, *The new Cambridge history of India: Socio-religious reform movements in British India* (New Delhi: Cambridge University Press, 1994).

³⁷ Of his numerous works the following have most direct bearing on the question of reform and the making of contemporary non-Western nationalisms. Partha Chatterjee, *Nationalist thought and the colonial world: a derivative discourse?* (London: Zed for the United Nations University, 1986); Partha Chatterjee, *The nation and its fragments* (Oxford University Press, 1995).

³⁸ Chatterjee makes this point in argument with the work of Benedict Anderson's claim that nations are imagined communities and that the historical experience of nationalism in Western Europe set the modular form that the phenomena assumed in all other parts of the world. Chatterjee, *The nation and its fragments*, 5.

³⁹ As he mentions a standard account of this history would involve the story of Indians realizing the errors of

modernity in India and the manner in which it has impinged on the making of the modern Indian nation.

Chatterjee does not deny the influence of Europe on the making of the modern Indian nation, nor does he over emphasise the exceptional nature of Indian nationalism. On the other hand he argues that the Indian nation is produced by a constitutive tension with Europe. As he argues

... anticolonial nationalism creates its own domain of sovereignty within colonial society well before it begins its political battle with the imperial power. It does this by dividing the world of social institutions and practices into two domains – the material and the spiritual. The material is the domain of the “outside”, of the economy and of statecraft, of science and technology, a domain where the West had proved its superiority and the East had succumbed. In this domain, then, Western superiority had to be acknowledged and its accomplishments carefully studied and replicated. The spiritual, on the other hand, is an “inner” domain bearing the “essential” marks of cultural identity. The greater one’s success in imitating Western skills in the material domain, therefore, the greater the need to preserve the distinctness of one’s spiritual culture. This formula is ... a fundamental feature of anticolonial nationalisms in Asia and Africa.⁴⁰

To illustrate the sovereign domain carved out by Indian nationalism, he notes the different native responses to colonial reform of Indian social practices. In first half of the 19th century Indian reformers were dependent on the colonial State to bring about reform of traditional institutions and customs. However, there was strong resistance to colonial ‘reform’ in the latter part of the 19th century which significantly coincided with the emergence of a nascent nationalist sentiment.⁴¹

their traditional society leading to the first movements for change that began in the 1820’s with the demand for the abolition of Sati. Gradually this was said to be followed by growing nationalist consciousness which organized under the banner of the Indian National Congress in 1885 which body is said to have led India to independence in 1947. Ibid.

⁴⁰ Ibid., 6.

⁴¹ Ibid.

The nationalists did not question the need for reform of many aspects of Indian society except that they denied that the colonial government should be the agent that would bring these reforms into effect. Thus as nationalists were elected to run government under the colonial constitutions of the early 20th century they began to introduce a whole range of reform measures dealing with religious and customary practices like child marriage, the regulation of Hindu religious trusts, and eventually in 1955 a set of reform measures that dramatically altered the character of the Hindu personal law on marriage, inheritance, guardianship and so on.⁴² Significantly this mandate for reform was incorporated into the Indian constitution, with religious freedom being constitutively qualified or perhaps even determined by the nationalist mission of socio-religious reform.⁴³

Chatterjee believes that this organisation of religious freedom does not seem compatible with a common sense understanding of a secular State as one premised on the grant of religious autonomy, and of a State that is removed from what are essentially religious matters. Thus in Chatterjee's framework the project of 'reform' makes for a distinct Indian conception and practice of the secular State because 'reform' is a project that is given life by the spiritual or the 'inner' aspect of Indian nationalism.⁴⁴ On the contrary through a detailed description of Indian constitutional practice I will argue that the contours of both inner and outer aspects of the reform project in India are constitutively defined by the institution and operation of European political ideas, especially normative toleration, in the government of India.

Though the secular State is organised as a project of 'reform' I also argue that it is a largely

⁴² These reform measures were first initiated by governments set up under the colonial constitutional statutes, the Government of India Act 1919 and the Government of India Act 1935, and later under the Constitution of Independent India.

⁴³ I elaborate this in chapter 1.

⁴⁴ This is specifically addressed in an essay on the nature of the secular state in India which I discuss in greater detail in chapter 1. Partha Chatterjee, "Secularism and Tolerance," in *Secularism and its critics*, ed. Rajeev Bhargava, Themes in politics series (Delhi ; Oxford: Oxford University Press, 1999), 345-79.

unrealised project. By describing the discursive operation of 'reform' as it is implied by the Indian secular State I demonstrate that 'reform' operates as a semantic veneer which screens social experience from the description of social practices. Thus even though the secular State is formulated as a project of social and religious reform it functions as a process by which Indian religious and social experiences are screened off from the conception and resolution of Indian institutional problems. I organise and set out my case as follows.

v. The Organisation of Chapters

In chapter 1 I elaborate the reforming aspect of the secular State through its legal operation in the Indian constitutional scheme. Through my reading of various Indian Supreme Court decisions I show that the question of 'reform' confronts Indian courts with the challenge of distinguishing between Indian and Semitic religious traditions. I argue that Indian religions and especially the Hindu religious traditions are entities whose value is derived from their status as valuable traditions or practices passed down over generations. In contrast the Semitic religions are creedal faiths that seek to establish doctrinal foundations for practices. These are very distinct ways of being religious; however, Indian constitutional practice proceeds as though this distinction is of little significance for the determination of the character of a religion. This constitutional attitude or disposition commits Indian and especially the Hindu religious traditions to present themselves in the law as religions founded in doctrines if they are to make successful claims to their traditional religious practices. Thus 'reform' in the Indian secular constitutional scheme is the process by which traditional religions are reformulated through the judicial process into religion founded in doctrines. However, I will also suggest that traditional Indian religions continue to have a vibrant presence in contemporary India, making 'reform' function only as semantic reformulation of these traditions. In other words 'reform' is made possible by a counterintuitive constitutional discourse that is unable to give expression to religion as it exists sociologically and empirically, in favour of a normative constitutional conception of religion that is founded on doctrine.

In chapter 2 I support my hypothesis on secular constitutional reform as I have developed it

in chapter 1 by tracing the manner in which a reformed and judicially determined Hinduism determines the shape of Indian constitutional debates on equality. I do so by demonstrating the manner in which a reformed conception of the Hindu religion has been normalised in the practice of Indian equality jurisprudence. Equality jurisprudence in the Indian Constitution takes the form of a commitment to a substantial equality which is elaborated through a scheme of differentiated citizenship, granting group rights to various communities constitutionally designated as ‘scheduled castes’, ‘scheduled tribes’, ‘other backward classes’ and ‘minorities’. Elaborating the rights granted to these constitutional groups, I demonstrate the significance of a reformed doctrinal conception of the Hindu religion, to maintain the intelligibility of each of these constitutional groups. Consequently I argue that this produces a sacralisation of Indian equality jurisprudence, a state of affairs in which the reformulated nature of the Hindu religion makes it extremely difficult to formulate the challenge posed by inequality and injustice in terms of empirical sociology.

In chapter 3 I begin the task of explaining the doctrinalising and sacralising dispositions of the Indian secular State. I do so by situating the Indian secular State against various strands of scholarship on the subject and advance reasons for pursuing some of these scholarly approaches as more appropriate explanations for the reforming character of the secular State. To theoretically organise and analyse the large literature on the secular State in India I re-describe the enormously large scholarly opinion on the subject into four intellectual strands. These are – (1) Normative Conceptions of the secular State, (2) Exceptionalist conceptions of the secular State, (3) Descriptivist conceptions of the secular State, and finally (4) Post-colonial conceptions of the secular State. As an analytical re-description of existing literature, these strands of scholarship are not strictly self contained and could shade into each other. Nonetheless they identify key positions all of which have a bearing on the understanding of the practice of the secular State in the Indian Constitution.

The normative conception of the secular State as the term suggests defends the constitutional scheme of the secular State as a normatively desirable institutional framework. In the Indian context this also includes a normative duty cast on the State to reform aspects of the Indian religious and social structure. However, from the perspective

of generating explanations for the specific reforming aspect of the Indian secular State, I argue that this strand of scholarship actively masks or even obstructs the task of generating a historically and sociologically located account of the practices of the Indian secular State. On the other hand, arguments suggesting Indian exceptionalism argue that the secular State in India is entirely free of the secular State as it developed in Western Europe. However, the inheritance and practice of the Indian secular State clearly suggests that this is not the case. That is, even if there are culturally distinct and Indian forms of arguing for toleration, the exceptionalism argument does not explain Indian constitutional practice as it currently exists. Thus the normative and exceptional lines of argument are not carried forward in this thesis.

I therefore place the burden of explaining the dispositions of constitutional secularism in India on the strands of scholarship that I have termed ‘descriptivist’ and ‘post-colonial’ conceptions of the secular State. These strands of scholarship draw attention to the significance of explaining the secular State as a historical and political project driven by the constitutional mandate to reform Indian socio-religious traditions. However, the fragmented and potted nature of these accounts as they presently exist points to the need for a more integrated and comprehensive genealogical map of the secular State in India. I therefore take up this task in chapters 4 and 5.

In chapter 4 I develop an explanatory account of the reforming disposition of the Indian secular State. I do so by outlining a genealogy of the Indian secular State through which I demonstrate the manner in which reform emerged from and continues to be tied to the institution and practice of ‘normative toleration’ in India by the British colonial government. In particular I demonstrate the manner in which toleration accorded by the colonial government to Indian religious traditions occluded or reformed the description of Indian socio-religious traditions. That is, I show that colonial toleration identified these traditions as religions founded on doctrines – a description that is carried into contemporary constitutional practice and which is inappropriate to understand many Indian religious traditions like Hinduism even up to the contemporary moment.

I sketch the reforming effects of normative toleration both at a micro and a macro level. At the micro level I use the example of Sati to argue that the eventual proscription of the practice in 1829 was born out of the colonial policy of normative toleration which transformed the representation of local social norms into religious truth embodied in the religious laws of the Hindus. At the macro level I demonstrate that specific practices like Sati were set in a broader debate in which the ethical framework of the *dharma shastra* tradition was reformed and incorporated into the framework of government discourse as the positivist legal injunctions of the Hindu religion. However, the *dharma shastra* tradition was not positive-law nor was it associated with particular ‘identity’ groups until it was absorbed as such by the British legal system.

In Chapter 5 I argue that the occlusion produced by the reformed identification of Indian socio-religious traditions acquired considerable force and intelligibility because it was tied to a more explicitly stated project of reform – that is, the making of modern Indian politics and nationhood. I trace the birth of colonial politics to the grammar of ‘trust’ developed in Edmund Burke’s reflections on the challenge of the colonial mission in India and later clarified in the work of scholar administrators of British India like T. B. Macaulay and J.S. Mill. Holding India in trust implied that the project of British rule in India was one of tutelage in the business of responsible government, which could at some future point render the presence of the British in India redundant. However, not all British administrators shared the optimism that the tutelage of Indians was possible and some like James Fitzjames Stephen entirely ruled out such a possibility. I suggest that unifying both these opinions about the possibility of a future indigenous politics were their notions of the fundamentally and irreconcilably fragmented ‘interests’ that comprised Indian society.

Reformed religious identities were drawn into this conception of Indian society understood as deeply fragmented by its numerous ‘interests’. Through the Indian Councils Act 1909, the Government of India Act 1919 and the Government of India Act 1935, the three major attempts by the colonial government to advance the constitutional project in India, I describe the colonial project to build government in the backdrop of what was believed to be an irreconcilably divided society. While the first of these statutes characterised the

nature of Indian society as irremediably divided, the latter two argued that it is possible that the present state of affairs might be overcome in a future nation. Accordingly the role of colonial government in these respective regimes was conceived as the holder of the peace or the force of authority that would guide India towards united nationhood.

This colonial modelling of Indian society as fundamentally divided by contending interests was not drawn from any community which was empirically in place in India, and Indians were often puzzled at being identified with these contending interests. However, participation in government required that Indians learn the language of interests and articulate their demands through this language. Thus it is my case that this language of interests has defined Indian constitutional politics ever since it was introduced in 1909 and that contemporary constitutional identities like caste, backward classes and minorities replay and entrench British conceptions of political community in India.

Throughout this thesis I will draw on the making of modern constitutionalism in India to argue that the theoretical conception of the secular State in India is unable to draw on Indian experiences of religion and society. As I have framed it in this introductory chapter I argue that the idea of the secular State operates as a conceptual and theoretical veneer that excludes Indian social experiences in important constitutional debates. In chapter 6 I treat this issue in greater detail through the manner in which the High Court at Allahabad addressed one of the longest standing disputes in independent India between Hindus and Muslims over a religious structure located at the temple town at Ayodhya. Through this chapter I demonstrate a disconnection between the religious rights of the Hindus identified as a reformed community and the actual solution that the judges devised to resolve the dispute between the parties. Chapter 6 is only illustrative of a deeper problem which requires more detailed study. Nonetheless it signals to the task of future scholarship – viz. bridging the gap between Indian institutional discourse and Indian social experience. I elaborate my case in the following chapters.

1. The Making of a Secular Constitution: Religious Freedom in the Indian Constitution

In the Introductory chapter I outlined the challenge that debates on multiculturalism pose to the liberal secular State in North Atlantic liberal democracies. The strength of the secular State is its claims to tolerate diversity on the back of universally formulated and supposedly neutral reasons. However, as the discussion in the introductory chapter showed, it was precisely these claims that were challenged in the debates on identity and multiculturalism. By merely reiterating the plausibility of the secular State when faced with challenge the North Atlantic debates on multiculturalism have been unable to formulate the implications of cultural difference for the secular State. It was against this background that I suggested the globalisation of secular constitutionalism and especially its adoption in a non-Western country like India as a useful way of coming to grips with the challenges it is faced with.

To clarify what was at stake in the multicultural challenges to the secular State I asserted the significance of the transforming or the reforming effect of secular norms. In this chapter I elaborate this reforming aspect of the secular State by drawing on its legal operation in the Indian constitutional scheme. By doing so I will argue that the institutionalisation of the Indian secular State is also committed to the semantic reformulation of Indian religious traditions as dogmas and doctrines. My claim about the reform of religious traditions does not merely imply that religious categories are expected to conform to the legal requirements and categories of the secular State. This is perhaps true of any kind of legal categorisation. I make the stronger claim that religious traditions, and especially Indian religious traditions, are unintelligible to the legal framework of the secular State unless they are suitably recast or reformed as doctrines.

1.1. Situating Religious Reform in the Indian Constitution

Adopted on the 26th of January 1950 the Indian Constitution drew heavily from the liberal constitutional cultures of the North Atlantic world. This included a Bill of Rights chapter modelled along the lines of the Constitution of the United States, a chapter titled 'Directive

Principles for State Policy’ borrowed from the Irish Constitution and, by retaining much of the earlier 1935 Government of India Act, a form of government modelled on the British parliamentary system. Constitutional clauses facilitating social, economic, cultural and religious reform are understood to be a uniquely Indian aspect of the Constitution making project.⁴⁵ In this chapter I emphasise the implications of these constitutional provisions facilitating socio-religious reform both in the Fundamental Rights chapter and in the chapter on Directive Principles for State Policy on the form that the secular State assumes in the Indian Constitutional scheme.

The word ‘secular’ was inserted into the preamble of the constitution in 1976 as an amendment describing the character of the Indian republic. However, the inclusion of the word only emphasised what was already understood to be a secular constitution deriving from the liberal democratic tradition. That is, the constitution had already instituted the secular State through its provisions for the protection of religious freedom subject to restrictions in the interests of broader public good,⁴⁶ disallowed discrimination on grounds of religion,⁴⁷ disallowed taxation on grounds of religious persuasion,⁴⁸ and mandated that

⁴⁵ In his landmark book Granville Austin presents these clauses as embodying the case for social revolution as envisaged by the national movement for Independent India. Granville Austin, *The Indian constitution: cornerstone of a nation* (Oxford: Oxford University Press, 1966).

⁴⁶ Art. 25(1) which reads “Subject to public order, morality and health and to the other provisions of this Part, all persons are equally entitled to freedom of conscience and the right freely to profess, practise and propagate religion.” The right to religious freedom is further elaborated in Article 26 providing for corporate freedom to all religious denominations, permitting them to manage their affairs in matters of religion, to own and acquire property and to administer property in accordance with law.

⁴⁷ Art. 14 which reads “The State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India.”

Art. 15(1) which reads “The State shall not discriminate against any citizen on grounds only of religion, race, caste, sex, place of birth or any of them.”

⁴⁸ Art. 27 which reads “No person shall be compelled to pay any taxes, the proceeds of which are specifically appropriated in payment of expenses for the promotion or maintenance of any particular religion or religious denomination.”

no religious instruction would be provided in schools run by State funds.⁴⁹ All these provisions instituting the secular liberal values of religious liberty, equality treatment of religions and neutrality towards religions are however qualified by the State's powers to reform aspects of religious belief and practice.

The Constitution contains many provisions furthering the agenda of social reform and which also have a bearing on religious freedom. For instance, Article 17 outlaws the practice of untouchability associated especially though perhaps not exclusively with the Hindu religion. Article 23 addresses issues in relation to human trafficking and bonded labour, which has a bearing on prohibited practices like those of temple dancing or the *devadasi* system. Article 44, a directive principle, calls for the progressive realisation of a uniform civil code. Similarly, Article 48, another directive principle, exhorts the government to work progressively towards the prohibition of cow slaughter, which is said to be contrary to the tenets of the Hindu religion. Of these provisions Articles 17 and 23 are part of the fundamental rights chapter and are rights directly enforceable against the State. Articles 44 and 48 are directive principles which, though not enforceable in courts, are deemed to be fundamental to the process of conducting government. In addition to the specific reforming powers that the Constitution grants to the Indian State, Article 25(2) grants a more general power to socially reform religious practice. This chapter focuses on the judicial construction of this provision.

Article 25(2) subjects religious liberty to the State's power to 'regulate or restrict economic,

⁴⁹ Art. 28 which reads "(1) No religious instruction shall be provided in any educational institution wholly maintained out of State funds.

(2) Nothing in clause (1) shall apply to an educational institution which is administered by the State but has been established under any endowment or trust which requires that religious instruction shall be imparted in such institution.

(3) No person attending any educational institution recognised by the State or receiving aid out of State funds shall be required to take part in any religious instruction that may be imparted in such institution or to attend any religious worship that may be conducted in such institution or in any premises attached thereto unless such person or, if such person is a minor, his guardian has given his consent thereto."

financial, political or other secular activity which may be associated with religious practice’ (Art 25(a)) or ‘provide for social welfare and reform or the throwing open of Hindu religious institutions of a public character to all classes and sections of Hindus.’ (Art.25(2)(b))⁵⁰ Though the wording of these clauses empowers the State to regulate religion in two distinct ways, courts have interpreted them as cognate and related powers. Therefore, by following the judicial interpretation of the regulatory power embodied in these clauses, I will demonstrate the peculiar manner in which they reform Indian religious traditions.

1.2. The Challenge of Reform in a Secular Constitution

From the perspective of liberal constitutional theory it would seem that social reform provisions are inconsistent with the liberal democratic scheme of religious freedom. It is not difficult to see why this is the case because social reform clauses pose obvious and significant difficulties for defending a secular State conceived in terms of a commitment to religious liberty, equality and neutrality. In an extremely insightful essay on the secular State in India, Partha Chatterjee demonstrates the legal and conceptual challenges that social reform poses for the defence of liberty, equality and neutrality in the following manner.⁵¹

⁵⁰ Art. 25(2) reads

“Nothing in this article shall affect the operation of any existing law or prevent the State from making any law –

(a) regulating or restricting any economic, financial, political or other secular activity which may be associated with religious practice;

(b) providing for social welfare and reform or the throwing open of Hindu religious institutions of a public character to all classes and sections of Hindus.

Explanation I.—The wearing and carrying of *kirpans* shall be deemed to be included in the profession of the Sikh religion.

Explanation II.—In sub-clause (b) of clause (2), the reference to Hindus shall be construed as including a reference to persons professing the Sikh, Jaina or Buddhist religion, and the reference to Hindu religious institutions shall be construed accordingly.”

⁵¹ Chatterjee, “Secularism and Tolerance,” 345-79.

First, reform strains the liberal democratic idea of religious liberty contained in the normative proposition that States ought not to play a determining role in religious or other notions of the good life. This of course does not imply that the liberal democratic notion of religious liberty does not envision constraints on freedom. Constraints on freedom are always tenable when overwhelming public interests are at stake or when the basic rights of citizens are materially affected by a particular exercise of religious freedom. However, the reforming power granted by the constitution permits the imposition of a substantially greater burden on the exercise of religious freedom. That is, it empowers State intervention in matters of religious practice even where no such public interest or the basic rights of other citizens are at stake.

Chatterjee demonstrates this by citing the instance of the Madras Animal and Bird Sacrifices Abolition Act, 1950, a statute which banned animal sacrifice as representing a 'primitive form of worship'. In judging that these religious practices were primitive, the State strains the liberal democratic conception of liberty as being driven by autonomous conceptions of the good life.⁵² However, making such judgments on the nature and character of religion is common to the manner in which religion is determined in the Indian constitutional scheme. Similar judgments were made when reforming Hindu Personal Law,⁵³ in legislation prohibiting the dedication of *devadasis* (temple dancers), and while permitting temple entry for untouchables in the immediate years after Independence. Without in any way condoning various ethically unconscionable practices that were the object of these reforms, it is important to note that reform targets religious communities in a manner that undermines the liberal conception of religious liberty as being autonomous or

⁵² In this context it is useful to note the Laurence Tribe's comment about US constitutional law that 'The most clearly forbidden church State entanglement occurs when institutions of civil government use the legal process in order to discover religious error or promulgate religious truth.' Laurence H Tribe, *American constitutional law*, 2nd ed. (Mineola, N.Y.: Foundation Press, 1988).

⁵³ Personal laws are a distinct aspect of Indian law by which the applicable law relating to subjects like marriage, divorce, inheritance, succession, adoption and related areas are governed by relevant religious laws. In its present form Personal Laws were developed in colonial India but have been reformed to various degrees in post independent India.

self generating.

Second, reform strains the liberal democratic ideal of equal citizenship. Equal citizenship is a particularly complex political and legal value and it is beyond the scope of this discussion to decide whether reform *per se* derogates from a commitment to equal citizenship. Instead, I only point to the uneven and unequal manner in which reform has been applied in Indian constitutional practice.⁵⁴ In independent India the reform of religious laws has been effected primarily on Hindu Personal laws.⁵⁵ Chatterjee points out that in post independent India there has been a fundamental lack of clarity about who represented the interests of minority communities like the Muslims, therefore raising questions about the legitimacy of the nation state taking on the task of the reforms of their religious personal law. The Muslim Personal Law has therefore been exempted in many cases from reform on the grounds that these personal laws constitute an aspect of Muslim religious freedom. Any departure from this position has been politically explosive as demonstrated by the decision of the Supreme Court in the infamous *Shah Bano Case*.⁵⁶

Third, the interventionist and reformist structure of the Indian constitution allows little possibility for strict government neutrality towards matters of religion. Donald Smith points out how the powers granted by the Constitution under Art 25(2)(a) to ‘regulate or restrict economic, financial, political or other secular activity which may be associated with religious practice’ has allowed the State to assume vast powers in relation to many religious institutions.⁵⁷ The State of course argues that it only assumes control of secular matters associated with religion leaving core religious activities completely in the control of religious communities. However with no foolproof way of making distinctions between the religious and the secular, a large part of the management of many religious institutions have

⁵⁴ I deal with the manner in which reform impacts the making of Indian equality jurisprudence in greater detail in the next chapter.

⁵⁵ For instance See *Narasu Appa Mali v. State of Bombay* AIR 1952 Bom 84

⁵⁶ *Mohammad Ahmed Khan v. Shah Bano Begum* AIR 1985 SC 945.

⁵⁷ Donald Eugene Smith, *India as a Secular State* (Princeton: Princeton University Press, 1963), 246.

ended up under the control of the Indian State.⁵⁸ In addition, the Constitution also explicitly permits many forms of State entanglement in religious activity, making the symmetrical treatment of religious and non religious activity particularly difficult. For instance, the Constitution mandates that the provincial State governments contribute towards temple funds;⁵⁹ permits religious education in State funded educational institutions if so required by the founding documents of such institutions;⁶⁰ and even permits the levy of religious taxes as long as its proceeds are not appropriated for the benefit of any particular religion.⁶¹

From the manner in which liberty, equality and neutrality find application in the Indian Constitution, it would seem that reform seriously compromises a liberal constitutional conception of a secular State. As Quentin Skinner has pointed out, the test of whether a concept has acquired a new meaning is to be ascertained not when efforts to apply it to a new context succeed but when arguments for such expansion of the concept fail.⁶²

Following this kind of argument Chatterjee seems to argue that the Indian constitutional practice makes for a new conception of the secular State.⁶³

I do not directly address the status of the term secularism in this chapter and whether a new conception of secularism has been instanced in Indian constitutional practice. However, it is

⁵⁸ The following cases are instances of this problem. *Bhumi Nath v. State of J&K* (1997) 2 SCC 745; *Sri Adi Vishveshar of Kashi Nath* (1997) 4 SCC 606; *Sri Sri Lakshmana v. State of A.P* (1996) SCC 548; *Pannalal v. State of A.P* (1996) 2 SCC 498; *Shri Jagannath Puri Management Committee v. Chantamani Khuntia* (1997) 8 SCC 422.

⁵⁹ Art. 290A

⁶⁰ Art. 28. See n. 30

⁶¹ Art. 27 See n. 29

⁶² Terence Ball, James Farr, and Russell L. Hanson, eds., *Political Innovation and Conceptual Change* (Cambridge University Press, 1989), 6-23.

⁶³ Similarly other scholars like V P Luthera and Donald Smith in two early and exhaustive studies on the secular State in India argue that India is not a secular State because of the interventionist State sanctioned by social reform legislation. Ved Prakash Luthera, *The Concept of the Secular State and India* (London: Oxford University Press, 1964); Smith, *India as a Secular State*.

important to note that the inconsistency that reform produces is manifested in the Indian Constitutional practice precisely because it seeks to be secular and institute liberal values. An inconsistency I will argue is produced by the attempt to render Indian religious traditions in a manner that is intelligible to the secular State. Thus it is my case that the project of religious reform in India is continuous with the liberal conception of the secular State. However, the more important question is the extent to which this reforming project would take root in the Indian context.

Over the course of this thesis I try to argue that reform is primarily a semantic project that has overlaid Indian social and religious experience. Thus instead of searching for a new concept of secularism I attempt to uncover the effect of constitutional reform on religious freedom and especially the freedom of Indian religious traditions. To do so I will outline the manner in which the norms of the secular State are discursively instituted through a project of religious reform. However, I must stress that my efforts do not amount to a normative analysis of the secular State.

As I suggested in the introductory chapter I am particularly concerned about the practices that institute and constitute the Indian secular State. As an example of what I suggest, consider the manner in which Winnifred Sullivan introduces her remarkable book on the impossibility of religious freedom in modern secular democracies:

Stories of the conflict between the demands of religion and the demands of law are daily news items all over the world, and take a familiar patterned form. School girls in France seek permission to wear the *hijab* to school. Sikhs in Britain seek exemption from motor-cycle helmet laws. Muslim women in India seek civil divorces on the same grounds as their Hindu and Christian neighbours. The Jehovah's witnesses seek the right to be a recognized religious organisation in Russia and to be exempt from Patriotic excesses in Greece. Native Americans seek repatriations of religious items in US museums. In each of these cases a court or a legislature or an administrative official must make a determination as to whether the religious practice in question is *legally religious*. In other words, *in order to enforce*

*laws guaranteeing religious freedom you must have religion*⁶⁴ (emphasis added)

The range of Sullivan's examples, drawn from various secular States, clearly demonstrates that the secular State is a form of governing religion, and one in which the State, law and politics are significantly implicated.

As a form of government, the secular State has much to do with the regulation of religion, and as Sullivan points out, it has much to do with the very determination of what is to count as religious and how it is to be separated from the non-religious. If this is so, then, as Pratap Mehta points out, there is perhaps something quite misleading in the invocation of phrases like the separation of 'church from state' because

(n)o secular state, as is now familiar, can be neutral or impartial among religions because the state determines the boundaries within which neutrality must operate. ... all states extensively regulate religion; one might say that they define the normatively permissible boundaries of religion. Particular aspects of religion are given protection, recognition, and support; others are the subjects of indifference, and many aspects are curtailed and proscribed. But the most crucial point is that the boundaries between the permissible and impermissible will be set by the state. It is therefore a little misleading to argue that the point of normative theory is to figure out the balance between "two realms," where religion does not encroach upon politics, or politics does not encroach upon religion. There is no such thing as "two realms" independent of where politics draws the lines.⁶⁵

In this chapter I draw on the insights from both Sullivan and Mehta to elaborate what I will argue is the reforming structure of the Indian constitution and the manner in which it makes certain conceptions of religion the normative standard for advancing claims to religious freedom.

⁶⁴ Winnifred Fallers Sullivan, *The Impossibility of Religious Freedom* (Princeton University Press, 2007), 1.

⁶⁵ Pratap Bhanu Mehta, "On the Possibility of Religious Pluralism," in *Religious Pluralism, Globalization, and World Politics*, ed. Thomas Banchoff, 2008, 71-72; Kent Greenawalt, "Five Questions about Religion Judges Are Afraid to Ask," in *Obligations of citizenship and demands of faith: religious accomodation in pluralist democracies*, ed. Nancy L. Rosenblum (Princeton, N.J.: Princeton University Press, 2000), 196-244.

The specific form that State led reform of religion assumes in the Indian Constitution traces its immediate history to concerns of Indian nationalism, and the adoption of its concerns into the Indian secular constitutional culture. Thus the present and the subsequent chapters will elaborate the manner in which the contours of the secular State have taken shape in the Indian context. However, it is perhaps useful at the outset to outline the concerns that permitted the constitution makers to consider reform as compatible with or as a necessary pre-requisite to institute the secular State in India. As suggestive examples, consider the following excerpts from two leading figures in the Indian constitution making process.

Talking about the need to reform Hindu personal law in the Indian Constituent Assembly B.R. Ambedkar, Chairman of the *Constitution* Drafting Committee, comments that

(t)he religious conceptions in this country are so vast that they cover every aspect of life, from birth to death. There is nothing which is not religion and if personal law is to be saved, I am sure about it that in social matters we will come to a standstill. ... There is nothing extraordinary in saying that we ought to strive hereafter to limit the definition of religion in such a manner that we shall not extend beyond beliefs and such rituals as may be connected with ceremonials which are essentially religious. It is not necessary that the sort of laws, for instance, laws relating to tenancy or laws relating to succession, should be governed by religion. ... I personally do not understand why religion should be given this vast, expansive jurisdiction so as to cover the whole of life and to prevent the legislature from encroaching upon that field.⁶⁶ (emphasis added)

The Indian national movement was rife with similar opinions on the reform of Indian religion. For instance, supporting a clause on reform and the progressive realisation of a uniform civil code, K.M. Munshi argues that

(w)e want to divorce religion from personal law, from what may be called social relations or from the rights of parties as regards inheritance or succession. What have these things to do with religion I fail to understand. ... after all we are an

⁶⁶ *Constituent Assembly debates: official report*, vol. 7 (New Delhi: Lok Sabha Secretariat, 1999), 781.

advancing society. We are in a stage where we must unify and consolidate the nation by every means without interfering with religious practices. If however the *religious practices in the past have been so construed as to cover the whole field of life*, we have reached a point when we must put our foot down and say that these matters are not religion, they are purely matters for secular legislation. ... Religion must be restricted to spheres which legitimately appertain to religion, and the rest of life must be regulated, unified and modified in such a manner that we may evolve, as early as possible, a strong and consolidated nation.⁶⁷ (emphasis added)

To both Ambedkar and Munshi Indian religions occupied too much public space and could not be accommodated within the nationalist and secular positions that they were advocating. That is, they did not view Indian religious traditions as legitimate candidates for religious freedom and only their *reform* into what Ambedkar calls their *essential* elements could make them such candidates. In other words, reform is a pre-requisite for the protection of religious freedom understood in terms of the essential aspects of religion. In this chapter I will elaborate the manner in which reform identifies the essential aspects of a religious tradition in the practice of Indian constitutional law.

Before I conclude this section I would like to clarify my claims about the norms of the secular State being consistent with Indian constitutional practice. I have not claimed that the reforming aspect of Indian constitutional practice can be logically reconciled with the liberal democratic norms of religious liberty, equality and neutrality. Instead, drawing on the insights of scholars like Mehta, Sullivan and Talal Asad, I argue that reform is consistent with the secular State because it is the specific form that the liberal secular State assumes as it takes institutional shape in the Indian Constitution.

Therefore as with Ambedkar and Munshi, the question that requires answering in the Indian constitutional scheme is ‘how to determine the essential core of a religious tradition?’ The clearest expression of this dynamic of socio-religious reform is found in Indian constitutional practice on the right to religious freedom. However before proceeding to

⁶⁷ Ibid., 7:547-48.

describe the centrality of essential religious truth in the contemporary constitutional practice on religious freedom, I first outline the debates in the Indian Constituent Assembly which instituted the present constitutional scheme on religious freedom.

1.3. Shaping Religious Liberty in the Indian Constituent Assembly

The right to religious freedom took its earliest form in the Constituent Assembly when the Fundamental Rights Committee⁶⁸ adopted K.M. Munshi's draft clause 16, granting all persons equal rights to freedom of conscience and the right to freely practice religion, subject to the maintenance of public order, morality or health. Munshi's clause was further qualified by a regulatory clause which stated that "the right to profess and practice religion shall not include economic, financial, political or other secular activities associated with religious worship."⁶⁹ The nationalist reformers in the assembly found this clause inadequate because it was not clear whether this regulatory clause would empower the State to steward social reform. In this section I outline the manner in which this clause providing religious freedom was reworked as it moved through the Assembly to reflect the ambitions of the nationalist reformers.

Speaking for the reformist position, Rajkumari Amrit Kaur expressed apprehensions about Munshi's clause "inasmuch as it might invalidate legislation against anti-social customs which might have the sanction of religion."⁷⁰ To facilitate social reform legislation Rajkumari Amrit Kaur thought it appropriate to limit religious freedom by conceiving of it narrowly to include only the right to conscience and worship and not the right to religious

⁶⁸The Indian constituent assembly was advised by an Advisory committee which in turn constituted sub-committees on various aspects of Constitutional governance. A large part of the discussion on religious freedom was debated by the sub-committee on fundamental rights and the sub-committee on minority rights.

⁶⁹ Clause 16 of the draft fundamental rights chapter submitted to the advisory committee by the fundamental rights committee B. Shiva Rao et al., *The framing of India's Constitution*, vol. 2 (New Delhi: Indian Institute of Public Administration, 1966), 122,140.

⁷⁰ *Ibid.*, 2:122.

practice.⁷¹ Thus when the Minorities' Committee suggested that clause 16 of the draft fundamental rights submitted by the Fundamental Rights Committee substitute the word 'religious worship' with 'religious practice', it was opposed by Amrit Kaur who feared that

... they would not only be a bar to future social legislation but would even invalidate past legislation such as the Widow Remarriage Act, the Sarda Act or even the law abolishing Sati. Everyone is aware how many evil practices, which one would like to abolish, are carried on in the name of religion, e.g., purdah, polygamy, caste disabilities, animal sacrifice, dedication of girls to temples, to mention a few.⁷²

Amrit Kaur's concerns were not unusual and many other powerful voices in the assembly expressed similar positions.⁷³ In a slightly altered manner, the concern over whether religious freedom should include the right to practices continues to be at the heart of the debate on the scope of religious freedom in contemporary constitutional practice.

The reform project of those like Amrit Kaur ostensibly sought to eradicate unethical practices that were understood to be associated with the Hindu religion. However, as

⁷¹ Ibid., 2:146-47.

⁷² Ibid., 2:213.

⁷³For instance K.M.Munshi himself submitted draft clauses to the fundamental rights committee which Stated that "Notwithstanding any custom or usage or prescription, all Hindus without any distinction of caste or denomination shall have the right of access to and worship in all public Hindu temples, choultries, dharmashalas, bathing ghats, and other religious places. (b) Rules of personal purity and conduct prescribed for admission to and worship in these religious places shall in no way discriminate against or impose any disability on any person on ground that he belongs to an impure case or menial class." Art. XIII(7)(a); Similarly draft clauses submitted by Ambedkar included provisions abolishing "any privilege or disability arising out of rank, birth, person, family, religion or religious usage and custom", as well as preventing the State from making or enforcing "any custom which shall abridge the privileges or immunities of any citizens".Art.II, Section 1, (1)&(2); Additionally Govind Ballabh Pant expressed similar opinions in the advisory committee discussing the issue of religious freedom when he argued against inclusion of a right to religious practice in the right to religious freedom. According to him "To say that it will be open to people to claim a safeguard against a thing done by the legislature in the Supreme or other courts on the ground that the law infringes the practices that come under the name of religion is to make any Constitution utterly unworkable by introducing the word 'religion' it will militate against any real right of religious worship." Ibid., 2:79, 86, 265.

Shyama Prasad Mookherjee and others pointed out, a reform agenda that sought to target and restrict religious practices would impose potentially unjustifiable burdens on the Indian religious traditions which as a matter of fact emphasised practices over worship. Consequently Mookherjee suggested that the assembly provide a significantly greater leeway for practices, permitting reform of religious practices only in exceptional circumstances. It was accordingly decided that a more comprehensive provision would be drafted in which practices would be included as part of the right to freedom but one that also empowered the legislature to reform religious practices as a separate proviso.⁷⁴ An appropriately re-drafted clause was presented to the assembly for final consideration on the 3rd of December 1948 as Art 19 of the draft constitution.

Mookherjee's case about the distinctness of Indian religions was not interrogated by the constitution makers at any length. Perhaps the only related intervention was that of Loknath Mishra, who objected to the inclusion of the right to propagation as part of the right to religion freedom. According to him propagation would ultimately lead to the marginalisation of the Hindu religious and cultural traditions by Christianity and Islam, which unlike the latter were not motivated by the need to proselytise.⁷⁵ This view was forcefully rebutted by numerous other members of the house, even though there was some concern in the Assembly about challenges such as mass conversion and religious propaganda on impressionable minds in institutional contexts.⁷⁶ The object of this chapter is to clarify the stakes involved in the disagreements between those like Mishra and the more dominant reformist opinion in the Assembly. However, since the right to propagate one's religion did not directly deal with the question of reform, I restrict myself to the manner in which the Assembly addressed religious freedom and the scope of reform to qualify that right.

⁷⁴ This was suggested by C. Rajagopalachari in response to the issues raised by the debate. *Ibid.*, 2:265-67.

⁷⁵ *Constituent Assembly debates*, 7:823-24.

⁷⁶ This was expressed in K.T. Shah's proposed amendment on religious propaganda in educational institutions and interventions of Pandit Lakshmi Kanta Maitra, L Krishnaswami Bharathi, K. Santhanam, Rohini Kumar Chaudari, T. T. Krishnamachari and K. M. Munshi in the general debate on the draft article 19 in the Constituent Assembly. *Ibid.*, 7:820, 831-37.

The dominant position in the assembly on the question of reform was that the State should have the power to reform religious practices. In a particularly fascinating statement of this reforming ambition, K.T. Shah moved an amendment seeking to empower the State to *prohibit* economic, financial, political or other secular activity which may be associated with religious practice.⁷⁷ Arguing his position he stated that

I should like the State also to have the power positively and absolutely “to prohibit” any such practice. Such practices in my opinion, only degrade the very name of religion. Nothing has caused more the popular disfavour of some of the most well-known and most widely spread religions in the world than the association of those religions with secular activities, and with excesses that are connected with those activities. Material possessions, worldly wealth and worldly grandeur are things which have been the doom of many an established Church. Many a well-known Religion, which has ceased to follow the original spirit or the precepts of its founders, has, nevertheless, carried on, in the popular eye, business, trade, and political activity of a most reprehensible character. *The State in India, if it claims to be secular, if it claims to have an open mind, should have, in my opinion, a right not merely to regulate and restrict such practices but also absolutely to prohibit them.*⁷⁸ (emphasis added)

Shah’s amendment was rejected but a reformist position not entirely dissimilar to his was adopted as Art 25 of the Indian Constitution. In what follows in this chapter I focus on the peculiar manner in which the Indian constitutional scheme on the social reform of religious traditions qualifies the rights of communities to their religious practices.

1.4. Reform and the Scope of Religious Liberty in the Indian Constitution

In this section I detail the manner in which the Indian Supreme Court has read Art 25 and 26 to determine the scope of religious freedom within the Indian constitutional scheme. Since I draw out my case about the nature of socio-religious reform in the Indian

⁷⁷ Ibid., 7:826-27.

⁷⁸ Ibid., 7:827.

Constitution from the decisions of the Indian Supreme Court it is perhaps useful to begin my enquiry by locating the role and place of the Supreme Court in the framework of the Indian constitutional order.

1.4.1. The Supreme Court as a Guardian of Constitutional Rights

A rash of contemporary scholarship has emphasized the enormous significance of judicially managed constitutionalism in respect of contemporary moral and political problems.⁷⁹ India is no exception with its unelected judges coming to occupy a very important role in the management of its constitutional democracy. Indian appellate Judges and especially those of its Supreme Court have therefore been deeply involved with all kinds of governance issues ranging from regulating air quality, education policy, forest policy, waste management as well as deciding questions about the fundamental rights of citizens. The governance of religious liberty is therefore one part of the vast powers that the Indian Supreme Court has come to acquire over the last sixty odd years.

India's court system is organised into a unitary three tiered system with the Supreme Court at the apex. Most provinces or states have their respective High Courts, with other subordinate courts below it. Established in 1950 the Supreme Court currently has 29 judges who have both original and appellate jurisdiction in a wide range of causes.⁸⁰ The most significant of their powers is that of judicial review which is derived from a reading of Arts 13, 32, and 142. Art 13 disallows the State from abridging fundamental rights granted by Part III of the constitution, Art. 32 grants give any person the right to move the Supreme Court, for the enforcement of the guaranteed fundamental rights,⁸¹ and Art. 142 permits the

⁷⁹For instance Ran Hirschl, *Towards Juristocracy: The Origins and Consequences of the New Constitutionalism* (Harvard University Press, 2004). For Indian examples see Upendra Baxi, *Indian Supreme Court and Politics* (Eastern Bk. Co, India, 1980); Upendra Baxi, *Courage, Craft, and Contention: The Indian Supreme Court in the Eighties*, 1st ed. (N.M. Tripathi, 1985); Pratap Bhanu Mehta, "The Rise of Judicial Sovereignty," *Journal of Democracy* 18, no. 2 (2007): 70-83.

⁸⁰ Art. 131-144.

⁸¹ Art 226 grants a similar right to move the respective high courts in case of the violation of fundamental rights.

Supreme Court to pass such orders or decrees “as is necessary for doing complete justice in any cause or matter”. Collectively these articles have allowed the court to acquire a creeping power which extends to large parts of Indian social, cultural and political life that even extends to the power to review a duly enacted amendment to the Constitution.⁸²

Most of the cases that I will study in this chapter are petitions that have found their way to the Supreme Court as writ petitions under Art. 32 of the constitution and are therefore complaints regarding infringements of the fundamental right to religious freedom. In turn, these complaints regard the demand that courts determine the scope of religious freedom through reading three constitutional clauses – Art 25(1),⁸³ which grants religious liberty, Art. 26,⁸⁴ which grants religious communities the right to manage their religious affairs, and Art. 25(2),⁸⁵ which empowers the State to reform and regulate these religious liberties.

From the logic of these three constitutional articles it is obvious that religious freedom in the Indian constitution is qualified by the power of the State to socially reform religious practice; however, the power to reform religion is certainly not intended to extinguish religious freedom. This implies that some aspect of religious freedom must necessarily survive the State’s exercise of religious reform. That is, the Constitutional provisions on religious freedom would always protect core or essential aspects of a religious tradition though incidental aspects of it could be subjected to reform. Thus the key challenge for courts (especially the Supreme Court as the last word on this question) charged with

⁸² Baxi, *Courage, Craft, and Contentions*, 64.

⁸³ See n.27

⁸⁴ Art. 26 reads ‘Subject to public order, morality and health, every religious denomination or any section thereof shall have the right—

(a) to establish and maintain institutions for religious and charitable purposes;

(b) to manage its own affairs in matters of religion;

(c) to own and acquire movable and immovable property; and

(d) to administer such property in accordance with law.

⁸⁵ See n.31

determining the essential core of a religious tradition has been the criteria by which they would arrive at such a determination. Following the manner in which the Indian Supreme Court has pronounced on ‘essential practices’ of a religious tradition, I advance the hypothesis that the constitutional conception of religious freedom semantically dislocates the conception of Indian religious traditions as they are traditionally practiced and experienced.

1.4.2. Determining Essential Religious Practices

*The Commissioner Hindu Religious Endowments, Madras v. Sri Laxmindra Thirtha Swamiar of Shirur Mutt*⁸⁶ is arguably the most authoritative and the earliest of the Indian Supreme Court decisions outlining a test to determine the essential aspects of a religious denomination. In this case the Mathadhipati, or head of the Shirur Mutt⁸⁷, challenged the constitutionality of various provisions of the Madras Hindu Religious and Charitable Endowments Act 1951 on the grounds that a scheme framed for the Mutt under the statute violated the petitioner’s right to manage its institutions according to its religious traditions as permitted by Art 25(1) and Art 26 of the Constitution.⁸⁸

Under the Hindu Religious Endowments Act a duly appointed Commissioner sat at the head of a department of government which dealt with the administration and governance of Hindu religious and charitable institutions, and had considerable powers to pass orders deemed necessary to ensure that religious endowments were properly administered and their income duly appropriated for the purposes towards which they were founded. Countering the claims of the petitioners, the State contended that it had the broadest powers of regulating ‘secular’ aspects related to a religious tradition under Art. 25(2)(a) and that the petitioner's right to religious freedom did not extend beyond the relationship between a

⁸⁶ MANU/SC/0136/1954

⁸⁷ A Mutt is a centre of Hindu religious learning.

⁸⁸ A ‘Scheme’ is a proposal under the legislation to take over aspects of the management of a ‘Hindu’ religious institution.

believer and his deity.⁸⁹ In resolving these competing claims, the court made its first detailed consideration of the manner in which the essential core of a religious tradition was to be determined.

A technical reading of Art 25 and 26 would suggest that the State could reform various aspects of a religious tradition as long as it did not completely extinguish the right to religious freedom. However the court categorically refused to accept the State's contention that the right to religious freedom extended only to the relationship between believers and their deities, holding that

... what constitutes the essential part of a religion is primarily to be *ascertained with reference to the doctrines of that religion itself*. If the tenets of any religious sect of the Hindus prescribe that offerings of food should be given to the idol at particular hours of the day, that periodical ceremonies should be performed in a certain way at certain periods of the year or that there should be daily recital of sacred texts or oblations to the sacred fire, all these would be regarded as parts of religion and the mere fact that they involve expenditure of money or employment of priests and servants or the use of marketable commodities would not make them secular activities partaking of a commercial or economic character; all of them are religious practices and should be regarded as matters of religion ...(emphasis added)⁹⁰

In other words the court stressed that the essential core of a religion was to be determined by taking into account those doctrines and practices that a community *subjectively* viewed to be essential to their religion. However it was unclear how a court would arrive at a subjective account of a religious tradition.

⁸⁹ P.K. Tripathi, an important commentator on the early working of the Indian constitution argues similarly when saying that the State's power to socially reform and to regulate non-religious aspects of religion is absolute given the nature of the non-obstante clause through which the language of Art. 25(2) is framed. P.K. Tripathi, "Secularism Constitutional Provision and Judicial Review," in *Secularism: its implications for law and life in India*, ed. G. S Sharma (Bombay: N. M. Tripathi, 1966), 165-94.

⁹⁰ *Shirur Mutt* Case MANU/SC/0136/1954., para 20

It is important to note that a subjective determination of a religion is primarily a method with which the court takes a sympathetic stance in relation to the claims of a community when determining the core of its religious tradition. One way of doing this would be to grant the ‘assertion test’ by which the court would simply enquire into the existence of a practice asserted by a practitioner to be part of his religious tradition. However, in an explicitly reforming constitutional scheme it is obvious that such a conception of religion would not be tenable.⁹¹ That is, it is understood that the court must make substantive judgments balancing the State’s reforming claims with those of the concerned religious tradition asserting religious freedom. Thus a subjective approach to religion only implies that this balancing of competing claims would have to be done in a manner sympathetic to the religious tradition concerned.

As I have already mentioned, my analysis of the Indian secular State is entirely at ease with the exegetical role that the Indian secular State assumes in relation to its religions. That is, my analysis assumes that the secular State in India will take on a quasi theological role in relation to religions, and make substantive decisions on what counts as religion and what will not. Consequently my concerns centre on what the secular State *does* to Indian religious traditions and especially to those traditions that are understood to be ‘Hindu’ when the determinations of the essential features of a religion are made. Thus in analysing the *Shirur Mutt* decision I am particularly concerned with the criteria that the court employs to determine the essential character of a religion and the potential sociological effects of this constitutional determination on Indian religious traditions.

It is my case that the *Shirur Mutt* court offers two options to arrive at the essential aspects of a religious tradition. However, they are intertwined with each other in Justice

⁹¹ Pratap Mehta notes that the court in the *Shirur Mutt* and subsequent cases consistently rejected the assertion test of the essential practices. While this is an important observation it is also important to note as I argue that this is an obvious consequence of the reforming structure of religious freedom envisaged by Art 25(2). See Pratap Bhanu Mehta, “Passion and Constraint: Courts and the Regulation of Religious Meaning,” in *Politics and Ethics of the Indian Constitution*, ed. Rajeev Bhargava (New Delhi: Oxford University Press, 2008), 322.

Mukherjea's decision. The first of these draws on an intuitive sociology of Indian religions. That is, in refusing to accept the State's contention that religion is merely a relationship between man and god the court drew on the sociological distinctness of Indian religions and argued that the State's conception of religion was inappropriate for Indian conditions because

(t)here are well known religions in India like Buddhism and Jainism which do not believe in God or in any Intelligent First Cause. A religion undoubtedly has its basis in a system of beliefs or doctrines which are regarded by those who profess that religion as conducive to their spiritual well being, but it would not be correct to say that religion is nothing else but a doctrine or belief. A religion may not only lay down a code of ethical rules for its followers to accept, it might prescribe rituals and observances, ceremonies and modes of worship which are regarded as integral parts of religion, and these forms and observances might extend even to matters of food and dress.⁹²

Though Justice Mukherjea places considerable emphasis on practice and ritual as the distinctive markers of religion in India, his account of religion is one in which religious practice 'undoubtedly has its basis in a system of beliefs or doctrines'. That is, practices are subordinated to, and amalgamated into religious doctrine and the beliefs that are said to flow out of them. Thus doctrines, and a conception of religion as practices grounded in, and flowing out of, doctrine, is the second option that Justice Mukherjea offers to determine the essential practices of a religious tradition.

It is undoubtedly true that the Supreme Court in the Shirur Mutt case has emphasised practices as a key aspect of a religious traditions. A standard legal authority that courts draw on to establish the significance of religious practices is the Australian judgment *Adelaide Company of Jehovah's Witnesses Inc. v. Commonwealth* in which that court states that

(t)here are those who regard religion as constituting principally a system of beliefs or statements of doctrine. So viewed religion may either be true or false. Others are more inclined to regard religion as prescribing a mode of conduct. So viewed

⁹² Shirur Mutt Case., para 17

religion may be good or bad. There are others who pay greater attention to religion as involving some prescribed form of ritual or religious observance.⁹³

Drawing on this decision scholars have gone on to presume that the dominant conception of religion endorsed by the Court is one that emphasises practices. While this decision has perhaps been useful for Indian courts to distinguish between the protection of belief and conscience from that of religious practice,⁹⁴ I think it is still tenable to argue that the Supreme Court has amalgamated practice and doctrine in its conception of religion.

The distinction that I have drawn between doctrine and practice is not one that is readily evident or perhaps even intended by Justice Mukherjea in his judgment. In his decision, religion is clearly a phenomenon in which religious practices are understood to be founded in, or flowing out of, religious doctrine. However this is an assertion he makes in relation to Indian religious traditions, in which this link between practice and doctrine is anything but certain. That is, religions like Hinduism, Buddhism and Jainism are not known to emphasise a conception of doctrinal truth in the same manner as Semitic religions like Christianity and Islam. It is for this reason that I argue that Justice Mukherjea has amalgamated two very different ways of identifying and determining a religious tradition. However, this latter claim needs more elaboration.

In an essay on the challenge posed by religious commitment in contemporary plural and liberal societies, Pratap Bhanu Mehta outlines what could be at stake when religion and religious freedom is invoked. Mehta answers the question through analogies from two important figures in Roman antiquity. The first is drawn from Cicero's *De Natura Deorum* where he asserts that

... *religion has been* dissociated from superstition not only by philosophers but by our own ancestors as well. I may mention as to these two terms that men who used

⁹³ 67 C.L.R. 116, 1943, p.123.

⁹⁴ In this context it is useful to recall the constituent assembly debates which discussed a similar problem on the need to conceive of religion to include practices. See also Mehta, "Passion and Constraint: Courts and the Regulation of Religious Meaning," 322.

to spend whole days in prayer and sacrifice in order that their children might survive them (*essent superstites*), were called *superstitiosus*, a title which afterwards extended more widely, while such as heedfully repeated and, as it were, “regathered” (*relegerent*) everything that formed a part of divine worship, were named *religiosus* from *relegere*, in the same way that *elegans* is derived from *eligere*, *diligens* from *diligere*, and *intellegens* from *intellegere*, for in all these words the force of *legere* is the same as in *religiosus*. It was in this way that with the words *superstitiosus* and *religiosus*, the one became the designation of a fault, the other of an excellence.⁹⁵

Mehta contrasts Cicero with Lactantius, a Christian who took issue with this characterisation of religion three centuries later. According to Lactantius religion is a bond of piety that ties man to God. In addition, he counters Cicero’s account of religion by arguing that

(t)he word is not as Cicero interpreted it from “re-reading,” or “choosing again” (*relegendo*). ... We can know from the matter itself how inept this interpretation is. For if superstition and religion are engaged in worshipping the same gods, there is light or rather no difference ... because religion is a worship of the true; superstition of the false. And it is important, really, why you worship, not how you worship, or what you pray for. ... We have said that *the name of religion is taken from the bond of piety, because God has bound and fastened man to Himself of piety, since it is necessary for us to serve Him as Lord and obey Him as father. ... They are superstitious who worship many and false gods; but we, who supplicate the one true God, are religious.*⁹⁶ (emphasis in original)

It is my case that these excerpts from Cicero and Lactantius are extremely useful to disaggregate Justice Mukherjea’s discussion of doctrine and practice in the *Shirur Mutt* case.⁹⁷

⁹⁵ Mehta, “On the Possibility of Religious Pluralism,” 67.

⁹⁶ *Ibid.*, 67-8.

⁹⁷ On this point Mehta paraphrases a far more elaborately argued position by S. N. Balagangadhara on the role that the Christian idea of *religio* played in the transformation of the Roman *traditio*. This chapter hangs upon this distinction but I will not elaborate Balagangadhara’s argument any further and only work with

Mehta contrasts three conceptions of being religious. These are: religion as devotion to all that is excellent in a tradition; religion as superstitious, excessive or absurd practice; and religion as commitment to the true theology. Thus for Cicero, religion is a way of life or a set of inherited and excellent practices. The manner of its practice is what makes it valuable, with superstition or excessiveness being the contrasting value against which it acquires salience. Significantly, the truth or falsity of belief or doctrine is unimportant to Cicero's conception of religion while it is the basis of Lactantius' conception of his religion.

It has been argued that the difference that Mehta identifies between Cicero and Lactantius are also the broad differences between the Semitic religions and non-Semitic religions like Hinduism.⁹⁸ Thus non-Semitic religions are less interested in the question of theological truth, often uninterested in proselytisation, and as a consequence do not see other traditions as theological or doctrinal rivals. This of course should not be taken to imply that a lack of concern with a true theology makes either the Roman religion or the Hindu traditions any more benign than the Semitic religions founded on theological truths. Like the Semitic religions, these religious traditions have identified rivals in other traditions, and even persecuted other traditions. However it can perhaps be said that the grounds of conflict in these cases was not the theological truth of doctrine. Similarly it is not that Non-Semitic traditions were uninterested in the question of the truth, except that their conceptions of truth were not necessarily linked to proving the error of their rivals. That is, their conception of truth is self contained in a manner unlike the Semitic traditions. I cannot follow these truth conceptions of the Non-Semitic and specifically of the Hindu Buddhist or Jaina traditions any further in this chapter. However I trust I have emphasised the point that the Semitic and the Non-Semitic traditions pick out very different ways of being religious.

its summary restatement by Mehta. See S. N. Balagangadhara, *The heathen in his blindness: Asia, the West, and the dynamic of religion*, 2nd ed. (New Delhi: Manohar, 2005).

⁹⁸ For the elaboration of a similar point See S. N. Balagangadhara and Jakob De Roover, "The Secular State and Religious Conflict: Liberal Neutrality and the Indian Case of Pluralism," *Journal of Political Philosophy* 15, no. 1 (2007): 67-92.

It is my case that the differences between these different kinds of religion are of little significance to the manner in which the Indian secular State views religion. That is, the Indian Constitutional framework on essential religious practices deals with Indian religious traditions as though they were Semitic religious traditions with essential doctrinal truths. Thus in the *Shirur Mutt* decision, it is my case that Justice Mukherjea's is unable to disaggregate customary religious traditions from doctrinal religions because he presumes that all religions are founded in doctrine. Since the distinction that I draw between Semitic and non-Semitic religions is not explicitly stated in the *Shirur Mutt* case itself, I draw on other decisions of the Indian Supreme Court to further clarify my case.

1.4.3. Entrenching the Conceptual Reach of Essential Religious Practices

The *Shirur Mutt* case is undoubtedly the most significant decision of the Supreme Court jurisprudence on religious freedom and numerous subsequent decisions have determined the bounds of religious freedom by referring to this case. However, Rajeev Dhavan comments that

Indian judges have not been discerning in dealing with the many difficulties raised in employing the 'essential practice' test. Mechanically citing the *Shirur Math* case, they have assumed that so long as some kind of inquiry into religious tradition takes place, the manner and form in which these inquiries are to be conducted have not been elaborated by even the highest court of the land. There are no indicators as to what kind of evidence should be considered authoritative, no rules of interpretation, no emphasis on detailed research, and no requirement to consult authoritative exponents and material.⁹⁹

Dhavan's charge that the *Shirur Mutt* case has produced an *ad hoc* re-formulation of the essential practices test would contradict my case that this decision makes normative a doctrinal conception of religion. Therefore in this section I defend my reading of *Shirur Mutt* against Dhavan's charge that the essential practices test formulated in this case is given to a whimsical and *ad hoc* formulation of the essential practices of a religion.

⁹⁹ Rajeev Dhavan, "Religious Freedom in India," *American Journal of Comparative Law* 35 (1987): 223.

A good example of the ‘mechanical citation’ of the *Shirur Mutt* case to which Dhavan refers, is the Supreme Court decision in *Venkataramana Devaru v. State of Mysore*.¹⁰⁰ In this case the trustees of a temple dedicated to the deity Venkataramana, and controlled by Gaud Saraswath Brahmins, challenged provisions of the Madras Temple Entry Authorisation Act 1947. The statute barred Hindu temples of a public character from refusing entry to any class or section of Hindus on the ground that they belonged to an untouchable caste or community. Temple entry laws are understood to be closely connected to the constitutionally provided fundamental right against untouchability, and at the time of Indian Independence many of India’s federating States enacted such statutes. As the specific Madras statute permitted all classes and sections of Hindus access to temples dedicated to any section of the Hindu public, the case had to address the Gaud Saraswath claim that the statute violated their constitutional right to manage their religious institutions as they deemed fit. That is, they contended that the right to manage their religious institutions included the right to regulate entry and the performance of appropriate traditionally sanctioned rituals.

Deciding the Gaud Saraswath claims turned on the manner in which their rights to manage their affairs according to their religious traditions under Art. 26(b) would be qualified by, or subject to, the reformist temple entry statute which drew its validity from Art. 25(2)(b). The court could have taken the position that the State’s power to regulate temple entry under Art 25(2)(b) would entirely eclipse the rights of the communities to manage their religious institutions according to their religious traditions. However, following the *Shirur Mutt* formulation, the court proceeded to determine whether the temple exclusion of the Saraswaths was an essential aspect of their religious tradition. Deciding this question, the court raised both the options offered in the *Shirur Mutt* case, and perhaps with considerably greater sharpness. That is, the court raised the possibility of determining the essential core of the Saraswath religion both as a historically and sociologically identifiable religious tradition as well as one founded in doctrine.

¹⁰⁰ AIR 1958 SC 255.

The sociological option was however considered only in passing when the Court described the manner in which the case was decided by the subordinate court at South Kanara. The subordinate judge determined the Gaud Saraswath religious tradition sociologically by ascertaining that the temple was as a matter of fact resorted to by all members of the general public even if the temple was dedicated only for the benefit of the Gaud Saraswath Brahmins. Using this factual account of the practices at the Gaud Saraswath temple, the subordinate judge gave effect to the provisions of the temple entry statute, while at the same time granting the Gaud Saraswath community the right to exclude the public from the performance of certain ceremonies. The Supreme Court did not determine the essential features of the Saraswath tradition in this manner. However, by mentioning the lower court judgment in its decision the Supreme Court highlighted the difficulty of making a purely traditional or sociological determination of the essential features of a religious tradition within the Indian constitutional framework.

That is, in the absence of a criterion like doctrine which would identify the essential core of a religion, sociological accounts of religious traditions would only be a set of enumerated and valued practices. Consequently, identifying religion in manner would fundamentally undermine the power that the Constitution grants the State to socially reform religious traditions, as it would be extremely difficult to determine which aspects are core or essential to that religious tradition and therefore immune from reform. I will return to this issue towards the end of this chapter, when I attempt to clarify what reform does in the Indian constitutional framework, and focus presently on the seemingly inconsistent manner in which the essential practices of the Saraswaths were determined in this case.

The essential core of Saraswath tradition was determined with the aid of what was supposedly 'Hindu' religious doctrine. Drawing from the *agamas*, a set of texts which were identified as 'Hindu' ceremonial law, Aiyar J. held that different castes were meant to access and worship in a temple according to different rules of worship,¹⁰¹ that an idol was made impure by the violation of these rules, and further, that appropriate purificatory rituals

¹⁰¹ *Ibid* at p. 265.

had to be performed in such instances. In support, the court cited a pre-Constitutional decision of the Privy Council in *Sankaralinga Nadan v. Raja Rajeswara Dorai*¹⁰², which held that a temple trustee would be in breach of trust if he permitted entry and worship in a temple contrary to the rules stipulated in the *agamas*. Accordingly the court concluded that exclusion of certain people or groups of people from a temple was an essential aspect of the Hindu religion. However, the court did not explain the status of the *agama* texts in the Hindu religion, whether these texts were obligatory to the Hindu religion, and most importantly how these texts bound the practices of the Gaud Saraswath Brahmins. Thus, although the *agamas* were treated as Hindu religious doctrine, it was not clear why it was essential to the Saraswath religious tradition.

A far more troubling aspect of the *Venkataramana* case was the manner in which the Court's reasoning undermined the very significance of essential practices. That is, having determined that the Saraswaths were bound by Hindu doctrines of temple exclusion, it was these very practices that were then subjected to reform as mandated by the Madras Temple Entry Act. However, the subjective view of religion demanded by the *Shirur Mutt* case made it difficult to subject the essential aspects of the Saraswath religion to reform. Thus the case got framed as one involving a conflict between two constitutional provisions and as a result the court had to work out a pragmatic compromise between the conflicting demands of the Gaud Saraswath religious freedoms and the State's power to reform their religious practices.

Justice Aiyar did so by arguing that empowering the Saraswaths to manage their temple according to their religious traditions under Art 26(b) would have rendered the State's power to socially reform religious traditions under Art 25(2)(b) inoperative. However, the inverse would not render Art 26(b) entirely inoperative. Therefore the court pragmatically resolved the problem by permitting the Saraswaths to perform some ceremonies and rituals at the temple to the total exclusion of all other communities, though the temple could be not be made entirely inaccessible to non Saraswath Hindus.

¹⁰² (1908) L.R. 35 I.A. 176.

By permitting reform of practices deemed to be essential to the Saraswaths, the *Venkataramana* court suggests that the relationship between ‘reform’ and ‘essential practices’ is *ad hoc* and pragmatically determined. However, drawing on my earlier discussion on the different kinds of religion, I believe it is possible to save important aspects of the decision in these cases from the charge of being decided *ad hoc*. This is best explained with another decision of the Supreme Court.

In *The Durgah Committee, Ajmer And Another v. Syed Hussain Ali And Others*,¹⁰³ the court heard challenges to the Dargah Kwaja Saheb Act 1955, a statute dealing with issues related to the governance and administration of the 13th century Dargah or tomb of Kwaja Moin-ud-Din Chisti of Ajmer, one of the holiest figures in Sufi Islam. This decision primarily sought to address the claims of the *Khadims* and *Sajjadnashins* or traditional custodians of the Dargah who claimed that various provisions of the statute violated their long standing traditional rights to manage the shrine, receive devotees, and receive *Nazars* or offerings in return. These customary rights were altered by the Kwaja Saheb Act on the basis of a committee of Enquiry conducted in 1949 which alleged that an unholy alliance between the *Sajjadanashins* and the *Khadims* exploited superstitious and ignorant believers by using the name of the holy saint.¹⁰⁴

Justice Gajendragadkar, who decided the case, was one of the most aggressively reforming judges of the Indian Supreme Court and this case typifies his impatience for traditional practices. Tracing the history of the Dargah from 13th century he pointed out that it was subject to secular control of rulers throughout its history and that its custodians had on occasion even been non Muslim. Therefore he felt that the traditional rights being claimed could be altered by the secular authority of the Indian government. Denying the claims of the *Khadims*, Gajendragadkar observed:

Whilst we are dealing with this point it may not be out of place incidentally to strike

¹⁰³ MANU/SC/0063/1961

¹⁰⁴ *Ibid.*, para 21

a note of caution and observe that in order that the practises in question should be treated as a part of religion they must be regarded by the said religion as its essential and integral part; otherwise even purely secular practises which are not an essential or an integral part of religion are apt to be clothed with a religious form and may make a claim for being treated as religious practises within the meaning of Art. 26. Similarly, even practises though religious may have sprung from merely *superstitious beliefs* and may in that sense be *extraneous and unessential accretions to religion itself*. Unless such practices are found to constitute an essential and integral part of a religion their claim for the protection under Art. 26 may have to be carefully scrutinised; in other words, the protection must be confined to such religious practises as are an essential and integral part of it and no other.¹⁰⁵ (emphasis added)

This invasive exegetical approach to religious traditions has gained currency in the Indian Supreme Court's approach to religious traditions. Thus in other cases the Supreme Court has held that the sacrifice of cows did not constitute an essential part of the Islamic faith;¹⁰⁶ overruled Muslim claims that prayer in a mosque was crucial to the Islamic faith;¹⁰⁷ refused to accept traditional rights of the Tilkayats of the Shrinathji temple at Nathdwara which was taken from them by the Nathdwara Temple Act, 1959;¹⁰⁸ stipulated that the tandava dance was not a significant part of the Anand Margi community;¹⁰⁹ declared that the followers of Aurobindo did not constitute a distinct religion¹¹⁰, and so on.

Commenting on this towering role that the courts have assumed in relation to Indian religious traditions, Dhavan notes:

After the preliminary years of 'balancing', the Court has generally allowed the

¹⁰⁵ Ibid., para 34

¹⁰⁶ *M.H. Qureshi v. State of Bihar* AIR 1958 SC 731

¹⁰⁷ *Ismail Faruqui v. UOI* (1994) 6 SCC 360.

¹⁰⁸ *Tilkayat Shri Govindlalji Maharaj v. State of Rajasthan* AIR 1963 SC 1638.

¹⁰⁹ *Jagdishwaranand v. Police Commissioner, Calcutta* AIR 1984 SC 51.

¹¹⁰ *S.P. Mittal v. Union of India* AIR 1983 SC 1

executive and legislative branches to do whatever they like. The nub of the issues in the religious freedom cases has devolved away from religious freedom to a disorganized discussion of the legitimate areas of operation of a modern State. And the courts' answer to the question, "How modern is the modern State?" appears to be, "As modern as it wants to be!" By resolving these questions mechanically, the Court has not really evolved a theory about the permissible limits of social reform. It has left it to other agencies of the State to assume broad powers to regulate religious freedom and has provided supportive constitutional protection so long as some nexus is deemed to exist between the power exercised and the broad undefined categories of control. By enlarging, but not defining, notions of secular management, public order, morality and health, almost any part of religious activity is subject to control.¹¹¹

From this account it would seem that the essential practices of religious tradition are determined only by political contexts and judicial pragmatism. As Dhavan notes, courts have steadily and arbitrarily expanded their power over large parts of religious life and their facilitation of the exercise of State power over religious traditions is perhaps uneven and arbitrary. However I argue that even if the *content* of religion is arbitrarily determined in these cases, a doctrinal *conception* of religion is made normative in all the *ad hoc* invocations of essential practices. Perhaps the best way of exploring this claim is by demonstrating the peculiar yet consistent effect of refracting Indian religious traditions through the doctrinal or true conception of religion that is made normative by the *Shirur Mutt* case.

As my earlier discussion of the different conceptions of being religious has shown¹¹², it would not be possible for Justice Gajendragadkar to speak of 'superstitious beliefs' giving rise to practices that are 'unessential accretions' unless he was referring to religious practice as embodying or being founded in the 'true' religion.¹¹³ The *Khadims* and the *Sajjadnashins* were however making traditional claims which could perhaps be judged to be superstitious

¹¹¹ Dhavan, "Religious Freedom in India," 230.

¹¹² Mehta, "On the Possibility of Religious Pluralism."

¹¹³ Ibid.

in the sense of being excessive but certainly not superstitious in the sense of entertaining *false* beliefs. However, this is precisely what Gajendragadkar does by reading traditional religious practices as founded in a true doctrinal conception of religion that excludes all superstitious practices. That is, Gajendragadkar is either oblivious to, or entirely misunderstands the nature of traditional claims and provides legal support for a foundationalist doctrinal reading of traditional practices. At this stage of my argument this is only a suggestion of a constitutional disposition towards entrenching a doctrinal conception of religion. I will therefore support this claim in much greater detail in the next chapter; but before I do so I first clarify an important issue related to my case about the constitutional disposition driving the determination of religious freedom in the Indian Constitution.

The *Dargah Committee* case and the other cases which rely on the reasoning in this decision, reorient the subjective aspect of essential practices as it was laid down in the *Shirur Mutt* case. That is, though they do not dispense with the *Shirur Mutt* formulation, these decisions de-emphasise the idea that religion ought to be determined according to the tenets as they are understood by the adherents of the tradition in question. In place of a subjective determination, the court emphasised the State's power to reform religions as dictated by the demands of public policy. This was reflected in the court's insistence in the *Dargah Committee* case that essential religious practices be separated from superstitious accretions and restricted to what was strictly essential. However, even if the *Shirur Mutt* case gestured towards subjective determination of essential practices, its subordination of religious practices to religious doctrines meant that it was not able to clearly and fairly consider the subjective claims of traditional religions. The formulation in the *Dargah Committee* case solves this shortcoming in the *Shirur Mutt* case, by de-emphasising, if not dispensing with, the subjective element in the determination of essential aspects of a religion. Therefore it could be argued that the essential aspects of a religion perhaps cannot be subjectively determined within the Indian constitutional scheme. Nonetheless the subjective requirement, as stated in the *Shirur Mutt* case, makes salient the limits of what can and cannot be successfully argued within the framework of the Indian constitution, and indeed the effect of re-reading traditional religions in terms of a doctrinal or true religion. In the next section I illustrate the peculiar effects of this re-reading of traditional practices

in greater detail.

1.4.4. On The Peculiar Ontology of Religion in the Indian Constitution

In *Sardar Syedna Taher Saifuddin Saheb v. The State of Bombay*¹¹⁴ the court considered the constitutional challenge brought by the *Dai-ul-Mutlaq* or the religious head of the Dawoodi Bohra community against the validity of the Bombay Prevention of Excommunication Act 1949. The statute was a reformist initiative of the Bombay legislature and was passed on the back of a judgment of the Privy Council in *Hasanali v. Mansoorali*¹¹⁵ which had decided that the *Dai* was the head of the Dawoodi Bohra community and had the right to excommunicate any member of the community after calling for a fair hearing. The statute penalised acts of excommunication and defined it as acts of expulsion which deprive members of a community of rights and privileges that they could enforce through a civil suit¹¹⁶. The Court therefore had to decide the claims of the *Dai*, on behalf of the Dawoodi Bohra community, that the statute violated various aspects of their right to religious freedom.

The Bohras were a tight knit Shia Muslim community and the *Dai-ul-Mutlaq* or the *Dai* was the spiritual head of the community with wide powers over the community, including that of excommunicating members who had fallen out of line with the beliefs and traditions of the community. Excommunication gave the *Dai* power to exclude members of the community from the right to worship in the community's mosques, the right to be buried according to the rites of the community, exclusion from property held in trust for the community and other similar rights and privileges. The Bombay statute sought to reform this practice and was therefore challenged by the *Dai* on grounds that it violated the community's rights to religious freedom as granted by Art. 25(1) and 26(b) of the

¹¹⁴ MANU/SC/0072/1962

¹¹⁵ (1947) L.R. 75 I.A. 1

¹¹⁶ Sections 2, 3 and 4. Since rights to religious office and property, the right to worship in any religious place or to be buried or cremated according to the traditions of a community were not necessarily enforceable by civil suits in independent India, these actions were also included into the statutory definition of excommunication as statutory explanations.

Constitution.

Delivering the decision of the majority, Justice Dasgupta recounts the claims of the petitioners regarding excommunication in the following manner:

According to the petitioner it is “an integral part of the religion and religious faith and belief of the Dawoodi Bohra community” that excommunication should be pronounced by him in suitable cases. It was urged that *even if this right to excommunicate is considered to be a religious practice as distinct from religious faith such religious practice is also a part of the religion of the Dawoodi Bohra community. (emphasis added)*¹¹⁷

That is, the Bohra's made a traditional defence of their religious practices. The status of the *Dai* in the Bohra community was not seriously contested by any of the parties to the litigation. It was more or less accepted across the board that the *Dai* was the head of the community and, that as a matter of historical and sociological convention he had wide regulatory powers over the community which included the power to excommunicate members in certain circumstances. In these circumstances the question raised was the constitutionality of the ban on excommunication and whether it violated the right to religious freedom of the *Dai* as a representative of the Bohra community.

The mere acceptance by all parties that the *Dai* was the head of the Bohra community and that he had the powers to excommunicate members would not be sufficient to determine whether the statute was a violation of religious freedom. In addition, and in accordance with the *Shirur Mutt* formulation, it would also have to be demonstrated that this practice constituted an essential aspect of the Bohra tradition. As in my discussion of the *Dargah Committee* case, I am not particularly concerned whether the prohibition of excommunication was legitimate or not and focus on the manner in which it was defended and justified by the Court.

¹¹⁷ MANU/SC/0072/1962 para 43.

Justice Dasgupta considered the question of excommunication to be indispensable to the sustenance of a religious community in general and noted that it was a practice common to Muslim communities from the earliest histories of the faith. As mentioned in his decision – “the Prophet and the Imam had this right; and it is not disputed that the Dais have also in the past exercised it on a number of occasions. There can be little doubt that heresy or apostasy was a crime for which excommunication was in force among the Dawoodi Bohras also.”¹¹⁸ Accordingly he held that the Bombay statute abridged rights of a community to manage its affairs as granted under Art. 26(b) and was therefore unconstitutional. It is important to notice that though Dasgupta J. defended the rights of the Bohras, he did so by affirming the centrality of excommunication to religion in general and to Islam in particular. However, this is not quite how the *Dai* argued his right to excommunicate errant members. As I have already pointed out, the *Dai* defended excommunication as a traditional practice that was to be considered as part of the Bohra tradition even if such practice was distinct from ‘religious faith’. This distinction is not considered in much detail in Dasgupta’s judgment; however, it is made particularly salient in the dissenting decision of Justice Sinha.

Recounting the facts and circumstances of the case, Justice Sinha mentions the submission of Kurbanhussein Sanchawala, a dissenting member of the Bohra community and an intervener in the case, who said that “the Holy Koran does not permit excommunication, which is against the spirit of Islam.” Justice Sinha drew on this foundational doctrinal conception of the Islamic faith to characterise the Bohra religious tradition. Drawing on the Supreme Court's decision in *Durgah Committee, Ajmer v. Syed Hussain*,¹¹⁹ Justice Sinha reiterated that constitutional protection extends only to essential features of a religion and not to incidental and superstitious accretions to religion. Thus he argued that the Bombay statute only affected civil rights and consequently had no bearing on the rights of the *Dai* to manage the religious affairs of the Bohras. In other words Justice Sinha argued that excommunication was not part of the Islamic faith and that it was incidental to the Bohra tradition. Thus in both Justice Dasgupta’s majority and Sinha’s minority decisions, the

¹¹⁸ *Ibid.*, para 42

¹¹⁹ MANU/SC/0063/1961

traditional claims of the Bohra community were re-framed in terms of a foundationalist doctrinal Islam. In other words the re-framing or founding of traditional practices in theological or doctrinal truth once again highlights the distinction I have made in this chapter between Semitic and non-Semitic religions.

In my discussion of the *Shirur Mutt* case, I argued that the Indian constitutional scheme made normative a Semitic and doctrinal conception of religion. However, as my discussion of the *Dargah Committee* and the *Syedna* cases suggests, traditional practices associated with Islam and perhaps any religious tradition are equally affected and compelled to re-frame their practices in terms of the doctrinal frame made normative by the Indian secular State. Nonetheless, as I will suggest in the next and last Supreme Court decision that I will discuss in this chapter, the problem is particularly acute in the case of traditional and non-Semitic religions like Hinduism, Buddhism and, Jainism. I demonstrate this through a widely discussed decision of the Indian Supreme Court, and through it sharpen my hypothesis on the constitutional disposition towards reform or effect of the commitment to the secular State.

In *Sastri Yagnapurshdasji v. Muldas Bhudardas Vaishya*,¹²⁰ the Satsangis or followers of Swaminarayan, a 19th century social reformer, claimed immunity from the provisions of a temple entry statute, the Bombay Hindu Places of Public Worship (Entry-Authorisation) Act 1956. This statute barred Hindu temples of a public character from refusing entry to any class or section of Hindus on the ground that they belonged to an untouchable caste or community. As I have already mentioned in my discussion of the *Venkataramana* case, temple entry laws sought to address a specific manifestation of the constitutionally prohibited practice of untouchability and, at the time of Indian Independence, many of India's federating States enacted similar statutes.

Arguing for their traditional and perhaps essential freedoms, the Satsangis claimed they were not bound by the temple entry statute because they were a religious sect entirely

¹²⁰ AIR 1966 SC 1119

distinct from the Hindu religion. They argued that though they could perhaps be considered socially and culturally Hindu, they were not part of the Hindu 'religion' because

Swaminarayan, the founder of the sect, considered himself as the Supreme God, and as such, the sect that believes in the divinity of Swaminarayan cannot be assimilated with the followers of Hindu religion. It was also urged that the temples in suit had been established for the worship of Swaminarayan himself and not for the worship of the traditional Hindu idols It was further contended that the sect propagated the ideal that worship of any God other than Swaminarayan would be a betrayal of his faith, and lastly, that the Acharyas who had been appointed by Swaminarayan adopted a procedure of "Initiation" (*diksha*) which showed that on initiation, the devotee became a Satsangi and assumed a distinct and separate character as a follower of the sect.¹²¹

That is, the Satsangis offered a subjective, sociological and traditional account of what made them into a distinct religious community with practices they viewed as distinct from the Hindu 'religion'. However it was not clear whether and how this description of their practices set them apart from the Hindu 'religion'. This question was considered at length by Justice Gajendragadkar and it formed the basis on which he made his decision.

Delivering the unanimous opinion of the Supreme Court, Chief Justice Gajendragadkar disallowed the Satsangi claims, pronounced them 'Hindu' and subjected them to the demands of the temple entry statute. However, there was an irresolvable contradiction in Justice Gajendragadkar's account of the Hindu religion. On the one hand he argued that the Hindu religion

... does not claim any one prophet; it does not worship any one God; it does not subscribe to any one dogma; it does not believe in any one philosophic concept; it does not follow any one set of religious rites or performances; in fact, it does not appear to satisfy the narrow traditional features of any religion or creed. It may broadly be described as a way of life and nothing more.¹²²

¹²¹ *Ibid.*, 1123.

¹²² *Ibid.*, 1128.

This account of the Hindu religion might perhaps seem far too vague and broad to refer to any well defined or discrete entity. However, despite its fuzziness, this is not an uncommon way to describe an important way of being religious in the Indian subcontinent.

Significantly it is also important to note *how* this account characterises the Hindu religion. That is, it is an account that attempts a sociological or empirical description of a religious tradition as part of a larger cultural way of navigating the Indian religio-cultural milieu.

On the other hand, drawing on the writing of Dr. S. Radhakrishnan, a renowned Indologist and former Indian Vice-President, and other modern commentators on the Hindu tradition, the court held that the wide variety of practices and religious reflections found in the Hindu tradition was underwritten by a philosophy of monistic idealism. That is

(b)eneath the diversity of philosophic thoughts, concepts and ideas expressed by Hindu philosophers ... lie certain broad concepts which can be treated as basic. The first amongst these basic concepts is the acceptance of the Veda as the highest authority in religious and philosophic matters ... The other basic concept which is common to the six systems of Hindu philosophy is that all of them accept the view of the great world rhythm... It may also be said that all the systems of Hindu philosophy believe in rebirth and pre-existence ...¹²³

It is not clear if any of these latter comments on the Hindu religion actually rule out the claims that the Satsangis make about their religious traditions. Perhaps this is what the Satsangis mean when they assert that they could be considered to be socially and culturally Hindu though not part of the Hindu religion. However, as in the *Dargah Committee* case, Gajendragadkar drew on Radhakrishnan to declare that the Satsangi claims were “founded on superstition, ignorance and complete misunderstanding of the true teachings of Hindu religion and of the real significance of the tenets and philosophy taught by Swaminarayan himself.”¹²⁴ In other words he treats the criteria that he has identified as though they are the true doctrinal foundations of the Hindu religion and pronounces the Satsangis to be Hindu despite their protest.

¹²³ *Ibid.*, 1130.

¹²⁴ *Ibid.*, 1135.

Justice Gajendragadkar therefore grounds his decision on a doctrinal conception of religion which I have argued was made normative in the *Shirur Mutt* case. However in doing so he identifies the very same object – the Hindu religion – in two very different and incompatible ways. On the one hand he asserts that the term Hindu denotes the diverse sets of social and cultural traditions that are empirically extant in India which, by and large, have not and do not assert any particular conception of doctrinal truth. On the other hand, he also argues that these Hindu practices and traditions are founded in essential doctrinal truth, from which its superstitious accretions can be separated and reformed if deemed necessary. Logically these positions are mutually exclusive. That is, either the essential core of the Hindu religion is grounded in true doctrines, or the Hindu religion is a term that denotes and encapsulates a range of diverse social and cultural traditions to be found in India, which have been decidedly uninterested in the question of doctrinal truth. However, the normative constitutional conception of religion leaves him with no option but to endorse a conception of the Hindu religion in terms of practices tied to an essential doctrinal truth. Oddly, Gajendragadkar J. does not seem to notice the obvious contradiction in his inconsistent assertions on the nature of the Hindu religion.¹²⁵ Why is this so? By answering this question, I believe it is possible to make salient what is at stake in the misunderstanding or the re-framing of traditional practices as religions founded on doctrinal truth.

As a heuristic it is useful to look at both Gajendragadkar's assertions as true, though truths valid under different conditions. As a matter of intuitive sociology as Gajendragadkar points out, and in scholarly accounts as well, there has always been good reason to contend that 'Hinduism' is not a religion that can be conventionally defined in terms of essential doctrinal truths.¹²⁶ That is, empirically or sociologically, it has been and continues to be

¹²⁵ For a similar account of the different contradictory forms of argument employed in the Satsangi case See Marc Galanter, "Hinduism, secularism, and the Indian judiciary," in *Secularism and its critics*, ed. Rajeev Bhargava (Delhi: Oxford University Press, 1999), 268-93.

¹²⁶ For instance in the multi-volume *Historia Religionum*, Dandekar refers to Hinduism in the following manner- 'Hinduism can hardly be called a religion in the popularly understood sense of the term. Unlike most religions, Hinduism does not regard the concept of god as being central to it ... Hinduism does not

possible to argue that Hinduism is not a religion with doctrines, dogmas, religious authority, theology and so on. In other words, it is entirely plausible to think of Hinduism as a traditional religion as I have outlined in S. 1.4.2. However, these Hindu traditions are interpellated or drawn into the Indian Constitutional scheme only as religions structured by essential or core doctrinal truths, and can claim their traditional freedoms only if they present themselves as such. That is, the Constitutional scheme compels the semantic *reform* or re-framing of religions as they are sociologically and empirically extant into religions underwritten by essential doctrines.

Thus Gajendragadkar J. does not see the contradiction in his incompatible assertions about Hinduism because his empirical and traditional assertions about the Hindu religion fall in the blind spot of his legal appreciation of the very same entity. In other words the legal appreciation of the term Hindu is unable to reflect the sociologically and culturally existing manner of being Hindu as argued by the Satsangis. Recasting the *Satsangi* case in this manner also allows me to sharpen the hypothesis I advanced in the *Shirur Mutt* case that the determination of religious freedom in the Indian Constitution entailed the semantic reform of traditional religions into religions founded in truth and doctrine. That is, the reform of religious traditions demanded by the Indian constitutional scheme makes normative a conception of religion as truth and doctrine, which is unable to recognise different *kinds* of traditional Indian religions as they sociologically exist and which do not fit this normative mould. I argue that this normativised conception of religion is extremely peculiar and counterintuitive because it compels courts and litigants to deny their sociological and cultural experience if they are to make successful legal claims to religious freedom.

venerate any particular person as its sole prophet or as its founder. It does not . . . recognize any particular book as its absolutely authoritative scripture. ’

Similarly Weightman describes Hinduism as displaying ‘few of the characteristics that are generally expected of a religion. It has no founder, nor is it prophetic. It is not credal, nor is any particular doctrine, dogma or practice held to be essential to it. It is not a system of theology, nor a single moral code, and the concept of god is not central to it. There is no specific scripture or work regarded as being uniquely authoritative and, finally, it is not sustained by an ecclesiastical organization. Thus it is difficult to categorize Hinduism as ‘religion’ using normally accepted criteria.’ cited in Balagangadhara and Roover, “The Secular State and Religious Conflict,” 70.

Reframing the present discussion of the *Satsangi* case in terms of the earlier distinction I drew between different kinds of religion, I claim that the differences between the different kinds of religion are of little significance to the manner in which the secular State views religion. As my discussion in this chapter demonstrates, the constitutional scheme of the Indian secular State compels all traditional religious practices and especially those associated with the Hindu religious traditions to behave as though they were Semitic religious traditions with essential doctrinal truths. That is, non Semitic religious traditions like the Hindu are made intelligible to the secular State only when they are reformed into the normative doctrinal form demanded by the Indian Constitution. Thus the *Satsangi* case makes explicit the structural disposition of the Indian Constitution to deny traditional freedoms of Indian religions as they are sociologically extant and experienced. It is this counterintuitive stance of the secular State towards Indian religious traditions that drives the concerns of this thesis. In what follows I try to account for the constitutional disposition or orientation that permits this stance.

1.5 Conclusion

In a recent book on the Indian Supreme Court's decisions on religious freedom, Ronojoy Sen summarises his claims on the essential practices doctrine by saying that

...the Court's use of the essential practices doctrine has served as a vehicle for legitimizing a rationalized form of high Hinduism, and delegitimizing usages of popular Hinduism as superstition. In doing so, the court has gone beyond the regulation of religion and social reform envisaged by Article 25. This has resulted in the sanction for an extensive regulatory regime for Hindu religious institutions, and substantial limits on the independence of religious denominations.¹²⁷

In this chapter I have made substantially similar claims, differing only with Sen's claim that courts have gone beyond the bounds of regulation envisaged by Art. 25. On the contrary I argue that the Indian Constitution is structurally disposed to reform traditional religions into religions founded on essence and doctrine.

¹²⁷ Ronojoy Sen, *Articles of Faith: Religion, Secularism and Indian Supreme Court* (New Delhi: Oxford University Press, 2010), 41.

Therefore this chapter has sought to study the effects or the implications of a commitment to the secular State. It has attempted to explore what it means to say, like Sen, that the application of the essential practices test has resulted in the legitimisation of a rationalised 'high Hinduism'. As I have pointed out through the *Satsangi* case, the legitimisation of 'high Hinduism' is made possible by a counterintuitive constitutional logic that is premised on the denial of religion as it exists sociologically and empirically, in favour of a 'high Hinduism' or a constitutional conception of the Hindu religion that is founded on doctrine. As a perspective on religious freedom in the Indian Constitution, this is only a hypothesis on what is at stake in the constitutional practice of religious freedom. However, in the next chapter I demonstrate that this is a hypothesis with considerable merit, by tracing the manner in which a doctrinally determined Hinduism fundamentally determines the shape of Indian constitutional debates on equality.

2. Sacralising Constitutional Practice: The Case of Indian Equality Jurisprudence

In the previous chapter I detailed the manner in which religious liberty in the Indian Constitution carried with it a mandate for the reform of religious traditions. I argued that the reformist structure of the Indian Constitution was incapable of recognizing and representing ‘traditional religious’ claims because it made normative a conception of religion based on doctrine and transcendental truth. It is in this context that the very task of reform acquires salience – that is, reform is the process or project that re-frames ‘traditional religious’ claims into those intelligible to the Indian constitutional framework on religious freedom. Through cases decided by the Indian Supreme Court, and especially the *Satsangi* case, I had also argued that the reform project is counterintuitive because of its disposition to semantically overlay Indian sociological experience, and especially the experience of traditional religions. In other words, the reforming disposition of the Indian Constitution sanctions a constitutional conception of religion which is founded or premised on the denial of ‘religious’ experience as it is experienced as a sociological entity.

In this chapter I carry forward the discussion of the doctrinal reformulation of Indian religious traditions by demonstrating the manner in which Indian equality jurisprudence has ‘normalised’ a reformed conception of religion. That is, I argue that a reformed conception of religion embeds itself in the Indian legal and constitutional debates on equality and fairness, and thereby masks the manner in which it overlays traditional religious practices in particular as well as Indian constitutional practice generally. The commitment to equality in the Indian Constitution takes the form of a formal commitment to equal citizenship. However, the Constitution also elaborates a differentiated conception of citizenship that grants group rights to various groups constitutionally designated as the ‘scheduled castes’, ‘scheduled tribes’, ‘other backward classes’ and ‘minorities’ who are granted various rights on grounds of historic disadvantages they are said to have suffered.

In this chapter I emphasise the rights granted to these constitutional groups and demonstrate the significance of a reformed doctrinal conception of religion, and especially the Hindu

religion, to maintain the intelligibility of each of these categories. However, before I demonstrate the influence of a doctrinal Hinduism on each of these categories, I first outline aspects of the transition to the present constitutional scheme of differentiated group rights by drawing on the debates in the Indian Constituent Assembly.

2.1 Minority Rights in the Constituent Assembly

In the Indian Constitution, the rights granted to groups designated as ‘scheduled castes’, ‘scheduled tribes’, ‘other backward classes’ and ‘minorities’ are seemingly unrelated to each other. However, these rights derive from a common source in the political structure of the British colonial State in which they were all considered minorities.¹²⁸ In fact this was the case even up to the point when the Indian Constituent Assembly considered the rights to be granted to all these minority groups.¹²⁹ The Assembly resolved the question of minorities differently from the colonial State and the Constitution as it stands today does not consider scheduled castes, tribes or other backward classes to be minorities, though all these groups continue to be entitled to different sets of group rights.

Moving a resolution in the Constituent Assembly to set up an Advisory Committee on Fundamental Rights, Govind Ballabh Pant outlines the challenge of fundamental rights in terms of being able to successfully resolve the issue of minority rights. As he noted

(t)he question of minorities everywhere looms large in constitutional discussions. Many a constitution has foundered on this rock. A satisfactory solution of questions pertaining to minorities will ensure the health, vitality and strength of the free State

¹²⁸ The Scheduled Tribes were strictly not considered to be minorities by the British colonial state. Areas with significant tribal populations were designated excluded or partially excluded areas in which the government could exclude the operation of laws duly passed by the legislatures. That is, Scheduled Tribes were considered special wards of the colonial state and not entirely similar to other minorities. Thus I suspect that the incorporation of the Scheduled Tribes into the current constitutional framework requires a separate discussion which I cannot pursue in the present chapter.

¹²⁹ To avoid confusion of terms I enclose the word ‘minority’ in scare quotes when I refer to the constitutional category. All other references to the word refer to the broader conception of minority as it was referred to in the colonial legal framework.

of India that will come into existence as a result of our discussions here. The question of minorities cannot possibly be overrated. *It has been used so far for creating strife, distrust and cleavage between the different sections of the Indian nation. Imperialism thrives on such strife.* It is interested in fomenting such tendencies. So far, the minorities have been incited and have been influenced in a manner which has hampered the growth of cohesion and unity.¹³⁰ (emphasis added)

These comments are quite representative of the challenge that minority rights posed for the Assembly. That is, the manner in which the nationally divisive or ‘communal’ scheme of government administered by the colonial State would be rejected by the independent Indian nation.

Pant’s target in this address was a peculiar form of colonial government in which legally designated minorities were entitled to be represented in government (especially in the legislative assemblies and government jobs) in proportion to their size in the general population. Equally intriguingly, elections to colonial legislatures were also conducted through separate electorates consisting only of members of the designated minority community. Most strands of the Indian nationalist movement were consistently opposed to this scheme of government and viewed this scheme of government as being communally divisive.¹³¹ These sentiments were carried into the Constituent Assembly where the drafters of the Indian constitution paid considerable attention to the task of dispensing with the ‘communal’ scheme of government that applied to minority communities in colonial India.

Consideration of the minority question in the Constituent Assembly commenced in the sub-committee on minorities, a sub-committee of the Advisory Committee on Fundamental Rights, Minorities and Tribal and Excluded and Partially Excluded Areas (hereafter the Advisory Committee on Fundamental rights). The sub-committee considered two kinds of

¹³⁰ Rao et al., *The framing of India’s Constitution*, 2:61.

¹³¹ The Nehru Report is a good example of nationalist opposition to the communal division and to the system of separate electorates in particular. *The Nehru Report: An Anti-Separatist Manifesto* (New Delhi: Michiko & Panjathan, under the auspices of the Indian Institute of Applied Political Research, 1975).

rights for minorities – a) cultural and educational rights granting minorities the rights to protect their language script and culture as well as the right to establish education institutions; b) economic and political rights which sought to grant minorities the rights to quotas in legislatures and in government services.¹³² There was relatively little controversy over the grant of cultural and educational rights to minorities. But nationalist opinion was not favourably disposed to political and economic rights, on the grounds that these had the potential to reinforce the communal form of government associated with the colonial State. The present section scrutinises this nationalist concern in some detail, especially because economic and political rights were the major fault-line across which the assembly granted different group rights to different communities.

The Constituent Assembly's discussion of economic and political rights was guided by a report first prepared by the Sub-Committee on Minorities, which was duly forwarded for consideration to the Advisory Committee on Fundamental Rights on the 8th August 1947. Among other things, the report recommended the following – first, quotas in legislatures for all minorities proportionate to their size in the population, though ruling out separate electorates and preferring instead a system of joint electorates. Second, it recommended that no cabinet positions be reserved for minorities, though it suggested a schedule to the Constitution outlining a convention through which minorities ought to be represented in the Cabinet. Third, it recommended that positions in public services be reserved to minorities subject to considerations of efficiency, and finally, that a commission be established that would periodically monitor and report to parliament on the status of the rights granted by the Constitution to the recognised minorities.

In their discussion of the various aspects of political and economic rights that were to be granted to minorities, the Constituent Assembly and its committees viewed the system of separate electorates to be most decidedly communal and nationally divisive. Discussing communally separated electorates, the report of the minorities subcommittee states that

¹³² I draw this classification of the rights discussed by the assembly from Iqbal Ansari's illuminating article on the issue. Iqbal Ansari, "Minorities and the Politics of Constitution Making in India," in *Minority identities and the nation-state*, ed. D Sheth and Gurpreet Mahajan (New Delhi: Oxford University Press, 1999).

...the system of separate electorates must be abolished in the new Constitution. In our judgment, this system has in the past sharpened communal differences to a dangerous extent and has proved one of the main stumbling blocks to the development of a healthy national life. It seems specially necessary to avoid these dangers in the new political conditions that have developed in the country and from this point of view the arguments against separate electorates seem to us absolutely decisive.¹³³

Despite the overwhelming consensus against separate electorates, there were contrary opinions that included, among others, a figure no less than B R Ambedkar, who enthusiastically supported separate electorates as the best protection for the interests of minorities.¹³⁴ However, these voices were drowned out by the political weight that the Congress party threw behind the abolition of separate electorates. Thus on the 27th and 28th August 1947 the Constituent Assembly adopted almost in its entirety the report of the Advisory Committee on the issue of minority rights, and in February 1948 these recommendations were incorporated into Part XIV of the Draft Constitution.¹³⁵

In the aftermath of partition and the violence that followed it, the Assembly's earlier consensus on the political rights of minorities began to come undone. On 11 May 1949 Sardar Vallabhbhai Patel wrote a letter to the President of the Assembly about the changing views on the question of minorities. According to him some members of the Committee felt that

¹³³ Rao et al., *The framing of India's Constitution*, 2:412.

¹³⁴ On the floor of the assembly support for communal electorates were articulated by members of the Muslim League from Madras. However as Ambedkar's submission to the Advisory Committee on Fundamental Rights reveals that he shared this opinion with members of the Muslim League. *Ibid.*, 2:109-11.

¹³⁵ Ansari, "Minorities and the Politics of Constitution Making in India," 111-23. It is my case that the communal challenge was the most pressing concern that animated the debate on separate electorates. However the discursive detail of these debates also reveal a concern with issues like a commitment to the secular state and of democracy. To get a better sense of nuances to this debates see Rochana Bajpai, "Minority Representation and the Making of the Indian Constitution," in *Politics and ethics of the Indian Constitution*, ed. Rajeev Bhargava (New Delhi: Oxford University Press, 2008), 365-71.

... conditions having vastly changed since the Advisory Committee made their recommendations in 1947, it was no longer appropriate in the context of free India and of present conditions that there should be reservation of seats for Muslims Christians, Sikhs or any other religious minority. Although the abolition of separate electorates had removed much of the poison from the body politic, the reservation of seats for religious communities, it was felt, did lead to a certain degree of separatism and was to that extent contrary to the conception of a secular democratic state.¹³⁶

These changing sentiments on the question of minority rights were echoed in the Assembly when it discussed the minority rights of Sikh refugees who had come over to India from Pakistan.

Debate on the rights due to the Sikhs had been deferred in the Assembly until the full implications of partition had become clear. Therefore, while considering the case of the Sikhs, the house got an opportunity to rework its earlier position on the question of minority rights. The records show that the reworked position was first formulated in the Advisory Committee by H C Mookerji on 11 May 1949 stating “that the system of reservation for minorities other than Scheduled Castes in Legislatures be abolished.”¹³⁷ This position was later ratified by the Assembly on the 26th of May 1949, though it granted group rights to some Sikhs castes by identifying them as Scheduled Castes.¹³⁸

It was not only reservations in legislatures that came up for review. On 14th October 1949 Draft Articles 296 and 299, permitting minority quotas in public employment subject to the interests of efficiency in administration, was modified to exclude ‘minorities’ other than the scheduled castes and scheduled tribes. Though this encountered opposition, predominantly

¹³⁶ B. Shiva Rao et al., *The framing of India's Constitution*, vol. 4 (New Delhi: Indian Institute of Public Administration, 1966), 600.

¹³⁷ *Ibid.*, 4:601.

¹³⁸ As I discuss in S. 2.2, this is significant because the dominant opinion in the House seemed to think that untouchability was not religiously sanctioned by the Sikh religion and therefore that no Sikh groups ought to be entitled to minority rights granted to the Scheduled or the untouchable castes.

from the Sikh members of the house, the Assembly held its ground and permitted quotas in the public services of the state and the central government only for the scheduled castes and tribes.¹³⁹ With these provisions Iqbal Ansari argues the Assembly significantly reworked Congress policy on the issue of ‘minorities’ that had remained more or less unchanged at least since the Nehru report of 1928.¹⁴⁰ In the new scheme envisaged by the Assembly, the issue of minority rights was resolved by granting scheduled castes and tribes political and economic rights while all other minorities were denied these rights though they remained eligible for cultural and educational rights.

The Constitutional resolution of the minority question just outlined is particularly significant because, in the dominant nationalist opinion, it is a widely held belief that this resolution cleansed the body politic of the poison of communal politics, and contributed to the building of a secular democratic State. However, I will argue in this chapter that these claims need further interrogation because Indian constitutional practice continues to be defined by reformed religiosity though less explicitly than in the colonial regime. That is, I will argue that the grant of constitutional rights to the scheduled castes, other backward classes, and minorities are either directly or indirectly dependent on a reformed conception of the Hindu religion. The debate on the rights of these constitutional groups is believed to be part of a constitutional attempt to secure substantive equality for its citizens. Though I do not comment on this larger normative goal of substantive equality in this chapter, I will argue that the practice of equality jurisprudence subtly sacralises Indian constitutionalism.

2.2. The Rights of a Reformed Community: The Case of the Scheduled Castes

The Indian Constitution grants Scheduled Castes a set of group rights on the grounds that they were subject to historic injustice, most notably the practice of untouchability which is understood to be an integral aspect of the Indian social structure and especially of the ‘Hindu’ caste system.¹⁴¹ At the most general level, these rights are fore-grounded by Art 14

¹³⁹ *Constituent Assembly debates: official report*, vol. 10 (New Delhi: Lok Sabha Secretariat, 1999), 229-65.

¹⁴⁰ Ansari, “Minorities and the Politics of Constitution Making in India.”

¹⁴¹ Bajpai, “Minority Representation and the Making of the Indian Constitution.”

which requires the State to treat all citizens equally irrespective of caste, class, and gender. However, precisely because of practices like untouchability, it is argued that a general right to equality cannot have significance without a revolution or reform or structural transformation of those aspects of Indian society which produce practices like untouchability.¹⁴² The rights granted to the Scheduled Castes are therefore part of this agenda for social transformation which Marc Galanter calls ‘compensatory’ discrimination measures in their favour.¹⁴³

The term ‘compensatory discrimination’ perhaps does not apply to all the rights granted to the Scheduled Castes, but it does capture the reformist and transforming orientation of these rights. These rights include Art 15(2), disallowing government or private persons from discrimination on the basis of caste in public places, Art 15(4), permitting government to make positive discrimination measures for the scheduled castes, scheduled tribes and other backward classes,¹⁴⁴ Art 15(5), permitting positive discrimination measures regarding admission to both government and even private educational institutions, Art 16(4), permitting compensatory discrimination in government jobs for backward classes of

¹⁴² As I have already mentioned earlier, in his defining book on the history of the Indian Constitution, Austin suggests that it was animated by a conception of revolutionary reworking of the economic, social and cultural foundations of Indian society. Austin, *The Indian constitution*.

¹⁴³ As Galanter mentions these preferences are of three basic types: First, reservations in legislatures, posts in government service, and places in academic institutions. To a lesser extent, the reservation device is also used in the distribution of land allotments, housing, and other scarce resources. Second, provision of services like scholarships, grants, loans, land allotments, health care, legal aid to a beneficiary group beyond similar expenditures for others. Third, special protections that include efforts to protect the backward classes from being exploited and victimized which include constitutional provisions against forced labour, governmental efforts to release the Scheduled Caste and Tribes victims of debt bondage, legislation regulating money lending, protecting SC and ST from the economic oppression of their more sophisticated neighbours by restricting land transfers and various constitutional and legal provisions addressing the issue of untouchability. Marc Galanter’s work in this field has been pioneering and I have used him extensively throughout this chapter. Marc Galanter, *Competing Equality: Law and the Backward Classes in India* (Delhi: Oxford University Press, 1984), 1-3, 42-43.

¹⁴⁴ Among the measures undertaken by the state under Art 15(4), quotas in institutions of higher learning have produced disputes involving the highest stakes in contemporary India.

citizens, Art 17, abolishing untouchability, Art 23, abolishing forced labour of any kind. Art 25(2), which I discussed in the previous chapter, can also be viewed as permitting the State to make social reform and temple entry provisions for the Scheduled Castes. Besides the rights enumerated in the Fundamental Rights chapter of the Constitution, the Scheduled Castes are also granted reserved seats in Parliament and in the provincial state legislatures under Art 330 and 332. Though these reservations were initially granted for a period of ten years they have been repeatedly extended by Parliament up to the present day. In addition, Art 338 establishes the National Commission for the Scheduled Castes and Scheduled Tribes, which is a standing body that monitors and advises government on the various rights and schemes for the benefit of the Scheduled Castes and Tribes. Lastly, it is perhaps also possible to argue that the entire scheme of rights for scheduled castes is guided by Art 46, a directive principle requiring the State to protect the interests of scheduled castes among other weaker sections.

The elaborate set of rights that the Constitution grants to the Scheduled Castes clearly marks out a substantive conception of equality and justice to which the Indian Constitution stands committed. However in this section I will be less concerned about the conceptions of equality endorsed by the Indian constitution, and highlight the manner in which Scheduled Castes are *identified* through the lens of a reformed doctrinal 'Hinduism' if they are to be eligible to avail these rights. Consequently, drawing on my discussion of the reformed nature of the Hindu religion in chapter 1 I will argue that the constitutional framework as it is currently organised is unable to formulate the problem of inequality and untouchability as empirically located problems of injustice which sociologically obtain in Indian society.

2.2.1. Outlining the Problem

The identification of the scheduled castes is a problem shot through with various challenges. At one level the problem seems disarmingly simple because the Constitution explicitly specifies that Scheduled Castes are those groups duly notified by the President of India as specified in Art 341.¹⁴⁵ Accordingly the *Constitution (Scheduled Castes) Order*

¹⁴⁵ Article 341 which identifies Scheduled Castes reads as follows.

1950 states that “no person professing a religion different from Hinduism shall be deemed to be a member of the Scheduled Castes.”¹⁴⁶ It is rather odd that the Constitution identifies Scheduled Castes with the Hindu persuasion, because this would be a patent case of religious discrimination. However, instead of emphasising the departure of this Presidential Order from the normative demands of equality, I emphasise the peculiar manner in which the identification of Scheduled Castes disconnects this legal category (i.e, the Scheduled Castes) from the underlying social objects for which the categorisation and the ensuing rights were presumably devised – the sociological practice of untouchability.

As an instance of the cleavage between the practice of untouchability and identification of the scheduled castes, it is useful to consider an intervention of K.M. Munshi during the early debate on the minority question in the Constituent Assembly. Moving an amendment that Scheduled Castes were not to be considered apiece with other minorities but as part of the Hindu community, he argued that

... so far as the Scheduled Castes are concerned, they are not minorities in the strict meaning of the term; that the Harijans are part and parcel of Hindu community, and the safeguards are given to them to protect their rights only till they are completely absorbed in the Hindu Community.

Another reason is this, and I might mention that reason is based on the decisions which have already been taken by this House. The distinction between Hindu Community other than Scheduled Castes and the Scheduled Castes is the barrier of

(1) The President may with respect to any State or Union territory, and where it is a State, after consultation with the Governor thereof, by public notification, specify the castes, races or tribes or parts of or groups within castes, races or tribes which shall for the purposes of this Constitution be deemed to be Scheduled Castes in relation to that State or Union territory, as the case may be.

(2) Parliament may by law include in or exclude from the list of Scheduled Castes specified in a notification issued under clause (1) any caste, race or tribe or part of or group within any caste, race or tribe, but save as aforesaid a notification issued under the said clause shall not be varied by any subsequent notification.

¹⁴⁶ Galanter, *Competing Equality*, 304. The *Constitution (Scheduled Castes) Order, 1950* was amended in 1956 and 1990 and now reads that “no person who professes a religion different from the Hindu, the Sikh or the Buddhist religion shall be deemed to be a member of a Scheduled Caste.”

untouchability. Now, by the Fundamental Rights which we have accepted, untouchability is prohibited by law and its practice is made a criminal offence under the law of the Federation. We have also accepted in the Fundamental Rights that no public place should be prohibited to anyone by reason of his birth. So far as the Federation is concerned, we have removed the artificial barrier between one section of the Hindu Community and the other¹⁴⁷

Through this intervention, Munshi makes a rather peculiar claim that the scheduled castes were provided with rights by the Indian Constitution so that they could be absorbed within the Hindu community. Even the abolition of untouchability is phrased as the removal of barriers between one section of the Hindu community and the other.

Munshi's comments were however not particularly anomalous either for nationalist opinion or for the Constituent Assembly. For instance even a towering figure in the Indian National Congress like Vallabhbhai Patel makes a rather similar statement when intervening in a Constituent Assembly debate considering the inclusion of some sections of the Sikh community in the list of Scheduled Castes. Expressing dismay at the Sikh demand, he states that

...it was against our conviction to recognise a separate Sikh caste as untouchables or Scheduled Castes, *because untouchability is not recognised in the Sikh religion*. A Scheduled Caste Sikh community has never been in the past recognised. But as the Sikhs began to make a grievance continuously against the Congress – and against us, I persuaded the Scheduled Caste people with great difficulty to agree to this for the sake of peace.¹⁴⁸ (emphasis added)

Though Patel caved in to the Sikh demands, his comments are extremely illuminating of his conviction that the Sikh demand was not legitimate because untouchability was not recognised in their religion. In Patel's view untouchability was a religious practice of the Hindus and therefore other religious communities could not legitimately claim inclusion in the list of scheduled castes because the practice had no religious support.

¹⁴⁷ *Constituent Assembly debates: official report*, vol. 5 (New Delhi: Lok Sabha Secretariat, 1999), 227-28.

¹⁴⁸ *Constituent Assembly debates*, 10:247.

However, Sardar Hukam Singh, whose statements in the Constituent Assembly prompted Patel's intervention, demanded that sections of his community be included in the list of scheduled castes because they suffered from the disabilities that accrued from untouchability as an existing social practice.¹⁴⁹ These were therefore very different claims on the practice of untouchability and the identification of Scheduled Castes, leading to the question – what does it mean to identify the Scheduled Castes as Hindu? And, how does this vary from the identification of untouchability through empirical sociology as proposed by the likes of Sardar Hukam Singh?

2.2.2. Scheduled Castes as Reformed Hindu Communities

It is my contention that the constitutional conception and identification of the Scheduled Castes is based on a reformed or doctrinal conception of the 'Hindu' religion. Consequently the constitutional conception of the Scheduled Castes is only obliquely related to castes as socially and empirically existing entities. To establish my case I rely on an analytical scheme on castes in India as drawn up by Marc Galanter.

According to Galanter, the dilemma about conceptualising Caste in India centres on the issue of the very religious nature of caste. To some scholars castes are the building blocks of Hinduism while to others they are merely sociological entities that obtain in India. To clarify these different positions Galanter suggests three models through which castes have been legally conceptualised. These are (1) the Sacral Model, (2) the Sectarian Model and (3) the Associational Model. The sacral model posits caste groups as a constituent part of the sacral order of Hindu society. In this model, Hindu society is seen as a differentiated but integrated order in which the different parts may enjoy different rights, duties, privileges and disabilities, which are determined by the position of the caste group in relation to the whole. The sectarian model posits caste as an independent religious community demarcated by doctrine, ritual or culture. This model conceives of caste as a religious unit but one that is self contained and disassociated from a larger religious order. The rights and duties of the

¹⁴⁹ Ibid., 10:232-36.

group and its members follow from its own rules and regulations and not from its place in a larger sacral order. Lastly in the associational model, caste is understood as a self governing group with its own set of rules and regulations, which are marked neither by a fixed place in a larger religious order nor by distinctive religious beliefs or practices. The bonds of association in this model might include religion but this is to be understood as one among many other aspects of group life.¹⁵⁰

In Galanter's scheme these three models are not presented as a theory of what castes are, but as three models that colonial courts have employed to organise the issues and problems involving caste. As self-governing entities with powers of internal self government recognised by the colonial government, they were organised as sectarian and associational entities. As constituent elements of the governance of religious personal laws castes were viewed through the lens of the sacral model. Despite the different functional role these models of caste played in the colonial courts which devised them, it is important to note the contending assumptions that give these models intelligibility. The sectarian and associational models are sociological models of caste while the sacral model as the name suggests is a doctrinal or foundational Hindu religious model of caste.¹⁵¹ However, what does this latter claim entail?

Caste groups are a ubiquitous feature of the Indian social terrain. Variously termed *jatis*, *sampradayas*, or *jamats*, they are sociological entities within which the life of collectives is transacted. However, a sacral or 'Hindu' conception of caste is a specific account of the entity that is informed by the category of *varna* from the classical Hindu texts. In classical Hindu law, the multitude of Indian castes are organised into four hierarchically organised groups or *varnas* – the *Brahmins*, *Kshatriyas*, *Vaisyas* and *Sudras*. This account was

¹⁵⁰ Marc Galanter, "Religious Aspects of Caste," in *South Asian Politics and Religion*, ed. Donald Eugene Smith (Princeton, N.J: Princeton University Press, 1966), 278-79.

¹⁵¹ For present purposes this chapter will not delineate and evaluate the theoretical debates on whether castes are religious or merely social entities. However, the question is a live and fraught issue in the study of caste. For instance see Nicholas B. Dirks, *Castes of Mind: Colonialism and the Making of Modern India* (Permanent Black, 2003).

implanted into Indian law by the British colonial governments who made it the basis of personal laws for all persons designated as Hindu.

Galanter argues that one of the most crucial distinctions within this *varna* based account of Hindu personal law was its division of the four *varnas* into two groups – the *Brahmin*, *Kshatriya* and *Vaisya* groups who were considered ritually superior were governed by a different set of personal law rules from the *Sudra* groups who were deemed ritually inferior. There was considerable difficulty in slotting the multitude of Indian castes into appropriate *varnas* and courts had to devise ways in which they could distinguish between the *Brahmin*, *Kshatriya* or *Vaisya* *varnas* from the *Sudra* *varna*. In some cases the test to identify a group was the customary practices said to be typical of the *Sudras*. In others the identification of *varna* took place by evaluation of the caste group’s own consciousness of its status and the acceptance of this estimate by other castes in the locality, with estimations of status being tied to notions of purity and pollution practices between caste groups.¹⁵² However, in all these cases castes are seen as religious entities who “occupy their respective places in the sacral order of ranks which embraces all groups within Hinduism.”¹⁵³

This treatment of caste as in colonial personal law underwent dramatic transformation with the coming of Indian independence. Two developments are of particular significance. First, the passage of the Hindu Code Acts which established a uniform Hindu law for all Hindus thereby rendering *varna* largely insignificant as a legal category. Second, the constitutional abolition of untouchability as laid out in Art 17. That is, the legislature attempted to render *varna* as a legal category irrelevant to the practice of law in contemporary India. According to Galanter, these developments have resulted in the decreasing significance of the sacral model of caste.¹⁵⁴ This is undoubtedly true at the functional level where the use of the sacral category of *varna* has significantly reduced in the Constitutional scheme of

¹⁵² Galanter, “Religious Aspects of Caste,” 280-82.

¹⁵³ *Ibid.*, 282.

¹⁵⁴ *Ibid.*, 289-310.

independent India. However, at the structural level it is this model of caste that shapes the very intelligibility of the constitutional approach to the problem of identifying the Scheduled Castes in contemporary India. That is, despite its functional decline, Galanter's sacral, textual, or doctrinal model is crucial to the way Scheduled Castes are conceived in the present constitutional framework.

As the threshold identification standard for the scheduled castes, the sacral model has subordinated both the sectarian and the associational models of caste to the level of sub-classifications. That is, in the present constitutional scheme these other classifications continue to be important in addressing issues related to the scheduled castes but only within the boundaries set by the sacral model.¹⁵⁵ However, in Galanter's castes schema the sectarian and the associational models of caste were presented as equally plausible ways of representing caste where one model was not dependent on the other. Quoting from a case decided in colonial Madras he notes that "a caste is a combination of a number of persons governed by a body of usages which differentiate them from others. The usages may refer to social or religious observances, to drink, food, ceremonies, pollution, occupation, or marriage." In other words caste need not be solely identified with religion, and it could just as well be understood as a way of living together. As autonomous social groups, castes could even be collections of Non Hindu groups, and, as Galanter shows, courts have recognised castes among Muslims, Parsis, Jains, Sikhs and Christians.¹⁵⁶

The sectarian and associational forms of modelling of caste therefore had a salience in colonial India which they do not have in contemporary constitutional identification of the scheduled castes. That is, though castes could potentially be of any religious persuasion in the colonial scheme, the present constitutional scheme under Art 341 identifies scheduled castes only as untouchable groups within the *varna* hierarchy of the sacral model, thereby excluding all non-Hindu groups. This is borne out in the manner in which Indian courts have held non-Hindu groups ineligible to be identified as Scheduled Castes. I elaborate this

¹⁵⁵ Ibid., 295-98.

¹⁵⁶ See for instance cases like *Abdul Kadir v. Dharma* 20 Bom. 190 (1895) cited in Ibid., 289.

by drawing on a couple of decisions of the Indian Supreme Court.

*S. Rajagopal v. C. M. Armugam*¹⁵⁷ was an early Supreme Court decision¹⁵⁸ that commented on the reasons that made non Hindu or non Sikh religions¹⁵⁹ ineligible to claim inclusion in the list of Scheduled Castes. In this case the parliamentary election of the appellant S. Rajgopal, a candidate claiming to belong to the Adi Dravida Scheduled Caste community, from a reserved constituency in the erstwhile State of Mysore, was challenged on the grounds that he had converted to Christianity. It was alleged that his conversion in 1949 made him ineligible to fight the disputed election which was held in 1967. Rajgopal claimed that he never converted to Christianity and even if it were proved that he had converted, he claimed that he had reconverted before the relevant election date in 1967.

The court held that he had converted to Christianity and was therefore ineligible to contest the election from the Scheduled Caste constituency. Interestingly, the reasons supporting this decision were entirely based on the doctrinal status of untouchability in Christianity. Thus, finding that he had converted to Christianity, the court stated that

... when the appellant embraced Christianity in 1949, he lost the membership of the Adi Dravida Hindu caste. The Christian religion does not recognise any caste classifications. All Christians are treated as equals and there is no distinction

¹⁵⁷ AIR 1969 SC 101

¹⁵⁸ The cases I discuss this point are only illustrative of my point and I do not undertake an exhaustive survey of the judicial landscape in this field and especially the many High Court decisions on this point. Therefore it is only to be expected that the Supreme Court cases that I discuss were preceded by important lower court decisions. For example in *Michael v. Venkataswaran* AIR 1952 Mad 474 and *In re Thomas* AIR 1953 Mad. 21 the court held that rights granted to the Scheduled Castes could not be claimed by Christians because the Christian religion does not recognise Caste. In both cases the courts were also reluctant to review the constitutionality of the Presidential order notifying Scheduled Castes by stating that it was beyond the reach of the courts.

¹⁵⁹ As of 1967 when this case was decided S. 3 of the Scheduled Castes Order, 1950 as amended in 1956 read “no person professes a religion different from the Hindu or the Sikh religion shall be deemed to be a member of a Scheduled Caste.” That is, the Scheduled Caste Order was extended to include the Sikhs as well.

between one Christian and another of the type that is recognised between members of different castes belonging to Hindu religion. In fact, *caste system prevails only amongst Hindus* or possibly in some religions closely allied to the Hindu religion like Sikhism. Christianity is prevalent not only in India but almost all over the world and nowhere does Christianity recognise caste division. The tenets of Christianity militate against persons professing Christian faith being divided or discriminated on the basis of any such classification as the caste system. It must, therefore, be held that, when the appellant got converted to Christianity in 1949, he ceased to belong to the Adi Dravida caste. (emphasis added)¹⁶⁰

By speaking of the caste system as entirely Hindu it is clear that the court does not refer to the associational and sectarian form in which groups of persons could be sociologically or empirically tied together as a matter of *fact*. On the contrary it seems that the court has understood caste as a phenomenon deriving from a doctrinal Hinduism conceived in terms of *varna* based hierarchies.

The difficulties and peculiarities of thinking about the Scheduled Castes in terms of a doctrinal Hinduism are illustrated with far greater clarity in *Soosai v. Union Of India*.¹⁶¹ In this case, the Supreme Court considered the constitutionality of the Scheduled Caste Order 1950 which excluded non Hindu and non Sikh religions from being identified as Scheduled Castes. Soosai, the petitioner in this case, was a cobbler belonging to the *adi dravida* scheduled caste community but had converted to Christianity. His constitutional challenge related to certain welfare schemes of the Government of India intended for *adi dravida* cobblers for which he was not eligible solely because of his conversion.

The Government Order granting these welfare measures clearly stated that members of the scheduled castes who had converted to Christianity would not be eligible for the assistance envisaged by the scheme. As this government order was framed in accordance with the Constitution (Scheduled Castes) Order 1950, he challenged its validity on the ground that it

¹⁶⁰ Ibid., 107

¹⁶¹ MANU/SC/0045/1985

violated the constitutional guarantees of equality and freedom to practise religion. Stating his case Soosai argued that despite his conversion he remained an *adi dravida* as a matter of *fact* and that being treated differently only because of his conversion would result in the violation of the Constitution's equality provisions as well as his right to religious freedom. I will not discuss the constitutional merits of Soosai's case which are undoubtedly quite strong and emphasise the contending sociologies of caste which came to a head in the case.

In favour of the Scheduled Caste order it was argued that

... the caste system is a feature of the Hindu social structure. It is a social phenomenon peculiar to Hindu society. The division of the Hindu social order by reference at one time to professional or vocational occupation was moulded into a structural hierarchy which over the centuries crystallised into a stratification where the place of the individual was determined by birth. Those who occupied the lowest rung of the social ladder were treated as existing beyond the periphery of civilised society, and were indeed not even "touchable". This social attitude committed those castes to severe social and economic disabilities and cultural and educational backwardness.¹⁶²

Soosai however responded to this contention with an empirical claim that he continued to be an *adi dravida* as a matter of *fact*

The court dismissed Soosai's claim on contradictory grounds – on the one hand it suggested that caste was *prima facie* a Hindu institution and on the other it also held that Soosai had not conclusively established that he retained caste on conversion. Thus though the court refused to accept Soosai's claims, it nonetheless flirted with both the contending arguments in the case. The main thrust of Soosai's empirical contention that he retained his caste despite conversion was dismissed by the court on the doctrinal grounds that caste was an exclusively Hindu institution and that conversion generally implied loss of caste. However, the court also considered the contention that Soosai could retain caste, but dismissed it on grounds that he had not advanced credible evidence to support this claim. That is, the court

¹⁶² *Ibid.*, para 8.

arrived at the conclusion that Soosai could not demonstrate that he was subjected to the same set of caste disabilities within the Christian community as a Hindu *adi dravida* was within the Hindu community. The burden of proving caste discrimination within the Christian community is a rather odd demand because it does not fully appreciate Soosai's claim. It might well have been possible to establish that he suffered caste disabilities within the Christian community.¹⁶³ However, his claim was that he suffered caste disability as an *adi dravida* and not as a Christian or a Hindu. That is, his contentions turned on the sociological fact of belonging to a caste group that was subjected to historical disadvantage.

The court was unable to appreciate Soosai's claims because its conception of caste was based on a textual or *varna* account of the phenomenon. Within this framework, Soosai's or indeed any claim about castes as social groups would be intelligible only if it were reformed or refracted through the sacral and doctrinal prism of *varna*. However, Soosai was making an empirical case for untouchability and caste discrimination by arguing that he suffered from untouchability as a matter of fact. When dealing with instances of social and historical disadvantage one would logically expect that rights granted to redress these disadvantages would be founded on empirical social science reasoning that would elaborate the problem of social disadvantage for which redress is given in terms of various rights. Strangely this methodological approach has not found much legal traction over the last sixty years especially in the case of Christians and Muslims. That is, the identification of the scheduled castes has been founded on a sacralised form of argumentation.

It could perhaps be argued that the sacral or doctrinal model of caste is a reflection of the empirical problem of caste. However, as I have suggested in chapter 1, it was extremely difficult to establish a definitive relationship between Indian textual or doctrinal traditions and Indian social practices.¹⁶⁴ Thus on the basis of the Indian textual tradition it is not possible to make the further claim that caste practice is a phenomenon restricted only to the Hindu religious traditions.

¹⁶³ For instance *Kattalai Michael Pillai And Ors. vs Right Reverend J.M. Barthe, S.J. Bishop Of Trichinopoly And Ors.* AIR 1917 Mad 431.

¹⁶⁴ I return to this question about the status of the Indian textual or doctrinal traditions in chapter 4.

On the other hand it is also possible to argue that there has been a progressive expansion of the definition of the scheduled castes to include other communities as well. Thus all Sikh untouchables were included in 1956 and Buddhists were included in 1990. Muslims and Christians continue to be barred from being identified as Scheduled Castes. However, the Ranganath Mishra Commission on minority rights has recommended that Art 341 be expanded to include Muslims and Christians as well.¹⁶⁵ Therefore it could be argued that the extension of the Scheduled Caste order to include all religious persuasions could erode the significance of the sacral account of caste. However, I want to argue that this is not likely because of the resonance that the sacral account of caste has acquired in the identification of the ‘other backward classes’, the other major beneficiary of differentiated citizenship in India.

2.3. A Sacralised Conception of Backwardness: The Case of the ‘Backward Classes’

The rights granted to the ‘other backward classes’ (OBC) are primarily contained in three constitutional articles – Art 15(4), Art 15(5) and Art 16(4). The term OBC is used to describe two groups – ‘socially and educationally backward classes of citizens’ and ‘backward class of citizens’ who are the recipients of the rights granted in Art 15(4)&(5) and in Art 16(4) respectively. These constitutional provisions permit governments to undertake measures for the advancement of OBCs. Historically these measures have primarily though not exclusively included the facilitation of quotas for the OBCs in State funded educational institutions, and in government jobs. These governmental measures have been a fertile ground for litigation, especially with regard to the administration of opportunities provided by these government measures. The principal legal challenge that these rights pose is the distribution of opportunity in government jobs and in State funded educational institutions in a manner that does not entirely derogate from the Constitution’s stated commitment to equality. As in the case of the scheduled castes I will be less concerned with the judicial treatment of the substantive rights granted to the OBCs, and

¹⁶⁵ Ranganath Misra, *Report of the National Commission for Religious and Linguistic Minorities* (New Delhi: Ministry of Minority Affairs, 2007), 153-54, http://iamc.com/files/NCRLM_Ranganath_Misra_Report.pdf.

emphasise the manner in which the OBCs are identified.

In the Constituent Assembly the discussion on the backward classes was limited to what eventually became Art 16(4), because Art 15(4) and 15(5) were subsequent amendments to the constitution. The debate on the draft constitutional article which sought to permit the government to reserve jobs for 'backward classes' of citizens was divided between members from the southern states who argued in its favour while those from the northern states were cautious about wording the provision in terms that they considered too broad. The term backward class had a technical legal meaning in parts of British India like Madras and Bombay but was less common in other provinces.¹⁶⁶ In Madras, for instance, at the time of independence there was a scheme of quotas in government services that included many castes that were considered socially above the untouchables but yet backward enough to be considered eligible for these measures.¹⁶⁷ With the constitution makers having resolved in favour of an elaborate scheme of rights for the advancement of the Scheduled Castes, the question was whether similar measures were envisaged for other groups who were considered to be backward in various parts of British India.

The debates of the Constituent Assembly and the adoption of Art 16 permitting reservation of quotas for the 'backward classes of citizens' in *government employment*, suggest that such measures were indeed intended for the OBCs. The case for quotas in *educational institutions* funded by the State was however less certain. In one of its first decisions on the question of government measures for the OBCs, the Supreme Court struck down an executive order of the Madras government that reserved available seats in government funded professional colleges through a system of quotas for the major communities in the province.¹⁶⁸ The court held that this measure granted benefits to various communities *solely* on the grounds of caste and community, which violated the constitutional commitment to

¹⁶⁶ Galanter, *Competing Equality*, 154-58.

¹⁶⁷ *Ibid.*, 157-58.

¹⁶⁸ *State of Madras v. Champakam Dorairajan* AIR 1951 SC 226

equality.¹⁶⁹ This decision however upset the government distribution of educational opportunity as it was commonly practised in many south Indian states, resulting in first constitutional amendment that added Art 15(4) to the constitution. The amendment permitted the government to undertake steps for the advancement of socially and educationally backward classes of citizens. Though Art 15(4) and 16(4) draw from the historical legacy of similar policies of the provincial governments in colonial India, the terms ‘socially and educationally backward classes’ and ‘backward classes’ were by no means settled. The content of the rights granted to these groups has also had to be read in accordance with the broader constitutional commitment to equality and has therefore required considerable judicial oversight.

The phrasing of articles Art 15(4), 15(5) and 16(4) permits the government to confer special measures or rights on ‘backward classes of citizens’ and to ‘socially and educationally backward classes of citizens’. Phrased in this broad manner the beneficiaries of these rights can potentially include any class of citizens who successfully demonstrate a case of their backwardness according to the designated government tests and standards. Constitutional practice has identified backward groups through identity based criteria like caste and religion, as well as criteria like income, education levels, and geographic location. Even so, caste has historically been, and remains, the most significant criterion to determine and establish backwardness in Indian constitutional practice. I will therefore focus on the manner in which courts have deployed caste to designate backwardness, and argue that to the extent that they rely on caste, they have found it difficult to escape a sacral conception of the Hindu religion.

Despite the centrality of caste in designating backwardness, there have always been doubts on whether and how caste was a permissible form of constitutional classification for the delivery of ameliorative government schemes under Art 15(4), 15(5) and 16(4). *M.R.Balaji*

¹⁶⁹ Especially the guarantee in Art 29(2) which states that (2) No citizen shall be denied admission into any educational institution maintained by the State or receiving aid out of State funds on grounds only of religion, race, caste, language or any of them.

v. *State of Mysore*¹⁷⁰ was an early and defining judgment of the Supreme Court that decided the extent to which caste could be legitimately deployed in government schemes reserving seats in educational institutions for certain designated communities who were identified as socially and educationally backward. Any such measure would be constrained by Art 15 (2) and Art 29(2) which prevents discrimination on (among others) grounds of caste *alone*. Thus constitutional limitations would force any classification of backwardness on grounds of caste to demonstrate that the classification in question was not founded on caste *alone*. However, the manner in which caste would determine backwardness was still an open question that required judicial consideration.

In the Balaji case the court held that caste could be an indicator of social backwardness, but could not be the sole determining consideration. Caste could not be the sole determining factor of backwardness because

... if the caste of the group of citizens was made the sole basis for determining the social backwardness of the said group, that test would inevitably break down in relation to many sections of Indian society which do not recognise castes *in the conventional sense known to Hindu society*. How is one going to decide whether Muslims, Christians or Jains, or even Lingayats are socially backward or not? The test of castes would be inapplicable to those groups, but that would hardly justify the exclusion of these groups in toto from the operation of Art. 15(4). ... That is why we think that though castes in relation to Hindus may be a relevant factor to consider in determining the social backwardness of groups or classes of citizens, it cannot be made the sole or the dominant test in that behalf.(emphasis added)¹⁷¹

This intriguing statement of the court seems to contain two conceptions of a backward class. When referring to castes in ‘conventional sense known to Hindu society’ the court was in all likelihood referring to castes as sacral Hindu entities. On the other hand the court also seems to suggest that a sacral conception of caste would not apply to Christians, Muslims, Jains and Lingayats in whose case backwardness would have to be established by

¹⁷⁰ AIR 1963 SC 649

¹⁷¹ Ibid

objective criteria like income, occupation and so on.

Referring to this ambiguity in the courts' sociology of backwardness Marc Galanter suggests that the Balaji decision has not been able to make clear the distinction between caste as a *unit* to measure backwardness as opposed to *caste rank* itself as a measure of backwardness.¹⁷² He claims this lack of clarity arises repeatedly in subsequent judicial decisions on the role of caste in the determination of the backward classes. In this section I elaborate on the usefulness of this distinction drawn by Galanter to demonstrate the manner in which a sacral conception of the backwardness of a caste intersects with a more socio-scientific determination of the backwardness of castes.

In one of the first decisions after the Balaji case, the Supreme Court in *Chitrallekha v. State of Mysore* held that the former case did not oblige it to consider caste as a necessary ingredient for the determination of backwardness. Responding to a government scheme which marked backwardness on the grounds of income and occupation but not caste, the court clarified that

... caste is only a relevant circumstance in ascertaining the backwardness of a class and there is nothing in the judgment of this Court which precludes the authority concerned from determining the social backwardness of a group of citizens if it can do so without reference to caste. While this court has not excluded caste from ascertaining the backwardness of a class of citizens, it has not made it one of the compelling circumstances affording a basis for the ascertainment of backwardness of a class. To put it differently, the authority concerned may take caste into consideration in ascertaining the backwardness of a group of persons; but, if it does not, its order will not be bad on that account ...¹⁷³

Justice Suba Rao's decision in this case suggests that castes were intended to have a limited role in the determination of backward classes. He also went on to add that the over-reliance on caste to determine backwardness would result in the frustration of constitutional

¹⁷² Galanter, *Competing Equality*, 191.

¹⁷³ AIR 1964 SC 1823, 1833.

objectives.

However, in other cases the court has also held that Caste can be the sole ground to determine held to be a backward class. Thus in *Rajendran v. State of Tamil Nadu* the Supreme Court held that

...if the reservation in question had been based only on caste and had not taken into account the social and educational backwardness of the castes in question, it would be violative of Article 15 (1). But it must not be forgotten that a caste is also a class of citizens and if the caste as a whole is socially and educationally backward, reservation can be made in favor of such a caste on the ground that it is a socially and educationally backward class within the meaning of Article 15(4).¹⁷⁴

In the *Rajendran* case the court clearly suggests that caste as such could be a unit whose backwardness was to be determined. Across these positions the court signals that the identification of backwardness could be determined on the basis of caste as long as caste was not the sole criterion for the determination of backwardness. But how was the *backwardness* of a caste to be identified and established?

Identification of backwardness has acquired a considerable degree of sophistication since the Balaji case in the early 1960s. As a result of demands made by the courts that backwardness cannot be determined solely on the grounds of caste, various State commissions as well as two centrally appointed backward classes commissions¹⁷⁵ have probed and identified the status of the backward classes. Of the two backward classes commissions established by the central government, the first Commission's report was rejected by the government. However the second Commission's report, popularly called the

¹⁷⁴ AIR 1968 S.C 1012, 1014-15.

¹⁷⁵ The backward classes commissions are appointed under Art 340. Unlike the commissions for scheduled castes and tribes, this is not a standing body and only reports to the President on the status of the socially and educationally backward classes. From 1993 onwards a significant part of these functions have also been vested on the National Commission for Backward Classes as instituted by the National Commission for Backward Classes Act, 1993. See also Galanter, *Competing Equality*, 178-86.

Mandal report after its chairperson, was accepted by the central government in 1990. Accordingly the government sought to implement aspects of the report and issued an official memorandum reserving 27 percent of the vacancies in central government services and public sector companies and undertakings for the socially and educationally backward classes. This notification was subjected to a constitutional challenge in the *Indra Sawhney*¹⁷⁶ judgment which is currently the definitive decision on the manner in which backward classes are to be identified.

The *Indra Sawhney* decision was decided by a nine judge constitution bench of the Indian Supreme Court, and consisted of five separate decisions. Here I only focus on the manner in which the court identifies backwardness. In particular I draw on the majority decision of Justice Jeevan Reddy, and the manner in which he ties caste to the identification of backwardness. One of the objections raised against the Mandal commission report, on which the government memorandum reserving positions was based, was that it used caste alone as a measure of determining backwardness. Responding to this charge Justice Reddy's judgment begins with a consideration of the significance of caste for the measurement of backwardness in the Indian constitutional scheme.

According to Justice Reddy the challenge caste posed to the egalitarian ethos of the Indian constitution was its role in the Hindu religion which was

... not known for its egalitarian ethos. It divided its adherents into four watertight compartments. Those outside this four tier system (chaturvarna) were the outcastes (Panchamas), the lowliest. They did not even believe all the caste system – ugly as its face was. The fourth, shudras, were no better, though certainly better than the Panchamas. The lowliness attached to them (Shudras and Panchamas) by virtue of their birth in these castes, unconnected with their deeds. Poverty there has been ... in every country. But none had the misfortune of having this social division – or as some call it, degradation – super-imposed on poverty. Poverty, low social status in Hindu caste system and the lowly occupation constituted – and do still constitute

¹⁷⁶ MANU/SC/0104/1993

– a vicious circle.¹⁷⁷

That is, caste is treated as a backward class within a sacralised *varna* based conception of the Hindu religion. Justice Reddy paints this *varna* based organisation of Indian society as the “stark reality notwithstanding all our protestations and abhorrence and all attempts at weeding out this phenomenon”.¹⁷⁸ Therefore the sacral order of Hindu society is the sociology that Justice Reddy employs to justify the inclusion of castes as a valid form of identifying and classifying the backward classes in Art 15(4) and 16(4).

However, the line of cases from Balaji has also held that a caste by itself would not qualify to be a constitutionally recognised backward class unless it was also established that the caste concerned was socially and educationally backward. This identification however proceeds on almost entirely non sacral lines. Thus, as Justice Reddy suggests, once a caste has been identified as potentially backward then the authority concerned with the determination of backwardness “can take caste ‘A’, apply the criteria of backwardness evolved by it to that caste and determine whether it qualifies as a backward class or not. If it does qualify, what emerges is a backward class, for the purposes of Clause (4) of Article 16.”¹⁷⁹ That is, castes would be seen primarily as sectarian or associational entities and their backwardness measured by a set of largely objective criteria developed for the purpose of running a reservation program.¹⁸⁰

The interesting aspect of Justice Reddy’s decision is that his justification for the inclusion of caste as a backward class is tied so thinly to the actual identification of backward classes in Art 15(4) and 16(4). That is, the measurement of the backwardness of a caste as a unit is

¹⁷⁷ Ibid., para 2.

¹⁷⁸ Ibid., para 82.

¹⁷⁹ Ibid., para 83.

¹⁸⁰ In an interesting essay on the inadequate attention devoted to the socio-scientific determination of backwardness, Palshikar notes that one of the remarkable aspects of the Mandal framework and of this judgment is its commitment to the determination of backwardness through rigorous socio-scientific method. Suhas Palshikar, “Challenges before the Reservation Discourse,” *Economic and Political Weekly* 43, no. 9 (May 26, 2008): 8-11.

a self standing and self justifying form of identifying backwardness making unclear the actual role that the *varna* account of caste plays in the determination of backwardness. In other words the *varna* account of caste seems incidental to the actual determination of the backwardness of particular caste groups. Nonetheless as Galanter has noted, different courts from the Balaji decision onwards have repeatedly invoked the role of caste in determining backwardness in this dual manner.

I do not have an explanation for the gratuitous invocation of a *varna* conception of caste, except to note that it forms the background to what is otherwise a socio-scientifically driven determination of backwardness. In Reddy J's decision it is perhaps possible to argue that the invocation of a reformed account of the Hindu religion was not really part of the ratio of the decision. Even if this were the case, all the other judges in *Indra Sawhney* and indeed many other decisions of the Supreme Court also invoke a reformed conception of the Hindu religion when identifying the OBCs. Therefore it is of significance to note the invocation and perceived significance of this reformed or *varna* account of caste even though it seems to have little obvious relevance to the actual measurement of the backwardness of a caste in the Indian constitutional scheme. However the divisibility of these accounts speaks to the challenge of minority rights as it was framed by the constituent assembly – that is, how to rid the body politic of the poison of communal politics. Framing this problem more evocatively in a slightly different context Pratap Mehta comments that “it would be a tragedy if modern India became a project for perpetuating caste than for transcending it.”¹⁸¹ In this section I have tried to suggest that, though divisible from more socio-scientific ways of determining the backwardness of castes, the *varna* conception of caste plays an important role in the perpetuation of caste in Indian constitutional practice.

2.4. Can a Hindu be in a Minority? Adjudicating Minority Claims in the Indian Constitution

The final group granted rights by the Indian constitution's system of differentiated rights

¹⁸¹ Pratap Bhanu Mehta, “Affirmation without Reservation,” *Economic and Political Weekly* 39, no. 27 (July 3, 2004): 2954. See also Satish Deshpande and Yogendra Yadav, “Redesigning Affirmative Action,” *Economic and Political Weekly* 41, no. 24 (June 17, 2006): 2420-24.

are groups designated minorities by Art 29 and Art 30. Both these articles are part of the Fundamental Rights chapter and grant what the constitution terms ‘Cultural and Educational Rights.’ Of these, Art. 29(1) grants *any class of citizens* the right to protect their language, script or culture and Art. 29(2) prohibits discrimination in admission to educational institutions receiving State funds on grounds ‘only of religion, race, caste, language or any of them’. Art 30 grants *minorities* based on religion or language the rights to establish and administer educational institutions of their choice¹⁸² and forbids the State from discriminating against minority educational institutions when making grants in aid.

Most judicial decisions dealing with various aspects of Art 29 and 30 have dealt with the extent to which the State can regulate the functioning of educational institutions run by various religious and linguistic minorities. Specifically these decisions have dealt with the extent to which Art 29 (1) and Art 29 (2) limit the right granted to minorities in Art 30(1) to establish and administer their educational institutions. Commenting on these decisions, two senior Indian lawyers have remarked that the Supreme Court was remarkably solicitous of the rights of minorities to control their institutions in the early years of the Indian republic but over the years have increasingly permitted greater State regulation of these institutions.¹⁸³ However my argument is less concerned with the manner in which courts have administered minority rights in educational institutions as with the manner in which courts have identified the minorities, especially religious minorities, who are eligible to avail themselves of the right granted in Articles 29 & 30.¹⁸⁴ As in the previous section, I claim that the intelligibility of the term religious minority in the Indian constitution is tied to a sacral conception of the Hindu religion.

¹⁸² Art 30 (1). Strictly speaking minority rights are granted only by Art 30. However as this section will show the rights in Art 29 and 30 are closely related and hence are considered together in this sections discussion of minority rights.

¹⁸³ Rajeev Dhavan and Fali. S Nariman, “The Supreme Court and Group Life: Religious Freedom, Minority Groups and Disadvantaged Communities,” in *Supreme but Not Infallible: Essays in Honour of the Supreme Court of India*, ed. B. N Kirpal et al. (New Delhi: Oxford University Press, 2000), 264-70.

¹⁸⁴ The right in Art 29 is granted to any section of Indian citizens. The right in Art 30 is granted specifically to minorities.

The primary challenge in identifying a minority is posed by the absence of a constitutional definition for the term. Discussing Article 29 in the Constituent Assembly B. R. Ambedkar justified the absence of the word ‘minority’ in the phrasing of that Article in the following manner:

*It will be noted that the term minority was used therein not in the technical sense of the word ‘minority’ as we have been accustomed to use it for the purpose of certain political safeguards, such as representation in the Legislature, representation in the service and so on. The word is used not merely to indicate the minority in the technical sense of the word, it is also used to cover minorities which are not minorities in the technical sense, but which are nonetheless minorities in the cultural and linguistic sense. That is the reason why we dropped the word “minority” because we felt that the word might be interpreted in the narrow sense of the term when the intention of this House...was to use the word ‘Minority’ in a much wider sense so as to give cultural protection to those who were technically not minorities but minorities nonetheless. (emphasis added)*¹⁸⁵

According to him the right granted in Art 29(1) was to be construed broadly to include all kinds of contingent minorities. An instance he discussed was that of a linguistic group who moved from one province in which they were a majority to another where they were a minority. By contrast the right in Art 30 is explicitly granted to ‘minorities’, presumably implying that Ambedkar viewed the right in Art 30 to vest in minorities identified by what he called the ‘technical sense’ of the word.’

Ambedkar suggests that minority in the technical sense of the word meant those groups who were identified as minorities for purposes of providing representation in the legislatures and the government services. As I have suggested in Section 2.1 of this chapter, this included those groups who were designated minorities by the colonial State and eligible to representation in political institutions according to their population.

¹⁸⁵ *Constituent Assembly debates*, 7:922-23.

Discussing this scheme of political representation under the ‘communal question’, the Nehru Report of 1928¹⁸⁶ cast the problem of political representation for communities in the following manner:

The communal problem in India is essentially the Hindu-Muslim problem. Other communities have however latterly taken up an aggressive attitude and have demanded special rights and privileges. The Sikhs in the Punjab are an important and well knit community which cannot be ignored. Amongst the Hindus themselves there is occasional friction especially in the south, between non-Brahmans and Brahmans. But essentially the problem is how to adjust the differences between Hindus and Muslims.¹⁸⁷

Thus the technical conception of minorities involves the identification of those minority communities who could be distinguished from an integrated conception of a Hindu majority. In this section I argue that an integrated and by implication sacralised conception of the Hindu religion forms the background against which religious minorities are determined in Art 30.

In administering the rights of minorities Indian courts have not emphasised the development of a conceptual account of the term minority. Instead their concerns have revolved around developing techniques by which education as a public good could best be distributed while protecting the rights of minorities to establish and administer educational institutions of their choice.¹⁸⁸ Thus from the earliest decision on rights granted in Art 30, courts have focussed on defining an administratively stable conception of the term which best protects the rights of minorities to run educational institutions. Thus Indian courts have been concerned about questions like whether the term minority in Art 30 should be

¹⁸⁶ The Nehru Report was a response to the Simon Commission which was sent to India by the British government to explore the increased constitutional devolution of powers to Indian representatives. The commission however did not include any Indian members to which the Indian National Congress and the Muslim League responded through a committee led by Motilal Nehru.

¹⁸⁷ *The Nehru Report*, 27.

¹⁸⁸ Politically this is a highly charged issue because many minority institutions are quite substantially funded by the State.

determined at the level of the State or the union government. Courts have generally answered this question by holding that a minority is a group that comprises less than fifty percent of the population of a regional province or State.¹⁸⁹ This geographical emphasis is perhaps also explained by the nature of the right granted in Art 30. That is, until 1976 the Union government did not have competence to legislate on matters dealing with education though the passage of the 42nd amendment to the Constitution altered this position by making education a concurrent subject.

In *T.M.A.Pai Foundation & Ors v. State of Karnataka & Ors*¹⁹⁰, currently the authoritative decision on the scope of Art 30, the court held that the 42nd amendment would make no difference to the manner in which a minority would be identified. Both Justices Kirpal and Khare argued that the conception of minority could not change depending on the government against whom a right was being claimed. Justice Khare also pointed out if minority were to be decided nationally then many linguistic minorities in India's linguistic States could claim to be minorities in their own States where they were in a majority, which he thought was against the design of the constitution makers. Ruma Pal J. dissented from this position by holding that constitutional rights arose in the context in which they were claimed. Thus according to her minorities would be decided nationally for rights that were to be claimed against the national government and at the level of a State for rights that were to be claimed against a State government. None of the judges however dealt with the minority rights as a conceptual problem, especially the specific conceptual problem for which the Indian constitution granted rights to minorities.

By suggesting that minorities are groups who comprise less than 50 per cent of the population of a state, it seems as if courts have taken a particularly flexible pragmatic position regarding the designation of minorities. That is, they preferred to determine religious and linguistic minorities depending on the demands of contingent circumstances.

¹⁸⁹ For example *In Re: The Kerala Education Bill* 1959 1 SCR 995; *Dipendra Nath v. State of Bihar* AIR 1963 Pat 54; *K.O. Varkey v. State of Kerala* AIR 1969 Ker 191; *D. A. V. College v. State Of Punjab* 1971 AIR 1737.

¹⁹⁰ MANU/SC/0905/2002

However, even if one were to accept that this was the suggestion of Indian court decisions on this issue, it is not possible to identify Hindu caste groups, like the Saraswath Brahmins discussed in the previous chapter, as religious minorities even though they may constitute less than 50 percent of the population of a State and can be perhaps be thought of as a sectarian caste group. I argue that this is so because caste groups are understood to be part of a sacral conception of a Hindu majority and it is against this conception of a majority community that the constitutional conception of minority assumes intelligibility. I support my claim about the Indian constitutional conception of minority rights by drawing on a Supreme Court judgment that decided this issue in relation to the identification of minorities in the Minorities Commission Act 1992.

In *Bal Patil & Anr. v. Union Of India*,¹⁹¹ the Supreme Court dismissed the petition of the Jain community challenging the Minorities Commission Act 1992. Providing *inter alia* for the welfare of Indian minorities, the minorities statute defines minorities as communities duly notified by the central government. Accordingly the Muslim, Sikhs, Christians, Parsis and Buddhists were notified as national minorities. The Jains who were left out of this list challenged this notification and petitioned the court to direct the government that they also be included in this list of minorities.

The court responded to the Jain petition by arguing that the Jaina tradition was born of the larger Hindu religion. According to Justice Dharmadhikari permitting the Jaina religion to be recognised as a minority was similar to construing Hindu castes as minorities, which he argued would be fatal for national unity. It is quite likely that Justice Dharmadhikari was wrong in considering the Jains to be Hindus. However, his observations on caste reflect the significance of an integrated doctrinal conception of the Hindu religion for the identification of a religious minority. Thus, the court's own definition of a minority as a social group (including castes) constituting less than 50 percent of the population of a State could not apply to Hindu sub groups because it would destroy the very intelligibility of a religious minority in the constitutional scheme. That is, the term minority acquires intelligibility only when it is set against an integrated and (by implication) foundationalist

¹⁹¹ MANU/SC/0472/2005

conception of the Hindu religion.

The Bal Patil case is not an isolated instance and the Supreme Court has dealt with the question of religious minorities similarly in many other cases.¹⁹² In these cases the constitutional conception of a religious minority assumes intelligibility only against an integrated and doctrinal conception of the Hindu religion.

2.5. Conclusion

In this chapter I have demonstrated the manner in which the practice of Indian equality jurisprudence has 'normalised' the significance of a sacralised conception of the Hindu religion. That is, a doctrinal conception of the Hindu religion has embedded itself in Indian equality jurisprudence and especially in identifying the beneficiaries of the rights the constitution grants to the scheduled castes, other backward classes and minorities. This in turn has had important implications for the affirmative action programs envisioned by the Indian Constitution. Any program for affirmative action or compensatory discrimination is critically dependent on socio-scientific data that validates a particular course of ameliorative action. However, I have argued that the constitutional groups to whom the constitution grants ameliorative rights are tied either directly or indirectly to a sacral conception of the Hindu religion, which is only thinly and unsatisfactorily tied to the underlying sociological problems for which the scheduled castes, the other backward classes, and the minorities are granted constitutional rights.

Considered along with the previous chapter, the present chapter has sought to demonstrate the manner in which a doctrinal conception of the Hindu religion semantically transforms traditional Indian religious identities and sacralises them as they are drawn into the constitutional practice of equality jurisprudence. That is, these chapters have demonstrated

¹⁹² *Bramchari Sidheswar Bhai v. State Of West Bengal* 1995 AIR 2089; *Commissioner Of Police & Ors v. Acharya J. Avadhuta And Anr* MANU/SC/0218/2004; *Sastri Yagnapurshdasji v. Muldas Bhudardas Vaishya* AIR 1966 SC 1119. the court has been reluctant to divide the Hindu religion into its constituent castes and groups and consider them distinct minority religious sect.

the manner in which the sacralising disposition of the Indian constitutional framework has screened off Indian social experience from Indian institutional problems. In the next chapter the thesis begins the task of explaining this constitutional disposition by situating the sacralising hypothesis in the context of the scholarship on the Indian secular State.

3. Defenders and Critics of Indian Secularism

The state of the secular State has been a matter of considerable concern in contemporary India, especially because it is viewed by many as a bulwark against the forces of tradition and obscurantism. In tangible terms this means that the secular State is viewed as a critical resource, perhaps the only one, when facing problems like mass violence, one of the most troubling challenges of government in contemporary India.¹⁹³ There has therefore been considerable scholarly reflection on the conceptual and practical challenges faced by the secular State in India, especially its ability to defend pluralism in the face of sectarian challenges. Against this background the present chapter situates the hypothesis developed in the previous two chapters in the context of the considerable literature debating the nature and significance of the Indian secular State.

It must be emphasised that the present chapter is not merely a literature review but an attempt to situate my hypothesis on the doctrinalisation of religious traditions and the sacralisation of constitutional practice produced by Indian secularism amongst the scholarly reflection on the subject. I do so by outlining some of the broad strands of scholarly opinion on the character of the secular State in India and advance reasons for pursuing some of these scholarly approaches as potential explanations for doctrinalising and sacralising disposition of the Indian secular State while rejecting others as inappropriate and unsuited for the task.

Since the literature in the field is unmanageably large I will re-describe the larger field of scholarly opinion into four strands. These are (1) Normative Conceptions of the secular State; (2) Exceptionalist conceptions of the secular State or arguments that assert that the secular State in India is an exception to the liberal European conceptions of the secular State; (3) Descriptivist conceptions of the secular State which emphasise the politics and practices of government implicit in the commitment to the secular State; and, finally (4)

¹⁹³ Rajeev Bhargava, ed., *Secularism and its critics*, Themes in politics series (Delhi: Oxford University Press, 1999), 1.

Post colonial conceptions and critiques of the secular State. As an analytical re-description cast over existing literature the strands of scholarship that I outline are not strictly self contained and could shade into each other. Nonetheless these strands identify key positions which all have a bearing on the understanding of the practice of secular constitutionalism in the Indian constitution.

3.1. Normative defences of the Indian Secular State

As I have already outlined in the introductory chapter liberal secular States have generally been identified in terms of normative goals or propositions of the following type – States *ought* to promote religious liberty, States *ought* to treat citizens equally irrespective of religious affiliation, and States *ought* to be neutral in their dealing with affairs of religion. This is not to say that States follow these norms as a matter of fact but that they ought to be bound by them as far as possible, and it has been the task of Constitutional government to ensure that States are organised on the basis of these norms. To these norms the Indian Constitution as I have shown in chapter 1 adds another norm – Indian society *ought* to be reformed if it is to be secular. The strands of argument that I term a ‘normative’ defence of the secular State fully accept these normative goals and are either explicit or implicit defences of these goals. In this section, I will argue that normative defences of the Indian secular State obstruct the study and comprehension of the constitutional practices that make up the Indian secular State.¹⁹⁴

There is a considerable and large literature defending the Indian secular State on normative grounds. Of these I will focus in this section on the essays of Rajeev Bhargava,¹⁹⁵ and Gary

¹⁹⁴ Martin Loughlin makes a similar point when he says that constitutional theory “does not involve an inquiry into ideal forms, since otherwise it would be completely absorbed into political philosophy. If constitutional theory is to form a distinct inquiry, it must aim to identify the character of actually existing constitutional arrangements.” M. Loughlin, “Constitutional Theory: A 25th Anniversary Essay,” *Oxford Journal of Legal Studies* 25, no. 2 (2005): 186.

¹⁹⁵ Bhargava, *Secularism and its critics*. Bhargava’s edited collection is a defining contribution to the state of the debate on Indian secularism. For my discussion in this section I draw in particular from his essays in this volume.

Jacobsohn's detailed comparative analysis of constitutional secularism in India.¹⁹⁶ Though I also discuss other texts, I will deploy these two authors as my principal interlocutors to demonstrate the manner in which the normative defence of the Indian secular State obstructs the comprehension, analysis and evaluation of Indian constitutional practice.

3.1.1. Defending Secular Norms: A social science perspective on a secular India

To illustrate the problem with the normative defence of the secular State I start by considering Rajeev Bhargava's account of the secular State. This is particularly interesting because he claims to have drawn up a theoretical model of the secular State that is committed to a separation of religion from politics but is stripped of any particular normative ideal. His essay seeks to defend secularism from three kinds of objections that Indian scholars have mounted against it. First, that the secular State is Western and Christian and therefore unsuited to Indian conditions. Second, that the secular State is hostile to religious persons. Third, that the claims of the secular State to be neutral are overstated and that it in fact favours the unbeliever or minority communities. Responding to these objections Bhargava defends secularism and the secular State from its critics.

In Bhargava's account, the task of the secular State is the separation of religion from politics. Assuming the centrality of the separation of religion from politics to the task of building a secular State, he states various grounds on which this separation could be justified. These include - (a) separation fosters autonomy, (b) it fosters equality, (c) it prevents the concentration of power, fosters democracy and prevents religious and political despotism, (d) separation is a necessity that results from instrumental rationality because religion as a matter of deepest conviction can never be transformed by coercive methods, (e) finally, that separation is necessary because it is the only way in which competing ultimate ideals are removed from politics to prevent an inevitable clash of these ideals which in turn will ensure a minimally decent existence in a given society. The first three reasons for separation are perfectionist justifications of the secular State producing what

¹⁹⁶ Gary J. Jacobsohn, *The wheel of law: India's secularism in comparative constitutional context* (New Delhi: Oxford University Press, 2003).

Bhargava calls ethical secularisms, while the latter two reasons are what Bhargava calls political justifications or arguments for political secularism. The term ethical secularism derives from the attempt to seek “separation of religion from politics by virtue of the contribution it makes to the realisation of some ultimate ideal.” Political secularism on the other hand is not as concerned with ultimate values but is interested in the separation of religion from politics because it holds that this makes for a more liveable polity.¹⁹⁷

The different kinds of justification for the separation of religion from politics lead to his conception of the kinds of separation of religion from politics. Bhargava posits two broad kinds of separation. First, a separation that is based on the exclusion of religion from politics and second, a separation grounded on an attempt to fashion a political neutrality or an attempt to assign religion and politics to their appropriate spheres. This analytical exercise eventually permits Bhargava to posit four types of secularism: (a) Ethical Secularism that excludes all religions from the affairs of the State; (b) Ethical Secularism which maintains principled distance from religion; (c) Political Secularism that excludes all religion from affairs of State; (d) Political Secularism that demands that the State maintain a principled distance from all religions.¹⁹⁸ It is with this typology that he proceeds to address the various objections raised against the secular State.

Bhargava claims that it is only a political secularism which demands that the State maintains a principled distance from all religions is capable of answering all the major objections that Indian scholars have raised against the secular State. These objections are that the secular State discriminates against religious people, that it is Western and therefore inapplicable in India, and that it favours minorities and non religious people. However, by unravelling Bhargava’s response to the charge that the secular State is hostile to religious persons, I argue that his political conception of the secular State can be sustained only with an impoverished conception of religion. This in turn substantially weakens his claim that a political conception of the secular State can be defended independent of any ultimate ideals

¹⁹⁷ Rajeev Bhargava, ed., “What is Secularism For?,” in *Secularism and its critics*, Themes in politics series (Delhi: Oxford University Press, 1999), 487-92, 94.

¹⁹⁸ *Ibid.*, 494.

or norms.

Responding to the charge that a secular State is biased against persons holding deep religious convictions, he agrees that ethical secularism will indeed favour a normative public value over those of religious people and especially so in the case of an ethical secularism that is committed to the exclusion of religion from politics. However, he maintains that secularism is compatible with religious convictions because one can still hold on to a political secularism which is only committed to the exclusion of ultimate values from the public sphere.

Recognising that secularism makes claims on identity, he argues that political secularism has the prospect of gaining the allegiance of persons with religious convictions because

...excessive demands are not made on any group, and such modifications as are required do not threaten its identity or existence. Ethical secularism requires that the believer give up everything of significance. Political secularism demands only that everyone – believer, non believer – gives up a little bit of what is of exclusive importance in order to sustain that which is generally valuable. If everyone is assured that politics will not be invaded by any one particular *ultimate ideal* then all are likely to restrict the scope of their respective ideals.¹⁹⁹ (emphasis added)

Political secularism therefore turns on protection both of and from ‘ultimate ideals.’ As he elaborates:

At no point in the history of humankind has any society existed with one and only one set of ultimate ideals. Moreover, many of these ultimate ideals or particular formulations of these have conflicted with one another. In such times, humanity has either got caught in an escalating spiral of violence and cruelty or come to the realisation that even ultimate ideals need to be delimited. In short it has recurrently stumbled upon something resembling political secularism. Political secularism must then be seen as part of the family of views that arises in response to a fundamental human predicament. It is neither purely Christian nor peculiarly Western. *It grows*

¹⁹⁹ Ibid., 496.

*wherever there is a persistent clash of ultimate ideals perceived to be incompatible.*²⁰⁰ (emphasis added)

However, to reduce political secularism to the response to the persistent clash of incompatible ultimate ideals, he flattens out his conception of the secular State into one committed to resolving any persisting law and order problem.²⁰¹ However, the more significant aspect of this argument for secularism is its conception of religion as an ultimate ideal.

It is entirely unclear what Bhargava considers an ultimate ideal. To the extent that he elaborates the term, it is presented as a dogmatic belief that is likely to produce conflict when it is met with other similar ultimate ideals or beliefs. However it is not clear on what basis this conception of an ultimate ideal is presented as a general feature of all religions. For instance, in the light of my discussion in the previous two chapters it is just as plausible to argue that Indian religious traditions are marked by an indifference to ultimate ideals, and that foundational doctrines are irrelevant to Indian religious tradition. However, doing so would undercut the foundation of Bhargava's conception of the secular State as a form of government that separates religion from politics. That is, if religion is indifferent to the question of ultimate ideals then the purpose of separating it from politics loses significance. As separation is at the core of Bhargava's account of the secular State, it would be untenable to admit Indian religious traditions into his theoretical framework. Consequently Bhargava's account of the secular State will be blind to the doctrinalisation of Indian traditions demanded by Indian constitutional practice.

Bhargava's model is one that has been derived from first principles assuming that the problem of the secular State is one of separating religion from politics. However, the model of political secularism with which he has ended up has resolved into a frame of government

²⁰⁰ Ibid., 497-98.

²⁰¹ Bhargava does later on in the essay modify this excessively 'law and order' based conception of secularism but these additions do little to the ontological presumptions that he makes and which is my principle concern.

devoted to the management of ‘ultimate values.’ Bhargava has of course claimed that his model is not tied to any normative value; however, the management of ultimate values is clearly the liberal problem that I have outlined in the introductory chapter. That is, his model is not entirely free from commitments to normative values. Therefore his model cannot escape some form of commitment to the defence of liberal values like liberty and equality.²⁰² More importantly, by resolving the problem of the secular State as the scheme to manage ultimate values, Bhargava is blind to the constitutional process that converts Indian religious traditions into ‘ultimate values’.²⁰³ I elaborate on this blindness to constitutional practice through an essay by Amartya Sen.

Having defined the secular State as an institutional form that is charged with the task of symmetrical treatment of all religious traditions in a polity Sen considers various objections raised against the secular State. One of these is what Sen calls the critique of prior identities. That is, the critique of the position that religious identities, which in most cases exist prior to the nation State in countries like India, ought to determine the character of politics. Interrogating this position and making a case that the prior identities ought not to matter to the shape of secular politics, Sen is able to show that identities like Hinduism are remarkably diverse and that it is their politicisation, often by non-believing modern nationalists, that go on to make sectarian political claims.²⁰⁴

However, while discussing the impact of modern citizen identities he is almost blind to the

²⁰² To get a sense of the extent to which Bhargava’s account relies on liberal values See Rajeev Bhargava, “India’s Secular Constitution,” in *India’s living constitution: ideas, practices, controversies*, ed. Zoya Hasan, Eswaran Sridharan, and R. Sudarshan (Permanent Black, 2002), 105-33. See also Rajeev Bhargava, *The Promise of India’s Secular Democracy* (Oxford University Press, 2010).

²⁰³ Bhargava does discuss the reforming provisions of the Indian Constitution. However, as his primary concern is to establish that Indian constitutional practice is of a piece with the Secular State he does not pay much attention to what the practice of the secular State actually does. I therefore consider this issue through the work of the Gary Jacobsohn which I describe in section 3.1.2

²⁰⁴ Amartya Sen, “Secularism and its Discontents,” in *Secularism and its critics*, ed. Rajeev Bhargava (Delhi: Oxford University Press, 1999), 468-69.

predatory effects of the modern nation State form on religious and traditional identities.

Thus responding to arguments about the violence of modernity he says that

... the nation state is under great suspicion these days as a constant perpetrator of violence, and indeed the state does manage to do many violent things. What is not clear is why taking a symmetric attitude to different communities would encourage or add to, such state violence. To invoke some concepts much favoured in contemporary theory, it is not, of course, difficult to conceive that a state might 'homogenise' to 'hegemonise', but it seems, at best, intensely abstract to see this happening whenever the state stops favouring one religious community over another (as secularism requires).²⁰⁵

It is perhaps true that if States act symmetrically between religions, the problem of the State's 'violent' influence on religious and political identities can be neutralised. However, Sen does not ask whether this is in *fact* how States have acted, or whether the normative demands and orientation of secular States permit them to act in this manner.²⁰⁶

By dismissing the 'homogenising' and 'hegemonising' effects of modern nationalist-citizenship as 'intensely abstract', Sen is unable to see that the framework of the secular State is deeply implicated in the process of shaping contemporary religious identities. It is this blindness to the practices of secular constitutionalism that allows Sen to make this blithe assertion about the secular State and it is my case that this blindness is tied to the normative approach to the secular State. That is, the normative defence of the secular State is structurally unable to make explicit the sociological and practical assumptions implicit in a commitment to secular constitutionalism. However, neither Sen nor Bhargava directly address the constitutional practices of the secular State as does Gary Jacobsohn whose book on the subject I address in the next section.

²⁰⁵ Ibid., 479.

²⁰⁶ For instance Balagangadhara and Deroover actually argue that the secular State is not able to be symmetric in its treatment of Semitic and non Semitic religions. Balagangadhara and Roover, "The Secular State and Religious Conflict."

3.1.2. Normativity in the Legal debates on Indian Secularism

Gary Jacobsohn's book on the secularism in India is a good example of the normative defence of Indian secularism made through a detailed discussion of Indian Constitutional practice. Like Bhargava, Jacobsohn's work is particularly interesting because he claims he is advancing a socially and politically located explanation of the secular State and explicitly denies that his account is a normative defence of the Indian secular State. Jacobsohn begins his inquiry with the assumption that constitutions vary depending on the contours of the body politic, and therefore that secular States are also dependent on the actual conditions of a polity. Consequently Jacobsohn insists that the student of law and religion should be sensitive to the facts on the ground and the "manner in which religious life is experienced within any given society and how this experience affects the achievement of historically determined constitutional ends."²⁰⁷

Jacobsohn's attention to context leads him to posit three types of the secular State. Each of these types is determined by the extent to which religion is constitutive of the society under consideration and the extent to which the State is associated with religion. As exemplars of his three types of the secular State, the United States of America stands for an assimilative secularism in which the State is envisioned to be strictly impartial in an assimilating or uniform political culture, in which religion is thinly constituted. India stands for an ameliorative secular model where the State tries to be impartial in a society where religion constitutes social life very thickly. Thus as a result of the deep social imprint of religion in India, the State was of necessity vested with the task of undertaking a reforming role in relation to religion. Lastly Israel stands for a visionary secularism where religion defines the conception of the Israeli nation and consequently of the Israeli State though its social presence is not definitive and is only of peripheral significance.

My concern in this chapter does not extend to the comparative element and typology of secular States that Jacobsohn outlines. Instead I am primarily concerned with the manner in which he casts the ameliorative model through which the Indian quest for a secular State is

²⁰⁷ Jacobsohn, *The wheel of law: India's secularism in comparative constitutional context*, 26.

shaped. Significantly, he claims that secularisation, by which he means a separation of religion from politics, cannot form the model by which secular States are assessed and studied. Instead he argues that

(t)he great challenge in pursuing the elusive goal of Indian secularism is bound up in what is distinctive about the Indian case, namely that *critical elements of the social structure are inextricably entwined with religion in a way that renders the possibilities for any meaningful social reform unimaginable without the direct intervention of the State in the spiritual domain.*²⁰⁸ (emphasis added)

As he summarises his work “the project of defending religious liberty and secular aspiration in a *deeply religious society* – India – is the subject of this book.” (emphasis added)²⁰⁹ Jacobsohn recognises that there is something distinct about Indian religious traditions as I have pointed out in chapter 1.²¹⁰ However, his account of the secular State presents the process of the reform of Indian religious traditions normatively desirable.

Jacobsohn is therefore acutely aware of the reforming disposition of the Indian constitution. However, he responds to it by recasting reform as necessitated by the ethical deficiencies in the Indian social structure. As he phrases it

I use the term ameliorative secularism to describe a model of the secular constitution as a conceptual projection of the multifaceted character of Indian nationhood. It is a term broad enough to encompass the layered meanings of Indian nationalism, including both its commitment to social reform and its mooring in rival and contentious religious/cultural traditions. Thus *the constitution seeks an amelioration of the social conditions of people long burdened by the inequities of religiously based hierarchies*, but also embodies a vision of intergroup comity

²⁰⁸ Ibid., 8.

²⁰⁹ Ibid., xi.

²¹⁰ However, it is an entirely different matter if this distinctiveness can be characterised as the deep religiosity of Indian society especially because it is a subjective assertion which cannot be rationally refuted.

whose fulfilment necessitates cautious deliberation in pursuit of abstract justice.²¹¹
(emphasis added)

As Jacobsohn suggests, reform is only one aspect of the Indian project of building a nation state. However, to the extent that he accepted that reform was a part of the nationalist project, it is presented as a normative project that sought to redress historic injustices of an integrated and unified socio-sacral order.²¹² In other words Jacobsohn's account restates the Indian constitutional consensus on religion and reform. However, this account is neither able to elaborate how this scheme of governing religious traditions assumed its current form, nor illuminate what the constitutional practice of the secular State entails for Indian religious traditions.

It is not that Jacobsohn does not recognise what is at stake in the practice of the Indian secular State. Jacobsohn's account does provide an oblique account of what the practice of the secular State entails. Thus commenting on the nature of Art 25 of the Constitution he says that

... this constitutional strand underscores the transformational dimension of Indian nationalism and the commitment to Nehruvian scientific rationalism with which it is frequently associated ... For this experiment to succeed, *popular religion had to be down played*, constituting as it did the principal impediment in the path of integrating different classes and peoples into the modern national state.²¹³ (emphasis

²¹¹ Jacobsohn, *The wheel of law: India's secularism in comparative constitutional context*, 94.

²¹² Jacobsohn is not alone in such a defence of Indian Secularism. Like him, Cossman and Kapur defend a similar conception of substantive equality when they argue that 'equality is concerned not with equal treatment but with addressing disadvantage. ... In the Indian context, this approach to equality is often referred to as compensatory discrimination, which is intended to capture the idea that certain individuals or groups may need to be treated differently in order to compensate for the discrimination they have suffered. Brenda Cossman and Ratna Kapur, *Secularism's Last Sigh?: Hindutva and the (mis) Rule of Law* (New Delhi: Oxford University Press, 1999), 91. For a more generic defence of Indian secularism as a product of the specific twists of Indian conditions see P.B Gajendragadkar, "Secularism: Its Implications for Law and Life in India," in *Secularism: its implications for law and life in India*, ed. G. S Sharma (Bombay: N. M. Tripathi, 1966).

²¹³ Jacobsohn, *The wheel of law: India's secularism in comparative constitutional context*, 93.

added)

However this sociological observation is absorbed in the normative account of this process where it is ethically desirable that popular religion is absorbed within a larger constitutional project. Therefore it is not possible in his account to examine the process by which Indian religious traditions are reformed into doctrinally founded categories because it is ethically desirable that such reform take place.

I must stress that my reading of Jacobsohn does not imply that I seek to gloss over any form of unjust practice that obtains in the Indian social fabric. Instead I wish to point out how injustice is invoked to render invisible the social transformation entailed by a commitment to the secular State. That is, the reforming disposition of the Indian secular State is unable to reflect or represent the social dynamic entailed by the practice of the Indian secular State because the ontology of the secular State normatively conceived does not permit traditional religions.

Normative arguments have however not been the only way in which the secular State has been understood in India. The other strands of scholarly argument that I will outline make a more explicit attempt to account for the dynamic of the Secular State as it obtains in the Indian Constitution. These are the strands of argument that suggests that the secular State in India is a form that is an exception to that found in Western liberal democracies, and yet other strands that are elaborated by scholars like Ashish Nandy, T.N. Madan, Partha Chatterjee, Pratap Mehta and Marc Galanter, whose work deals with the origins and practice of the secular State in India. I outline these positions in the following sections and make a case for extending and elaborating some of these arguments to provide an explanation of the doctrinalising and sacralising disposition of the Indian secular State.

3.2. An Exceptional Form of Indian Secularism

Prefacing a little known book on secularism in India, B.N. Puri speaks of secularism in the following manner:

In a pluralist society like India, with a number of religions flourishing in the spirit

of unity in diversity, Secularism is nothing new. Its genesis could be traced to the Vedic times, as is evident from the Rig-Vedic hymn proclaiming ‘Sages name variously that which is One’. This concept of the Supreme and Ultimate Spirit infused a sense of eclecticism...²¹⁴

Similarly elaborating on the types of reflection on Secularism in India, G.S. Sharma identifies a strand of thinking about secularism in India as being closely tied to the “pluralist view held by Hindus, which accepts all religions...”²¹⁵ I will refer to these perspectives that draw their inspiration from the Indian civilisational ethos as exceptional arguments in favour of the secular State.

As I will show, this class of arguments draws on the reforming legal form that the secular State takes in the Indian constitutional scheme and infers from it the exceptional character of the secular State in India. That is, it is a way of accounting for the reformist character of the Indian secular State in a manner that is entirely free of liberal normative demands. However, it must be stressed that the ‘exception argument’ is often rolled together with other ways of arguing for the secular State and is not clearly demarcated as an independent strand of thinking about the character of the secular State in India. Thus by identifying an exceptional form of thinking about the secular State in India I only try to isolate for analytical purposes a strand of argument which otherwise often accompanies the more standard normative and liberal democratic forms of justifying the secular State. The exceptional argument is best elaborated by Indian judicial opinion and therefore I will illustrate and assess this strand of thinking about the secular State through examples from Indian case law.

Secularism has been declared by the Indian Supreme Court to be part of the basic structure of the Indian constitution and numerous decisions have stressed the centrality of secularism

²¹⁴ B. N Puri, *Secularism in Indian Ethos* (Delhi: Atma Ram & Sons, 1990), ix.

²¹⁵ G. S Sharma, “Rule of Law, Legal Theory and Secularism,” in *Secularism: Its Implications for Law and Life in India*, ed. G. S Sharma (Bombay: N. M. Tripathi, 1966), 195.

to the Indian constitutional scheme.²¹⁶ Of these decisions *Ismail Faruqui v. Union of India*²¹⁷ makes a distinct case for what I term the exceptional argument for Indian secularism. This case dealt with a constitutional challenge to the Acquisition of Certain Areas at Ayodhya Act, 1993 which was enacted following the demolition of the Babri Masjid in 1992. The demolition of the Babri Masjid was tied to a property dispute between different groups of Hindus and Muslims about the ownership of a piece of land in the temple town of Ayodhya in the State of Uttar Pradesh. The dispute produced unprecedented popular mobilisation, eventually resulting in the destruction of a Mosque that stood at the disputed site by a large Hindu mob. The wave of communal violence that followed the destruction resulted in the statute of 1993 through which the central government acquired the disputed property and abated all pending suits regarding the property pending a Presidential reference made to the Supreme Court asking if the site was of religious significance to the Hindu community. The *Ismail Faruqui* case arose as a challenge to the acquisition of the disputed property claiming that it violated the rights of the Muslims to establish claims to the disputed property. More importantly for my argument in this section, it was also claimed that the circumstances in which the property was acquired by the central government legitimised the demolition of the mosque and violated the constitutional commitment to secularism.

In my discussion of this case I outline the manner in which Justice Verma's majority decision addressed the question of secularism through civilisational arguments. Justice Verma suggests that the word secular refers to different concepts in India and the West. Though the contrast between the Western and Indian conceptions of secularism are not elaborated clearly in his judgment, he asserts that the Indian conception is contained in the phrase '*Sarva Dharma Sambhaav*' which is a philosophical approach of understanding,

²¹⁶ *Keshavananda Bharathi v. State of Kerala* (1973) 2 SCC 225. In this case the Supreme court expounded the basic structure doctrine according to which core aspects of the constitution, like secularism, could not be subject to legislative amendment. This was position was subsequently reaffirmed in *S.R. Bommai v. Union of India* (1994) 3 SCC 1, which explicitly held that Secularism constituted a part of the unamendable basic structure of the Indian constitution.

²¹⁷ MANU/SC/0860/1994

coexistence and tolerance that undergirds ancient Indian thought.²¹⁸

Drawing cursorily and perhaps even randomly on Indian metaphysical and philosophical texts, he asserts that “a philosophical and ethnological composite is provided by ancient Indian thought for developing *Sarva Dharma Samabhaav* or secular thought and outlook. This enlightenment is the true nucleus of what is now known as Hinduism.”²¹⁹ The association of ‘Hinduism’ with Indian traditions of toleration is then tied to the manner in which traditions like Islam and Christianity were integrated into this philosophical horizon of Indian tolerance. Speaking of the relationship of the non Hindu traditions with the ‘Indian ethos’ he notes that these religions were accommodated without great difficulty by local authorities and that “Christianity, Islam and Zoroastrianism brought with them spiritual and humanistic thought harmonious and, in fact, identical to the core ideas of the established religious thought in India as exemplified by the basic beliefs of Vedic, Vedantic, Buddhist and Jain philosophy.”²²⁰ From this discussion he concludes that “The Constitution of India specifically articulated the commitment of secularism on the basis of a clear understanding of the desirable relationships between the Individual and Religion, between Religion and Religion, Religion and the State, and the State and the Individual.”²²¹

It is significant to note that Justice Verma’s, case for an Indian form of secularism draws on a *traditional* conception of religion and its ability to devise a tolerant civilisational horizon. However, if the doctrinalising and sacralising disposition of the Indian secular State is assumed, then it will not be possible to defend such a conception of religion within the Indian constitutional scheme. That is, Justice Verma’s scheme of toleration drawing on phrases like *Sarva Dharma Sambhaav* is not compatible with the practice of the liberal secular State in Indian Constitution, especially its disposition to reformulate traditional

²¹⁸ He draws these ideas predominantly from a lecture delivered by the former President of India S.D. Sharma titled ‘Secularism in the Indian Ethos’. Ibid., para 34.

²¹⁹ Ibid.

²²⁰ Ibid.

²²¹ Ibid., para 35.

religions into religions underwritten by essential or foundational truth. Therefore, even though it is socially plausible to argue in terms of Indian traditions of toleration, they do not sit easily with the Constitutional framework in relation to religion and religious freedom.

In the *Ismail Faruqui* case the court's decision did not turn on the exceptional form of defending the secular State. However, this exceptional or civilisational form of defending an Indian model of toleration has been at the heart of deciding an important set of cases on religious speech popularly referred to as the *Hindutva* judgments. Perhaps ironically, in defending the civilisational conception of Indian secularism in this set of cases the court even appeared to become an apologist for extreme nationalist political organisations claiming to represent 'Hindu' interests.

The *Hindutva* judgments²²² decided a set of election petitions that sought to invalidate the elections of many candidates belonging to a Maharashtra based party called the Shiv Sena for indulging in 'corrupt practices' under the Representation of Peoples Act 1951 while canvassing votes for elections to the Maharashtra State assembly. The Act defines 'corrupt practices' as electoral appeals to vote or to refrain from voting for any person on the ground of religion, or the promotion of feelings of enmity or hatred between different communities in the process of canvassing votes²²³. That is, the Act sought to promote secular values by

²²²*Ramesh Yashwant Prabhoo (Dr.) v. Prabhakar K. Kunte*, (1996) 1 SCC 130; *Manohar Joshi v. Nitin Bhau Rao Patil*, (1996) 1 SCC 169; *Ramchandra K. Kapse v. Haribansh R. Singh*, (1996) 1 SCC 206. *Ramakant Mayekar v. Smt. Celine D'Silva* 1995 SCALE 72, *Moreshwar Save v. Dwarakdas Yashwantrao Pathrikar* 1995 SCALE 85, *Chandrakanta Goyal v. Sohan Singh Jodh Singh Kholi* 1995 SCALE 88, *Shri Suryakant Venkatrao Mahdhik v. Saroj Sandesh Naik* 1995 SCALE 92. Of these the courts opinions in the *Ramesh Yashwant Prabhoo* case and the *Manohar Joshi* will be the focus of the discussion in this chapter.

²²³ Sections 123 proscribes 'The appeal by a candidate or his agent or by any other person with the consent of a candidate or his election agent to vote or refrain from voting for any person on the ground of his religion, race, caste, community or language or the use of, or appeal to religious symbols or the use of national symbols, such as the national flag or the national emblem, for the furtherance of the prospects of the election of that candidate or for prejudicially affecting the election of any candidate'; Similarly 123A of the Representation of Peoples Act, 1951 prevents 'the promotion of, or attempt to promote, feelings of enmity or hatred between different classes of the citizens of India on grounds of religion, race, caste, community or language, by a candidate or his agent or any other person with the consent of the candidate

proscribing religion from unduly influencing the electoral process and especially in a manner that could produce strife among communities. In these cases the courts had to pronounce upon the legal status of the extreme nationalist platform of *Hindutva*, which the Shiv Sena had adopted to fight the election. That is, the court had to decide whether explicit appeals to voters in the name of *Hindutva* by candidates or their agents amounted to a corrupt practice under the Representation of Peoples Act?

The court decided this question in a manner quite similar to the *Satsangi* case I discussed in chapter 1. That is, they dealt with *Hindutva* as a phenomenon that represented an extremely diverse set of practices that could not be reduced to ‘religion’ as it was conventionally or doctrinally understood. Referring to judgments like the *Satsangi* case and scholarly writing on Hinduism the court equated *Hindutva* with Hinduism and asserted that it had no one holy book, no one prophet, no unified church etc, which they saw to be conventional markers of religion. Thus by pointing to the diversity and plurality of Hinduism they called it a ‘way of life’ of the people of India.

However, this exposition of Hinduism produces two kinds of problems for the court. If Hinduism was indeed just a way of life, how was it to be subject to the provisions of a statute that proscribed an invocation of ‘religion’ in elections? To get around this problem the court asserted that it would police the extreme meanings that fringe elements attributed to the essential plurality of Hinduism²²⁴ If on the other hand the problem was one of extremism and of hate speech why refer to Hinduism at all? That is, the court could have dealt with attempts to create discord among communities purely as a law and order problem or through s. 123A and by making no reference at all to Hinduism. Thus referring to Hinduism in traditional or civilisational terms the court seemed to render the Act and its solutions meaningless. In other words deciding that ‘*Hindutva*’ was not a corrupt practice solved the immediate problem at hand but seemed to render the entire framework to address religious speech meaningless.

... for the furtherance of the prospects of the election of that candidate or for prejudicially affecting the election of any candidate.

²²⁴ *Ramesh Yashwant Prabhuo (Dr.) v. Prabhakar K. Kunte*, (1996) 1 SCC 130, paras 39,42.

Ironically, in arguing for an exceptional form of Secularism which contained the plurality of Hinduism and of Indian traditions, the court condoned a political party whose extreme nationalist positions attacked this very conception of plurality.²²⁵ There are of course good pragmatic reasons that could justify the court's defence of the electoral campaign of the Shiv Sena and especially by using civilisational arguments, which arguments the Shiv Sena campaign sought to undermine. Not least among these reasons was the fact that one of the candidates that these election petitions sought to disqualify, Manohar Joshi, was the serving chief minister of the State of Maharashtra. That is, it could be argued that the court was trying to hammer out a *modus vivendi* which attempted to tie an elected government and its representatives to Indian values of toleration without upsetting the very stability of that government.

Justifying the agenda of the Shiv Sena as the court has done can therefore be challenged as poor or even perverse expositions of existing law because they do not take into consideration the extreme nationalism the party stands for.²²⁶ Alternatively, as I have argued, raising the civilisational argument threatened to undermines the very intelligibility of supposedly dangerous speech. Exceptional arguments for the secular State are therefore set in a context of confusion. While they do point to culturally existing conceptions of toleration, these conceptions of toleration are in important ways disconnected with the institutional imagination of the Indian secular State. Exceptional arguments for the secular State thus point to the disjunction between conceptions of toleration that have cultural valence and the liberal democratic secular scheme for toleration and the protection of religious liberty.

However, as exceptional arguments are set within the larger liberal democratic framework

²²⁵ For instance in the *Manohar Joshi* case, the court argued that the Shiv Sena candidate Manohar Joshi's assertion that 'the first Hindu State will be established in Maharashtra is by itself not an appeal for votes on the ground of his religion but the expression, at best, of such a hope.'

²²⁶ Kapur and Cossman make one kind of case that these decisions are wrongly decided in law and are inattentive to the history of the Hindutva movement. Cossman and Kapur, *Secularism's Last Sigh?*.

of the secular State, it is often not possible to offer an explanation for the disjunctions they produce. That is, since the exceptional account has not been able to do a ground clearing exercise that explains the logic of the Indian secular practice, it is unable to meaningfully extend its arguments on distinct or exceptional forms of secularism in India.

How is it then possible to get past this disjunction produced by the dynamic of the secular State? Speaking about Secularism in Indian Jurisprudence, Justice S. S. Dhavan, a judge of the Allahabad High court, alludes to the task involved in thinking about Indian conceptions of secularism.²²⁷ The problem as he sees it was the misidentification of Indian concepts by European thinkers. Through a study of the Sanskrit word *dharma* he identifies a problem with its mistranslation into the Hindu religion or religious faith. He argues that “this misunderstanding of the concept of *dharma* is responsible for the mistaken view that Indian jurisprudence is wrapped in religion ...”²²⁸ The problem as he identifies it is the acceptance of frames of knowledge generated by British government in the Indian social sciences as typified by Macaulay’s Minute on education in which all ‘Indian thought in all ages was dismissed as dotages of Brahminical superstition.’ Justice Dhavan claims that the refraction of India through Western frames of thought resulted in the dismissal of Indian knowledge frames. Thus the attempts at generating an exceptional case for the secular State get re-framed as a negative question – why do Colonial knowledge frames prevent the possibility of a distinctly Indian scheme of toleration?

I address this question in more detail in chapters 4 and 5 and preliminarily address the issue in section 3.4 of the present chapter which elaborates a strand of argument that I call the post-colonial analysis of Indian secularism and which offers an account of colonialism and its impact on Indian society and the structure of its contemporary institutions. However, before I proceed to elaborate the colonial and post-colonial accounts of the secular State I first outline another important attempt at accounting for the Indian secular State through what I call descriptivism or an attempt to characterise the working of secular institutions in

²²⁷ S.S Dhavan, “Secularism in Indian Jurisprudence,” in *Secularism: Its Implications for Law and Life in India*, ed. G. S Sharma (Bombay: N. M. Tripathi, 1966), 102-138, 102.

²²⁸ *Ibid.*, 115.

terms of a politics of the present.

3.3. Descriptivist Accounts: On the politics of Indian Secularism

As I mentioned in chapter 1, one way of thinking about the secular State normatively was to argue that the reforming orientation of the Indian secular State itself violated secular norms. Holding this opinion, scholars like Donald Smith and Ved Prakash Luthera termed India an inadequately or partially secularised State.²²⁹ As I argued in that chapter, accounts like those of Smith would clearly be an inadequate response to understanding the constitutional practices that sustained the Indian approach to religion and religious freedom. Similarly, Gary Jacobsohn's account of secularism as described in s. 3.1.2 of this chapter accounted for Indian secularism as a product of reform but then unquestioningly accepted the nationalist account of the need to reform Indian religious practices. Thus even though Jacobsohn's account was an account of the practice of the secular State he was not able to demonstrate what was at stake in secular reform in India. In this section I recount what I understand to be attempts to make explicit the ideology and politics implicit in the practice of Indian secular reform.

In an illuminating essay on the nature of the secular State in India Marc Galanter presents what I term a descriptivist conception of the Indian secular State. Summarising the various ways in which the Indian secular State has been considered, he notes that there was disagreement on whether the secular State implied "... a severe aloofness from religion, a benign impartiality toward religion, a corrective oversight of it, or a fond and equal indulgence of all religions."²³⁰ However, there was a general agreement that public life was not to be determined by religion and that religious freedom ought to be respected and perhaps even supported. The problem however was the manner in which the radical reformulation and transformation of Hinduism, still an ongoing national project in 1971 when Galanter wrote his essay, was to be considered and located within a conception of the secular State. As I have done in a part of chapter 1 Galanter also considered the problem of

²²⁹ Smith, *India as a Secular State*; Luthera, *The Concept of the Secular State and India*.

²³⁰ Galanter, "Hinduism, secularism, and the Indian judiciary," 268.

secular reform in India through the the *Satsangi* case.

Considering the Indian secular State he notes that:

In assessing the thrust of India's secularism it is important that we avoid equating secularism with a formal standard of religious neutrality or impartiality on the part of the state. No secular state is or can be merely neutral or impartial among religions, for the state defines the boundaries within which neutrality must operate.

...

A secular state, then, propounds a charter for its religions; it involves a normative view of religion. Certain aspects of what is claimed to be religion are given recognition, support, and encouragement; others are the subject of indifference; finally, some are curtailed and proscribed. Religion, then, is not merely a datum for constitutional law, unaffected by it, and independent of it. It is, in part, the product of that law.²³¹

In chapter 1 while describing the Indian secular State I had proceeded on this assumption of secular control. In this section I pursue Galanter's typology of the permissible regulation entailed by the reforming disposition of the Indian secular State.

Recognising that the Indian Constitutional framework is premised on a model that envisages that the State must play an arbitral role in the regulation of religion, Galanter attempts a typology of the manner in which this power is exercised. He suggests that it is possible to distinguish between two kinds of legal regulation of religion which he terms the mode of limitation and the mode of intervention. These modes are defined in the following manner:

By limitation I refer to the shaping of religion by promulgating public standards and by defining the field in which these secular public standards shall prevail, overruling conflicting assertions of religious authority. By intervention I refer to something beyond this: to an attempt to grasp the levers of religious authority and to

²³¹ Ibid., 283.

reformulate the religious tradition from within, as it were.²³²

While the first mode implies a form of regulation by which the State asserts the superiority of its legal norms, the second entails that the State asserts the competence or even specialisation in the authoritative exposition of religious norms. These are depicted in tabular form which I have reproduced as under.

Galanter organises his Alternative modes of Secular Control in tabular form as follows²³³:

External superiority of legal norms	Internal competence of legal specialists	
	Low	High
High	Mode of Limitation	Mode of Intervention
Low	‘Separation of powers’ mode	Religious State

Galanter’s tabulation of the different forms of control that the State therefore produces four forms of regulation – the mode of limitation, the mode of intervention, the separation of powers mode and the mode of the religious State. Arising from his types of regulation the key question Galanter raises is whether the Indian constitutional model permits an interventionist mode of regulation. That is, of the various modes of regulation in his model, the mode of limitation was clearly a permissible form of regulation but it was less certain if the constitution mandated a mode of regulation marked by ‘intervention.’ He explores this problem through the Satsangi decision in which the court adopted the mode of intervention through the provocative question – ‘Is the Supreme Court a forum for promulgating official interpretations of Hinduism?’²³⁴

²³² Ibid., 284.

²³³ Ibid., 285.

²³⁴ Ibid., 286.

There are two aspects to Galanter's response – one of constitutional interpretation, and the other which tries to make intelligible the court's 'interventionist' approach to the Hindu religion in the *Satsangi* case. At the level of constitutional interpretation Galanter suggests that the interventionist approach of the Supreme Court was perhaps avoidable. However, as I have shown in chapter 1, the 'interventionist' mode was merely an extension of the mode of limitation and the conception of religion adopted in the mode of intervention was already contained in the mode of limitation.²³⁵ On the other hand, Galanter's discussions of the reasons that impel intervention are particularly important to my discussion in the next couple of chapters.

Galanter considers two important reasons why the Indian Supreme Court adopted the mode of intervention. First, justifying regulation internally would make it more palatable to the various Hindu traditions. Second, the desire of the national elite to reform popular and traditional Hinduism whose static and fragmented nature was considered to be an obstruction to forging national unity. However, he is sceptical of the strength of both these reasons to defend the interventionist mode of the Indian Supreme Court.

On the advisability of using the mode of intervention to make regulation more acceptable, he points out the serious questions of competence that could plague judicial decisions prescribing the content of Hinduism. Thus in the *Satsangi* case he points out that the authorities employed were not those picked from within the Hindu tradition but glosses on Hinduism by Western or Western inspired scholarship – that is, scholars like Monier Williams, Max Muller and S. Radhakrishnan. He also raises doubts about whether religious justification adds to the effect of interventionist decisions by suggesting that the influence of higher courts stem from their ability to rechannel major institutional opportunities and controls and by their liberating effect though these were relatively independent of whether

²³⁵ In addition the genealogy of the secular state as I outline it in the next couple of chapters suggests a long history to the movement towards the judicial led doctrinalisation of the Hindu tradition.

the justifications they provided were secular or religious.²³⁶

Galanter is more critical of the elite desire to modernise the static and traditional aspects of Hinduism and to create out of the Hindu traditions a more unified reformed and rational religion. He recognises that independent India was presented with the unprecedented opportunity to wield the levers of reform over all the various traditions and strands of Hinduism. However he cautions against the exercise of such powers on the grounds that the success of the project to unify Hinduism might impede its ability to tolerate difference and sustain India's diverse democracy.

Galanter thinks that the success of this unification project is likely to be partial and local and largely fuelled by elite illusions about Indian society. As he puts it

... the lawyers' fallacy that behaviour corresponds to legal rules offers powerful reinforcement of the elite's fallacy that the masses are following them – a coincidence of illusions that can lead to dangerous miscalculation about popular sentiment about the efficacy of legally enacted reforms.

In Galanter's account this statement is only a passing observation. However, I think this is an important insight on the practice of judicially led reform of the Hindu religion. In the course of the next two chapters I will try to account for and explain this 'elite illusion.'

In an account similar to Galanter's, Pratap Mehta also argues that the interventionist function played by the Supreme Court is a way of overcoming the ills of tradition without having to debunk it as a whole. In addition Mehta argues that intervention was part of the process by which Indians in general and Hindus in particular made their peace with the modern world by trying to reconcile their traditions with democratic ideals. As he mentions, the State "became the vehicle for the democratization of religion. In a sense the democratic State was the vehicle through which the community of believers acquired interpretative

²³⁶ Galanter, "Hinduism, secularism, and the Indian judiciary," 287-89.

authority over many of the requirements of their religion.”²³⁷ He therefore argues that reform was a process through which the State was given powers to protect and to regulate religion.

As Mehta himself mentions, it was not entirely clear that unelected courts could claim democratic authority to speak for a community but suggests that in a parliamentary system the fact that court rulings were not overruled could be presented as some presumptive evidence that they were representative of the views of the larger community. The other way of claiming democratic authority was through what Mehta calls the paradoxical consolidation of Hindu identity. That is, the reforms were obviously aimed at excising undesirable aspects of the ‘Hindu’ community and raised the possibility of speaking for the lower and untouchable castes. However, in asserting this authority courts creates a unified authority which had never previously existed – “one single territorially based community welded together to a coherent body of law by a uniformity of laws overriding particular customs”²³⁸

Unlike Galanter, Mehta places a greater emphasis on reconstructing the political significance of the normative vision of constitutional reform. Thus the consolidation of the Hindu religious identity is presented as a paradox within his account. However, the nature of this paradox is not entirely clear. It could be that the paradox is produced by the fact that reforms in the name of excising unethical aspects of the Hindu religion also produces a unified Hindu identity which is capable of being politically mobilised as a force of intolerance. Alternatively the paradox could perhaps be posed as the inability of the religious model that the Constitution makes normative, to encapsulate the numerous customary traditions that constitute the Indian religious landscape.

In the next couple of chapters I will argue that the interpretative mode of the constitution does not pose a paradox, especially when it is located in its historical trajectory. The

²³⁷ Mehta, “Passion and Constraint: Courts and the Regulation of Religious Meaning,” 328.

²³⁸ *Ibid.*, 328-29.

consolidation of religious identities was a historical process that traces back to regimes through which religion was regulated in the British colonial State. That is, reform was constituted as the reformulation of the Hindu religion when many aspects of the reform project could just as well be cast as reforms of unethical practices obtaining in Indian society more generally. The case for interrogating the historical origins of what after Galanter can be called the ‘interventionist mode’ for regulating religion is made more apparent in the work of anti-modern or Post-colonial scholars whose work I discuss in the next section.

3.4. Post-Colonial Accounts of Indian Secularism

This class of scholarship points to the influence of colonialism or of European intellectual models in the formation of the Indian secular State. More importantly, it points to the difficulties and challenges faced by the secular State as it has embedded itself as a political value in the practice of the Indian Constitution. As I will show, this class of arguments about the secular State inevitably entails (though not always explicitly) the consideration of historico-sociological accounts of the manner in which the secular State took shape in the Indian institutional horizon. In this section I look at the work of three scholars – T.N. Madan, Ashish Nandy and Partha Chatterjee, all of whom address the challenges posed by India's secular institutional and governmental inheritance in slightly different ways.

Along with the scholarship of the descriptivist scholars, the work of these scholars substantially anticipates and forms my hypothesis on the dynamic of the secular State in India. Thus it is my case that these sections outline the directions in which existing scholarship ought to be extended to explain the challenge posed by the first two chapters. That is, why is the Indian secular State disposed to the doctrinalisation of Indian religious traditions and the sacralisation of its constitutional practice?

Both Nandy and Madan attack secularism and the secular State as being fundamentally at odds with the manner in which Indian society is organised. Commenting on secularism in India, Madan states that

(s)ecularism is the dream of a minority that wishes to shape the majority in its own image but lacks the power to do so under a democratically organised polity. In an open society the state will reflect the character of the society. ... From the point of view of the majority, secularism is a vacuous word, a phantom concept, ... For the secularist minority to stigmatize the majority as primordially oriented and to preach secularism to the latter as the law of human existence is moral arrogance.... because it fails to recognize the immense importance of religion in the lives of the peoples of South Asia.²³⁹

Madan draws his canvas roughly and broadly but the thrust of his argument asserts that the secular State has no cultural resonance with a majority of Indians because “the great majority of the people of South Asia are in their own eyes active adherents of some religious faith.”²⁴⁰ The secular State also has a place for religion but, as Madan argues, one that is largely privatised and shaped by the intellectual force of the Protestant Reformation.

As Madan points out, the Lutheran and Calvinist theology which inspired the Protestant Reformation saw ‘religion’ as grounded primarily in individual faith and through the de-linking of the Church from the jurisdictional powers it previously held in Catholic Europe. This kind of privatised religion was at odds with ‘religion’ as it was practised by most Indians. However, when latched onto processes such as the ‘enlightenment’ and ‘modernisation’, Protestant conceptions of religion were imposed on non-Christian and non-western societies. Madan emphasises that he is no cultural relativist and that he has no objections to ideas that derive from another cultural context purely because of its provenance. However, he makes a distinction between the mere transfer of an idea from its translation into one that resonates with the context to which it is being transplanted. Thus the challenge that secularism poses in a comparative cultural context is that of finding the

²³⁹ T.N. Madan, “Secularism in its Place,” in *Secularism and its critics*, ed. Rajeev Bhargava (Delhi; Oxford: Oxford University Press, 1999), 298. See also T.N. Madan, *Modern Myths, Locked Minds: Secularism and Fundamentalism in India*, 2nd ed. (New Delhi: Oxford University Press, 2009); T.N. Madan, “Whither Indian Secularism?,” *Modern Asian Studies* 27, no. 3 (July 93): 667-97.

²⁴⁰ Madan, “Secularism in its Place,” 298.

appropriate means for its expression.²⁴¹

The translation of western ideas in ways that find resonance in India is not the task of the present discussion and is perhaps a task that awaits scholarship concerned with outlining distinct or exceptional conceptions of toleration in Indian society and in politics.²⁴²

However, I suggest that the dissonance that Madan points out between Protestant and Indian conceptions of religion maps onto the dynamic of the Indian secular State which compels the transformation of religion understood as tradition and ritual into religion founded in truth and essence. The implications of this Protestant notion of religion on Indian society are less clear in Madan's work and it is here that the work of Nandy assumes significance.

Nandy focuses on the manner in which the intellectual dominance of secularism as an idea impacts upon Indian traditions.²⁴³ According to him, secularism is one among a cluster of concepts that illustrate the imperialism of knowledge structures in the post-colonial world. One of the most telling effects of this colonial structure of knowledge is the manner in which the hegemony of Western ideas causes whole domains of knowledge to vanish from the awareness of the colonised people. He illustrates this hegemony of knowledge in the case of secularism by demonstrating the manner in which the conception of religion as it is conceptualised by official discourses of Indian secularism marginalises religion as it is associated with the Indian traditions.

²⁴¹ Ibid., 309.

²⁴² For instance Madan suggests that the separation of religion from politics in the Indian religious traditions is one in which the secular is always subordinated to the religious. Thus a secularism that resonates with the Indian condition would presumably be able to factor in and respond to this aspect of Indian religious traditions and their intersection with secular or political authority. Madan, *Modern Myths, Locked Minds: Secularism and Fundamentalism in India*, 309.

²⁴³ Ashish Nandy, "The Politics of Secularism and the Recovery of Toleration," in *Secularism and its critics*, ed. Rajeev Bhargava, Themes in politics series (Delhi; Oxford: Oxford University Press, 1999), 322. See also Ashish Nandy, "The Twilight of Certitudes: Secularism, Hindu Nationalism and Other Masks of Deculturation," in *Bonfire of Creeds* (New Delhi: Oxford University Press, 2011).

To explain his case Nandy suggests two ways of thinking about religion in contemporary India. First, 'religion as faith' which is associated with the plural ways in which religion is practised by most Indians and second, 'religion as ideology' associated with "one or more texts which, rather than the ways of life of the believers, then become the final identifiers of the pure forms of the religions."²⁴⁴ He argues that 'religion as ideology' has taken historical roots in India over the last two centuries by instituting itself into State conceptions of religion, besides also being the dominant intellectual prism of the Indian middle classes. As a result, he claims, secularism in India has little to say about Indian religious cultures and more significantly that religion as ideology is often "definitionally ethnophobic and frequently ethnocidal, unless of course cultures and those living by cultures are willing to show total subservience to the modern nation state."²⁴⁵

Though Nandy's evidence is often only anecdotal, insofar as he speaks of secularism implying the establishment of 'religion as ideology' over 'religion as faith', his analysis quite distinctly maps onto my hypothesis in chapters 1 and 2 regarding the disposition to reformulate traditional Indian religions as they have been engendered by the Indian secular State. In contrast to Madan, who is more sceptical of the ability of the secular State to secularise Indian religion, Nandy thinks that the secular State has the capacity to be actively destructive of Indian religious traditions and even actively generative of religious discord.

Thus he responds to the secular State by making an unabashed case for the affirmation of the traditional ways of life which he claims have

... over the centuries developed internal principles of tolerance, and these principles must have a play in contemporary politics. This response affirms that religious communities in traditional societies have known how to live with one another. It is not modern India which has tolerated Judaism in India for nearly two thousand years, Christianity from before the time it went to Europe, and Zoroastrianism for

²⁴⁴ Nandy, "The Politics of Secularism and the Recovery of Toleration," 322.

²⁴⁵ *Ibid.*, 324.

over twelve hundred years; it is traditional India which has shown such tolerance.²⁴⁶

That is, Nandy responds to the secular State by signalling the significance of forms of tolerance that are different from that produced by the secular State.

Nandy's account though intuitively appealing is largely based on anecdotal evidence. Additionally, he provides no account of what makes for the capacious Indian forms of tolerance, or of how it differs from the manner in which the liberal secular State envisions toleration. He does of course point out that the mobilisation of identity around conceptions of 'religion as ideology' might play a crucial causal role in the large scale instances of religious violence witnessed in contemporary India. However, he provides no explanation or account for why the secular State is committed to producing 'religion as ideology.' Thus in the next couple of chapters I try to extend Nandy's account and argue that the disposition to reform Indian religious traditions is tied to colonial models of toleration which could extend toleration only when a religious tradition and especially the Hindu religious traditions were reformulated in terms of foundational doctrines.

The scholarship of Partha Chatterjee acquires significance against the background of the work of both Nandy and Madan. Like Madan and Nandy, Chatterjee also agrees that the search for appropriate models of toleration in the practices and politics of the secular State might be counterproductive and work at cross purposes. Addressing the specific Indian problem of extreme nationalist politics, Chatterjee raises the question whether secularism is "an adequate, or even appropriate, ground on which to meet the political challenge of Hindu Majoritarianism."²⁴⁷

Chatterjee's essay on secularism is set against the challenge of Hindu majoritarian or hindutva politics and suggests that hindutva

... in its most sophisticated forms seeks to mobilize on its behalf the will of an

²⁴⁶ Ibid., 336.

²⁴⁷ Chatterjee, "Secularism and Tolerance," 345.

interventionist modernizing state, in order to erase the presence of religious or ethnic particularism from the domains of law or public life, and supply, in the name of ‘national culture’, a homogenized content to the notion of citizenship.²⁴⁸

Chatterjee therefore recognises the modernising or secularising impact of the Indian State and points to the manner in which hindutva politics piggybacks on the secular modern State.

Thus he is in broad agreement with Nandy’s thesis that secularism is rolled together with modern State practices which promote ‘religion as ideology’ and do not necessarily promote toleration. However he disagrees with Nandy’s argument that the solution to the problems generated by modern religious identities lies in exploring aspects of everyday toleration in Indian religious traditions in the hope that the State systems of South Asia might learn something from these traditions. Instead he presents his project as one that seeks “political possibilities *within* the domain of the modern State institutions as they now exist in India.”²⁴⁹ (emphasis in original)

Chatterjee’s account of the emergence of the modern State in South Asia is far more extensive than either Madan or Nandy.²⁵⁰ Therefore his work is significant because he is far more invested in accounting for the specific form taken by the secular State as it embedded itself into Indian constitutional practice. However, unlike both Madan and Nandy, who suggest reliance on native forms of toleration in their approach to understanding and responding to the secular State in India, Chatterjee suggests that this option is not politically available. Instead he argues that the secular State in India be understood in terms of a distinct Indian modernity that is shaped by European ideas and that this modernity is

²⁴⁸ Ibid., 347.

²⁴⁹ Ibid., 348.

²⁵⁰ See also Chatterjee, *Nationalist thought and the colonial world*; Chatterjee, *The nation and its fragments*; Partha Chatterjee, *The Politics of the Governed: Reflections on Popular Politics in Most of the World*, University seminars/Leonard Hastings Schoff memorial lectures (New York: Columbia University Press, 2004).

the only ground on which a scheme of toleration can be built.

As I have already mentioned in chapter 1, Chatterjee suggests that the Indian constitutional practice of the secular State is inconsistent with the liberal democratic scheme on religious liberty and the secular State. However, though the normative liberal account cannot come to grips with the Indian situation, it can be suitably re-worked to account for the manner in which it acquires meaning in India. The burden of recasting the secular State as it acquires meaning in Indian political practice is placed on Michel Foucault's idea of 'governmentality'.

In the concept of 'governmentality' Chatterjee claims that he has an account of the modern State that resists appropriation by the liberal account of the State. That is, this account provides an account of modern power that cuts across the liberal divide between State and civil society, targets the well-being of populations, and operates through the mode of an instrumental notion of economy through the apparatus of an elaborate network of surveillance.²⁵¹ Chatterjee reads Foucault as saying that this framework of modern power is marked by a process called the 'governmentalization of the state.' That is, modern power is marked by the enveloping of juridical sovereign power by technologies of government.

This extensive governmental power allows the State enormous flexibility to deploy coercion and to secure consent. However, Chatterjee claims that governmentality does not entirely envelop juridical sovereignty and it is at these sites that assertions of minority communities for cultural rights are made possible. At these points, Chatterjee argues, liberal forms of government reach their limits because various communities are able to assert, on the ground of sovereign power, a right not to offer reasons for their difference. The right not to offer a reason for cultural difference would seem from the perspective of the liberal democratic State a concession to cultural relativism. However, Chatterjee presents this as the predicament of engaging with governmental power – that is, resisting governmental power invites the claim of being unreasonable.

²⁵¹ Chatterjee, "Secularism and Tolerance," 370.

Chatterjee however argues that the charge of cultural relativism can be overcome through internal democracy within communities. That is, he argues that a community can claim toleration for its own practices from others as a matter of right only if it can demonstrate that it tolerates its own members. As he says, “toleration here would be premised on autonomy and respect for persons, but it would be sensitive to the varying political salience of the institutional contexts in which reasons are debated.”²⁵²

It is important to recognise that Chatterjee’s reworked conception of modern power attempts to formulate a conception of the secular and tolerant State that can be defended in terms of existing constitutional practices but without resorting to liberal justification. Therefore the question of toleration is framed in terms of minority and community rights because that is how the existing constitutional arrangement understands and defends conceptions of Indian citizenship. As I have already mentioned in the previous two chapters the Indian State has historically been organised in terms of minority rights for a whole range of legally specified communities as well as separate religion based personal laws for various religious communities. That is, minorities and others groups are “an actually existing category of Indian citizenship – constitutionally defined, legally administered, and politically invoked at every opportunity.”²⁵³ Therefore, through ideas like governmentality and internal democracy within communities, Chatterjee attempts to recuperate the existing form of the secular State in a way that gets around its formulation in normative liberal theory.

Normative liberalism however poses problems for Chatterjee in a manner quite different from either Madan or Nandy. While Chatterjee recognises the modernising or reforming power of the modern State, he believes that the Indian practice elaborates a different conception of the secular State. It is this new conception of secularism that forces him to re-describe the liberal account of the secular State. Recounting this problem in a recent essay

²⁵² Ibid., 375.

²⁵³ Ibid.

he mentions that “...while the secular State is a central feature of the constitutional structure, its practice has come to mean neither the mutual separation of State and religion nor the strict neutrality of the state. Rather, an altogether new norm of the modern secular State seems to have emerged...”²⁵⁴ This assertion however raises questions about the nature of this newness in the concept of secularism produced by the practice of secularism in post-colonial India.

Unlike Chatterjee, I have tried to suggest that there is no new ‘concept’ of secularism but only practices that try to reformulate Indian society so that it can be made intelligible to the conceptual universe of modern liberal ideas. Though Chapters 1 and 2 are illustrations of my position it is perhaps useful to illustrate this through Chatterjee’s analytical framework itself. According to Chatterjee minority rights are a site where communities resist the expanding and enveloping powers of the governmentalising State. However, minorities are categories that the Indian State has inherited from the colonial State and are governmentalised categories themselves. Further, as I demonstrated in chapter 2, this governmentalised categorisation of the minorities excluded the claims of various ‘Hindu’ groups even if they empirically satisfied the criteria of being a minority. Therefore, even if Indians have adopted these governmentalised categories, it is not apparent that various Indian communities have been able to assert their sovereignty through these categories and generate a new conception of the Indian secular State.

In contrast to Chatterjee, the work of Nandy, Madan as well my own description of the practice of Indian secularism in chapters 2 and 3 have emphasised the *effects* of adopting the concept clusters associated with the secular State. Though I am not competent to speak of the structures of native toleration I will try to extend my argument that the adoption of the secular State doctrinalises and distorts Indian traditions. Thus by extending my discussion of the Satsangi case I will also argue that the attempt to establish the foundations of the Indian and especially the Hindu religious traditions also produces a distortion of these social forms.

²⁵⁴ Partha Chatterjee, “Lineages of Political Society” (Forthcoming, 2010).

Explaining the distortion of Indian social forms is the scholarly burden undertaken by both Nandy and Madan. Thus though their engagement with actual State practice was rather thin, they have been able to capture the dynamic of the secular State in a far more accurate manner than Chatterjee. Either way, the historical emergence of the secular State is significant to both their accounts although in different ways. In the subsequent chapters I will attempt to detail this history in order to provide an explanatory account of the disposition of the secular State to doctrinalise Indian religious traditions as I have outlined it earlier. To do so, the insights of Nandy and Madan will be appropriately extended though this cannot be done except in argument with Chatterjee.

3.5. Conclusion

In concluding this chapter it is perhaps useful to summarise the various strands of argumentation regarding the secular State that I have outlined in this chapter and the extent to which they will be carried into the subsequent chapters. The problem that this chapter sought to outline was the manner in which the selected strands of scholarship on the Indian secular State were situated in relation to its reforming disposition as I had outlined it in the previous chapters.

I began the chapter by describing the normative approaches to the secular State and demonstrated the manner in which normative conceptions of the secular State mask the historical or the sociological dynamic of the secular State if not actively obstructing the task of generating an explanation of the practices of the secular State in India. On the other hand the exceptionalist arguments of the Indian secular State suggest that the secular State in India was entirely free of the secular State as it developed in Western Europe. However, I argue that even if there are culturally distinct and Indian forms of arguing for toleration, the exceptionalist form of argument does not explain the secular State as it exists and its disposition to reform religion understood as tradition into religion founded on essential practices. Thus the normative and the exceptionalist strands of argument are not carried forward into the next couple of chapters.

I therefore carry forward the task of explaining the dispositions of the secular State through the strands of scholarship that I have termed descriptivist and post-colonial. These strands of scholarship make salient the task of explaining the secular State as a historical and political task. Through the work of scholars like Marc Galanter, Pratap Mehta, T. N. Madan, Ashish Nandy and Partha Chatterjee I have outlined important points of arrival and departure in this larger task of explaining the emergence of secular constitutionalism in India.

4. Towards a Genealogy of Liberal Toleration in India

In the present chapter I shift the course of the thesis more explicitly towards an explanatory account of the peculiar reforming disposition of the Indian secular State. To do so I will outline the genealogy of the Indian secular State. I consciously use the word ‘genealogy’ as opposed to ‘history’ because I do not trace the origin and evolution of the secular State as much as I try to identify the conditions that give ‘reform’ intelligibility. In an essay on the Enlightenment Michel Foucault describes the genealogical approach to the past as one that is oriented towards identifying the “contemporary limits of the necessary.”²⁵⁵ Following this approach I do not narrate the evolution of a historically constituted object – the Indian secular State. Instead I try to outline important aspects of the conditions which made it possible for the reforming scheme of the secular State to emerge as the constituted object I have identified in the previous chapters.

Methodologically I outline the making of the secular State in India by drawing especially on the ‘normative’ and the ‘post-colonial’ accounts of the secular State which I outlined in chapter 4. Through the normative account I identify the reforming secular State as the object I study in the present chapter. That is, I proceed on the assumption that the secular State in India is a project involving the institutionalisation of liberal norms accompanied by the demands for the social reform of Indian religious traditions. The descriptivist and anti-colonial account on the other hand are significant because of their refusal to accept the norms of the secular State as universal values and its insistence on uncovering the manner in which the contemporary secular condition is constituted. I believe that these methods of studying the secular State will allow me to locate and explain the manner in which the reforming liberal framework of the secular State was constituted in contemporary India.

Thus in this chapter and the next I will undertake two tasks – first, provide an account of the emergence of normative or liberal toleration as a reforming project in the British

²⁵⁵ Michel Foucault, “What Is Enlightenment?,” in *The Foucault reader*, ed. Paul Rabinow (New York: Pantheon Books, 1984), 32-50.

colonial State. Second, I will outline the manner in which the reformed religio-legal identities produced by the secular State were drawn into the political institutions in British India. Through the course of this thesis I have argued that the reforming disposition of the Indian secular State operated as a semantic veneer that screened off Indian social experience and especially those of Indian traditional religions. Consequently in the next two chapters I describe how this process of distancing Indian social experience from the discursive structure of the Indian secular State was made possible.

4.1. Toleration as a Moral Imperative for Government

As I have already argued in the introductory chapter and in chapter 3, it is not tenable to speak of the liberal secular State as having multiple meanings or as referring to a fundamentally different *kind* of object. Instead I suggested that reference to the secular State refers to the same object that manifested differently in different contexts. The only possibility of speaking about a different kind of secular State arose in the context of the exceptional accounts grounded in ‘Indian’ traditions of toleration. However, these accounts of toleration are entirely distinct from the Indian secular State as it is organised around the project of religious reform as I had identified it in the previous chapters. Thus the object whose reforming disposition I will explain in this chapter is the secular State committed to the political values of liberty, equality and neutrality and to that of religious reform.

As both Nandy and Madan point out, the normative scheme of the secular State grew out of the complex religious and political changes that came over Western Europe in the aftermath of the Protestant reformation. In a fascinating article on the manner in which these changes are significant for the making of secularism in India, DeRoover and Balagangadhara note the emergence of tolerance as a *moral value* in post-reformation Europe. Their claim is important in the context of my argument because they demonstrate their case by showing that similar value based claims about toleration emerged in the colonies under the administration of the British East India Company (hereafter the Company). I attribute the reformist disposition of the Indian secular State to this form of toleration that was brought to bear on the early administration of the Company in India. However I must first clarify what is implied in the assertion that toleration emerged as a moral value.

DeRoover and Balagangadhara present the case of toleration emerging as a moral value in the following manner:

Right up to the sixteenth century, toleration of heretics was a temporary expedience at best. Catholic theologians and canon lawyers conceived *tolerantia* as non-interference in certain immoral acts (like prostitution) and with the Judaic worship in order to prevent greater evils: adultery, rape and forceful conversion. During the Reformation, irenic thinkers like Erasmus considered that granting civil tolerance to the different Christian ‘sects’ was a judicious step in avoiding civil war. This was to be a transient phase in the restoration of Christian unity. The *Politiques* in France and elsewhere provided an independent temporal purpose to the state, which should not be subordinated to the demands of religious unity. None of these groups perceived toleration as a moral ideal. In the late sixteenth and early seventeenth century, however, several thinkers began to argue that *religious toleration was the duty of all states*, and that the liberty of conscience was the right of all individuals...²⁵⁶ (emphasis added)

I do not attempt to assess their claim that toleration emerged as a moral value in Western Europe in the 16th century. However, my claims in this chapter are indebted to their further and supporting claim that toleration as a moral value emerged as a principle guiding the administration of the Company.

The earliest European powers in India like the Portuguese (in Goa) and the Dutch (in Sri Lanka) were known to have engaged in forcible conversions and actively limited native religious activity in the 15th and early 16th centuries.²⁵⁷ By contrast a significant aspect of Company governance in India was its stated policy of tolerance for the religious traditions

²⁵⁶ Jakob De Roover and S.N. Balagangadhara, “Liberty Tyranny and the Will of God: The Principle of Toleration in Early Modern Europe and Colonial India,” *History of Political Thought* 30 (2009): 114-15.

²⁵⁷ John William Kaye, *Christianity in India: An Historical Narrative* (London: Smith, Elder and Co., 1859); Arthur Mayhew, *Christianity and the government of India: an examination of the Christian forces at work in the administration of India and of the mutual relations of the British government and Christian missions, 1600-1920* (Faber & Gwyer limited, 1929).

of the people they governed. Large sections of the early Company administration argued for the toleration of Indian religious practices and even made the religious laws of these communities the basis for colonial jurisdiction over their Indian possessions. In this chapter I provide a synoptic account of colonial tolerance for different religious or personal laws and demonstrate that this toleration is part of a scheme of toleration as norm or as a moral value. Most importantly I also suggest that it has played an important role in the reforming structure assumed by the contemporary Indian secular State.

An important aspect of British colonial government in India was the fact that it legitimated its legal authority by governing the ‘native’ through his very own laws and customs. This attitude to local laws and customs traces back to the earliest legal institutions of the Company. Well before the company had any significant governmental power in India, Company officials expressed their opposition to provisions of the Charter of 1726 which seemed to permit the Mayors’ courts²⁵⁸ to adjudicate disputes between natives through English common law.²⁵⁹ As a result of this opposition the subsequent charter issued in 1753 explicitly stated that the Mayors’ courts were not permitted to try cases between Indians without the consent of both parties to a dispute. Rankin presents this as the first instance of the “reservation of their own laws and customs to Indians.”²⁶⁰ This policy of deference to the native laws continued through the years of company rule and was a defining feature of British colonial rule even after the Crown assumed direct charge after the revolt of 1857. I argue that normative toleration was a crucial component of the British policy of deferring to indigenous religio-legal forms.

²⁵⁸ The Mayors’ courts were the first royal courts instituted in India. Its decisions were therefore authoritative in England as well. Additionally the charter of 1726 by which these courts were first established also provided the link between the legal systems of British India and that of England by permitting appeals from these courts to the Privy Council. Mahabir Prashad Jain, *Outlines of Indian legal history* (Bombay: N. M. Tripathi, 1966), 35-54.

²⁵⁹ The company had sovereign like powers over its limited Indian possessions well before its victory at Plassey which gave it control over the province of Bengal in 1757. Therefore for a considerable part of its existence in India the Company had to exercise government over Indians as well. For an account of the conflict produced by the Mayors’ Courts exercising jurisdiction over natives see *Ibid.*, 47-50.

²⁶⁰ George Claus Rankin, *Background to Indian Law* (Cambridge: The University Press, 1946), 2.

Explicit government deference to, and tolerance for, native laws is however generally dated from Warren Hastings' attempts to consolidate the Company's judicial government of its Indian subjects. In Hastings' judicial plan for Bengal in 1772 it was stated that

... in suits regarding Inheritance, Marriage, Cast, and other religious usages or institutions, the laws of the Koran with respect to the Mahometans, and those of the Shaster with respect to Gentoos, shall be invariably adhered to: on all such Occassions, the Moulavies or Brahmins shall respectively attend to expound the Law, and they shall sign the Report and assist in passing the Decree.²⁶¹

As I have mentioned, this policy was continually reaffirmed through the course of colonial rule in India. Thus after the revolt of 1857 when the British Crown assumed direct rule of India, it was proclaimed that all Indian subjects could practise their religious traditions free from interference and that laws for India would be made having due regard to the 'rights, usages and customs of India'.²⁶² Elaborating the toleration accorded to Indian religio-legal forms I demonstrate that this regime of governing Indian religions was committed to *normative* toleration. However, before I do so I first distinguish my account from some

²⁶¹ *Art. XXIII, Judicial Plan of 1772, IOR/H/420, 1772.* (Extended by Justice Elijah Impey in 1882 to include Inheritance and 'succession' as also to include the provision that cases where no specific directions had been given the courts was to act according to 'Justice, equity and good conscience'. ss. LX and XCIII Regulation VI 1781.

²⁶² The declaration states -

"Firmly relying Ourselves on the truth of Christianity, and acknowledging with gratitude the solace of Religion. We disclaim alike the Right and the Desire to impose our Convictions on any of Our Subjects. We declare it to be Our Royal Will and Pleasure that none be in any wise favored, none molested or disquited, by reason of their Religious Faith or Observances; but that all alike shall enjoy the equal and impartial protection of the law: and *We do strictly charge and enjoin all those who may be in authority under Us, that they abstain from all interference with the Religious Belief or Worship of any of our Subjects, on pain of Our highest Displeasure.*

We know, and respect, the feelings of attachment with which the Natives of India regard the lands inherited by them from their Ancestors; and We desire to protect them in all Rights connected therewith, subject to the equitable demands of the State: and We will that generally, *in framing and administering the Law, due regard be paid to the ancient Rights, Usages and Customs of India*" (emphasis added), Mss Eur D620.

standard accounts of colonial toleration.

First, prefacing a popular introduction to the study of the colonial legal system in British India, George Rankin, one time Chief Justice of the High Court at Calcutta wrote that “Not many people in this country have any settled notion of what we are doing in India administering law to Indians, nor have means of readily acquiring a well-founded notion of how we came to be doing so or of the principles which we apply.”²⁶³ Writing at the close of two centuries of British rule in India, Rankin seems to suggest that expedience, pragmatism and the demands of specific contexts drove British government in India. John Seeley expresses this sentiment more elegantly in his famous quote that the colonial project was put together in ‘a fit of absence of mind’.²⁶⁴

Colonial arguments for toleration were interspersed with both normative and pragmatic arguments. For instance there was a strong belief that toleration and the respect for local customs would further the commercial interests of the East India Company by maintaining social stability. Expressing one such opinion Nathaniel Halhed, the compiler of the first Hindu legal code in colonial India, observes that the interest in commerce

... awakened the attention of the British Legislature to every circumstance that may conciliate the affections of the natives, or ensure the stability to the acquisition. Nothing can so favourably conduce to these two points as a well timed toleration in matters of religion, and an adoption of such original institutes of the country, as do not immediately clash with the Laws or interests of the Conquerers.²⁶⁵

²⁶³ Rankin, *Background to Indian Law*.

²⁶⁴ For a recent example of this argument see Jon Wilson, “Anxieties of Distance: Codification in Early Colonial Bengal,” *Modern Intellectual History* 4, no. 1 (2007): 7-23.

²⁶⁵ Nathaniel Brassey Halhed, ed., *A Code of Gentoo Laws, or Ordinances of the Pundits, from a Persian Translation Made from the Original, Written in the Shanscrit Language. [Translated and Edited by N. B. Halhed.]* (London, 1776), ix. For a similar opinion see William Jones, *Institutes of Hindu Law, or; The Ordinances of Menu, According to the Gloss of Cullúca, Comprising the Indian System of Duties, Religious and Civil* (London: Routledge, 2000), iii-iv. See also De Roover and Balagangadhara, “Liberty Tyranny and the Will of God: The Principle of Toleration in Early Modern Europe and Colonial India,”

Similarly William Bolts distinguishes British colonial government from that of the Portuguese by suggesting that

...the Portugueze had enthusiastically demolished the Idols of the Gentoos, and by persecutions endeavoured to abolish their customs, nay, and even to force them to the profession of the Christian religion, which could not but be destructive of all commercial intercourse²⁶⁶

However, I will demonstrate that normative arguments accompanied these pragmatic and expedient defences of toleration. That is, I argue that colonial law and government were also framed by normative principles and the historical legacy of such principles.

Second, I also distinguish my case about normative toleration from an influential strand of post-colonial scholarship which argues that the colonialism or colonial government was a knowledge project tied to colonial power. The work of Bernard Cohn is perhaps the best exemplar of this argument. Speaking of colonialism as a framework of knowledge, Cohn's work suggests the exciting and useful possibility of understanding colonialism as a 'structured' framework of knowledge.²⁶⁷ However, in accounting for the relationship between colonial domination and colonial knowledge, Cohn claims "the conquest of India was a conquest of knowledge. ... knowledge which the conquerors defined as *useful for their own ends*." (emphasis added) I argue that this account fails because of its inability to make a sufficiently sharp distinction between knowledge and power, and its inability to

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²⁶⁶ William Bolts, *Considerations on India Affairs; Particularly Respecting the Present State of Bengal and Its Dependencies. To Which Is Prefixed a Map of These Countries, Chiefly from Actual Surveys. The Second Edition, with Additions. By William Bolts* (London: printed for J. Almon. P. Elmsly. and Brotherton and Sewell, 1772), 67.

²⁶⁷ For instance See Bernard S. Cohn, *Colonialism and its forms of knowledge: the British in India*, Princeton studies in culture/power/history (Princeton, N.J: Princeton University Press, 1996); Bernard S. Cohn, "The Census, Social Structure and Objectification in South Asia," in *An anthropologist among the historians and other essays* (Delhi ; Oxford: Oxford University Press, 1987); Nicholas B. Dirks, *The Scandal of Empire: India and the creation of Imperial Britain* (New Delhi: Permanent Black, 2006); Lata Mani, "Contentious Traditions: The Debate on Sati in Colonial India," in *Recasting women: essays in Indian colonial history*, ed. Kumkum Sangari and Sudesh Vaid (New Delhi: Kali for Women, 1989), 88-126.

explain the manner in which the exercise of power is itself shaped by forms of knowledge. Like Cohn I also argue that colonialism is a framework of knowledge adopted by the colonising power to characterise the colonised. However, my account is distinct from Cohn's in that I try to interrogate the manner in which colonial knowledge determines the conceptual frames within which colonial interests are pursued. In other words I do not deny the significance of power but emphasise and flag the significance of the discursive and theoretical bounds within which the exercise of power was made possible.

In the following sections I demonstrate that colonial toleration was normatively driven and explore the effects of this policy at two levels. First, through the archetypal example of Sati (wife burning), I demonstrate the manner in which the eventual proscription of this practice in 1829 was born out of the colonial policy of normative toleration. That is, I show that colonial toleration intersected with this social practice to transform its representation as the religious *truth* embodied in the religious laws of the Hindus. Second, through debates on the making of Anglo-Hindu law I demonstrate that specific practices like Sati were set in the broader framework in which the ethical framework of the *Dharma Shastra* tradition (science of right action) was mistranslated or reformed in colonial discourse as the religious laws of the Hindus.

4.2. Founding Practice: The Colonial Reformulation of Sati

The colonial debate on the practice of Sati or widow immolation is a particularly instructive example illustrating the colonial policy of normative toleration on India as well as its effects on Indian religious traditions. Until the practice was legally banned in 1829 it was consistently tolerated by colonial policy despite the unanimous belief of almost all colonial officials that the practice was morally repugnant. In this section I am concerned with a particular question that structured the colonial discourse on Sati. That is, did the practice of Sati constitute a part of the *true* religious laws of the Hindu religion?

While expressing his horror about the practice of Sati the District Collector of Shahabad in 1789 noted that “the rites and superstitions of the Hindoo religion should be allowed with

the most unqualified tolerance” according to existing government policy. The collector had restrained practice of Sati but was unsure of the course of action that he had pursued and therefore asked for government approval of his order. In response the government at Calcutta instructed him that

... they are desirous he should exert all his private influence to dissuade the natives from a practice so repugnant to humanity and the first principles of religion, they do not deem it advisable to authorize him to prevent the observance of it by coercive measures, or by any exertions of his official powers; as *the public prohibition of a ceremony, authorized by the tenets of the religion of the Hindoos,...*²⁶⁸ (emphasis added)

The exhortation to persuade the natives was reiterated again by the Governor General when they signalled approval of the actions of James Rattray, the acting magistrate of Midnapore who dissuaded a widow from committing Sati. Thus the moral repugnance that the practice evoked in the colonial administration was tempered by the belief that Sati was a part of the religious laws of the Hindus and therefore worthy of toleration.

However, there was a degree of ambivalence about whether a practice they held to be so barbarous could indeed be part of the religion of the Hindus. Thus in 1805 the *Nizam Adalat* or provincial criminal court was asked by the Governor General in Council to ascertain through the Hindu pundits attached to the Diwani Adalat (the civil disputes court) whether Sati was founded in the religious laws of the Hindus.²⁶⁹ In response the court expressed the opinion that “the practice of widows burning themselves with the bodies of

²⁶⁸ “Letter from the Collector of Shahabad (M.H. Brooke), to the Right Honorable Charles Earl Cornwallis, K. G. Governor General in Council, Fort William” in “Papers relating to East India affairs: viz. Hindoo widows, and voluntary immolations,” *House of Commons Parliamentary Papers XVIII* (1821): 22. See also Lata Mani, *Contentious traditions: the debate on Sati in colonial India* (Berkeley, London: University of California Press, 1998), 11-41.

²⁶⁹ This followed another question from J.R. Elphinstone asking for instructions from the Governor General in Council saying that he was not “aware of the existence of any order or regulation to prevent such a barbarous proceeding and as the proceedings of the natives may be affected by an interference on the part of the magistrate.” “Extract Bengal Judicial Consultations, 7th February 1805” in “Papers relating to East India affairs: viz. Hindoo widows, and voluntary immolations,” 24.

their deceased husbands is founded on the religious notions of the Hindoos, and is expressly stated with approbation, in their law.”²⁷⁰ Thus though there were some early debates among colonial officials on whether Sati was a religious practice of the Hindus, by the early years of the 19th century most of the debate on Sati proceeded on the assumption that it was religiously sanctioned.²⁷¹

It is odd however, that colonial legal practice should have tolerated Sati on the grounds that it was permitted in the religious laws of the Hindus. This is because the act could have been penalised as a homicide under the Anglo-Islamic criminal law which governed crime in colonial India until the enactment of the Indian Penal Code in 1860. According to section 3, Regulation 8 of 1799, it was stated that “it shall not justify any prisoner convicted of wilful homicide, that he or she was desired by the party slain to put him or her to death”. However, the *Nizamat Adalat* (the criminal court) clarified that this section did not apply to Sati or to the suicide of lepers because these acts had the sanction of the shastras.²⁷² This seems to suggest that an exception to the applicable criminal law was made out through judicial practice, clearly pointing to the weight attached to the toleration of recognised religious practices like Sati. However, my concerns centre on the *manner* in which the colonial government tolerated Sati.

Following the opinion of the pundits that Sati was part of the religious laws of the Hindus, the Nizamat Adalat in concord with the Governor General in council issued a set of directions to the police which were the guiding principles regulating the practice until it was banned in 1829. According to those directions

²⁷⁰ “Extract Bengal Judicial Consultations, 5th December 1812” in *Ibid.*, 27.

²⁷¹ For instance see the exchange between Alexander Dow and Nathaniel Halhed contesting the religious character of Sati in De Roover and Balagangadhara, “Liberty Tyranny and the Will of God: The Principle of Toleration in Early Modern Europe and Colonial India,” 119.

²⁷² Radhika Singha, *A despotism of law: crime and justice in early colonial India* (Delhi; New York: Oxford University Press, 1998), 82. See also J. H. Harrington “Extract from the Reports of the Criminal Cases adjudged by the Court of Nizamat Adalat in the year 1810” in “Papers relating to East India affairs: viz. Hindoo widows, and voluntary immolations,” 26.

(t)he ceremony denominated suttee (at which Hindu women burn themselves) certain acts have been occasionally committed in direct opposition to the rules laid down in the religious institutes of the Hindoos, by which that practice is authorized and forbidden in particular cases; as for instance, at several places pregnant women and girls not yet arrived at their full age, have been burnt alive; and people after having intoxicated women, by administering intoxicating substances, have burnt them without their assent, whilst insensible; and *as much as this conduct is contrary to the Shaster*, and perfectly inconsistent with every principle of humanity ... , the police darogahs are hereby accordingly under the sanction of government, strictly enjoined to use the utmost care, and make every effort to prevent the forbidden practices above mentioned ...²⁷³ (emphasis added)

That is, the practice ought to be tolerated because it was enjoined by the Hindu scripture though it had to be regulated strictly in accordance with the ‘truths’ of the Hindu Shaster or religious law. In other words the practice was divided by the colonial establishment into the tolerated or the legally and scripturally permitted Satis and those that were not scripturally permitted and therefore illegal or liable to be treated as a criminal offence.

Drawing on the expositions of the pundits attached to the courts the government decided that the most important criteria that constituted a valid Sati were that the practice be performed voluntarily and with the assent of the woman being committed to the flame.²⁷⁴ In this regard it is extremely important to note that the opinion the pundits attached to the court often spoke of Sati in highly localised and qualified terms. However, their qualified

²⁷³ “Extract Bengal Judicial Consultations, 17th April 1813” in *Ibid.*, 31.

²⁷⁴ To quote the response of the pundits attached to the court “Having duly considered the question proposed by the court, *I now answer it to the best of my knowledge*: Every woman of the four casts (bruhmin, khetry, bues and soodur) is *permitted* to burn herself with the body of her husband, provided she has not infant children, nor is pregnant, nor in a state of uncleanness, nor under the age of puberty in any of which cases she is not allowed to burn herself with her husband’s body. But a woman who has infant children, and can procure another person to undertake the charge of bringing them up, is permitted to burn. It is contrary to law, as well as to the usage of the country. to cause any woman to burn herself against her wish, by administering drugs to stupify or intoxicate her. (emphasis added) “Extract Bengal Judicial Consultations, 5th December 1812” in *Ibid.*, 28-29.

responses to the questions of colonial officials were interpreted to mean that Sati was mandatorily enjoined by the Shastras.²⁷⁵ Lata Mani's pioneering work on Sati demonstrates the manner in which official assumptions on Sati shaped the responses of the pundits to the questions that were posed to them. That is, the pundits were coaxed and compelled to validate colonial scriptural assumptions about the practice. Thus colonial practice initiated a particular manner of interpreting Sati by privileging texts over customs, older texts over more recent ones, organising a hierarchy of the textual sources and so on.

Mani demonstrates that the official assumption of the scriptural truth of the practice determined the manner in which the practice was considered and debated by the entire spectrum of intellectual opinion until it was eventually banned in 1829. Thus the official colonial position on the practice was therefore less interested in the social reality of the practice as it was in the status of the practice as a Hindu religious truth. Even the various strands of colonial opinion that opposed the practice for its barbarity argued against it not on grounds of cruelty but by demonstrating that the practice was invariably or inevitably performed involuntarily in contravention of scriptural rules.

Mani however goes on to argue the standard thesis that colonial discourse was a product of colonial domination. In this respect this chapter differs from her account by positing that it was normative toleration that produced the specifically colonial discourse as witnessed in the case of the Sati debates of the early 19th century. That is, normative toleration shaped the manner in which colonial domination was exercised over the practice of Sati. At the level of the broader debate Mani identifies three significant positions in the discussion leading to the abolition of Sati. These are the official position, the indigenous reformist

²⁷⁵ Statistics on Satis were maintained since 1815 till the practice was abolished. In this regard it is significant to note that magistrates recorded instances of Sati in their districts according to whether they had been performed legally in accordance with the Shastras. More importantly, most of the opinions given by the pundits on which official decisions were based were framed in extremely localised and particular terms. For instance the opinion would include a sentence "In certain villages of Burdwan, a district in Bengal, the following ceremonies are observed" or that "The ceremonies practically observed, differ as to the various tribes and districts." However these differences were flattened out to construct the scriptural and religious foundations for the practice. *Ibid.*, 67-80, 116-18, 130.

position and the indigenous opponents of reform, each of which I outline in what follows.

Mani takes Walter Ewer's (the acting superintendent of police of the Lower Provinces) letter to W.B. Bayley, secretary to the government in the Judicial Department, written in November 1818, to be a good example that summed up the official position.²⁷⁶ Ewer, argued that "... such an event, as a voluntary suttee, very rarely occurs;" that she was often a victim of "the surrounding crowd of Hungry Brahmins and interested relations."²⁷⁷ In other words, an involuntary Sati had nothing to do with religious liberty but in fact contravened the Hindu religious law as it was known to the British. In addition Ewer also undertook a reading of classical Hindu jurists like Manu to argue that the religious texts of the Hindus recommended Sati but none enjoined it.

Having undermined the scriptural basis for Sati he even drew from available empirical evidence to show that the incidence of Sati was largely restricted to a few districts like Calcutta, Shahbad, Sarun and Ghazipur. Therefore he tried to argue that the practice had no general significance for Hindus. However, the literature suggests that this empirical questioning of Sati did not undermine the significance of questions regarding the religious nature of Sati. Thus W. B. Bayley could be intrigued that adjoining districts could display wide discrepancies in the reported instances of Sati. Mani argues that this could only be because of the larger scriptural background in which the practice of Sati was located by the Company government.²⁷⁸

Mani argues that the indigenous opinion on Sati formed something of a native public sphere which debated amongst itself as much as it spoke to the Company government. As she mentions

(i) indigenous discourse for and against *sati* was dispersed across a variety of texts,

²⁷⁶ Mani, *Contentious traditions*, 26.

²⁷⁷ A similar opinion was also expressed E. Molony, acting magistrate of Burdwan. "Papers relating to East India affairs: viz. Hindoo widows, and voluntary immolations," 227, 235.

²⁷⁸ Mani, *Contentious traditions*, 31.

their tenor and inflections shaped in part by the audience being addressed. ... In general, petitions to the government addressed the legality or illegality of *sati*. In them, opponents of widow burning emphasized its involuntary nature and only secondarily engaged questions of scripture, while proponents tended to integrate into a discussion of scripture, their claims regarding widow burning as a freely expressed and inalienable right of Hindus. By comparison, pamphlets on *sati* focused primarily on questions of scripture and turned only secondarily to the details of practice.²⁷⁹

In petitions to the government on the legality of Sati it was perhaps not unexpected that the indigenous positions would attempt to mould their arguments in a manner that would be intelligible to the colonial State. However, Mani demonstrates that the nature of the indigenous debate was also gradually reformed along the lines of an increased scripturalisation of the practice.

Ram Mohan Roy is Mani's archetypal instance of the Indian reformer who over years of interactions with the British government eventually came to argue against Sati in a manner quite similar to Ewer. Drawing from a tract published by Roy in 1830 Mani demonstrates how Roy's argument against Sati was constructed through a deep engagement with Hindu Upanishadic or scriptural literature. That is, he relied on Vedic texts attributed to the classical jurist Manu to argue that Sati is not imperatively enjoined by the Hindu religion. Similarly he also drew on classical Hindu law texts less authoritative than the Vedas and the Upanishads to argue that Sati was not an obligatory act even though it might be recommended in some of them. Having argued that Sati was not mandated by the scriptures, he also suggests that the incidence of Sati was caused by local reasons like the superior property rights that women enjoyed in Bengal under the *Dayabhaga* school of Hindu law.²⁸⁰

Ram Mohan Roy therefore does not think that there is sufficient evidence in the scriptures

²⁷⁹ Ibid., 65.

²⁸⁰ Mani, "Recasting women," 102-6.

demanding or recommending the practice of Sati. It is important to note that he does not dispute that the Hindu classical texts are an appropriate way to determine whether the practice is legitimate or not. That is, he accepted the broader colonial account that founded the practices of Hindu society in the prescriptions of what was supposed to be Hindu classical or religious literature. Mani also demonstrates how Roy's forms of argumentation on divinity in general and the practice of Sati in particular changed over a fifteen year period from 1815 to 1829 as came into contact with the colonial establishment. As she notes, the earlier influences of Islamic rationalism which were also critical of ritual practices like Sati were replaced by a scriptural critique of these practices that derived from the colonial appreciation of Indian ritual practices. Arguments like those of Roy and Ewer eventually undermined the case that Sati ought to be tolerated and the practice was eventually banned by Governor General Bentinck in 1829.

Protesting the ban imposed by Bentinck, a petition representing indigenous opposition argued that textual evidence was not crucial for the continuation of a custom. They argued that even though there was no scriptural mandate for a whole range of traditional practices like *durga puja* or *dola jatra* their performance was not inconsistent with the scriptures and that it would be impious not to perform these rituals. Presumably referring to the likes of Ram Mohan Roy they also argued that questions addressing issues relevant to the interpretation of sacred books and the authority of custom ought to be answered only by pious men. That is, the authority of customs could not be decided by "men who have neither any faith nor care for the memory of their ancestors or their religion."²⁸¹

However, even this petition seemed to adopt the scripturally founded account of Sati when it argued that

... the sacrifice of self immolation called suttee, which is not merely a sacred duty but is a high privilege to her who sincerely believes in the doctrines of their religion; and we humbly submit that any interference with a persuasion of so high and self-annihilating a nature, is ... *an unjust intolerant dictation in matters of*

²⁸¹ Ibid., 107.

*conscience ...*²⁸² (emphasis added)

Nonetheless, the indigenous opposition to the ban on Sati clearly suggest that the practice could be understood as a traditional practice which was not necessarily understood by the native supporters of Sati as scripturally founded.

Treating Sati as a traditional practice was however a way of rendering and interpreting the practice that the scriptural approach marginalised. This marginalisation is perhaps better explained through the position taken by Mrityunjay Vidyalkar a pundit at the *Nizamat Adalat* at Calcutta who gave an opinion to the Court that Sati was of ambiguous or low scriptural value. However, he also refused to go further along that line of argument and declare that the practice ought to be abolished or morally devalued.²⁸³ Vidyalkar's support for the pro Sati position would seem contradictory from the point of view of a scripturally founded doctrinal view of the practice. However, as I have repeatedly maintained traditional religious practices are understood not on grounds of foundational truth but merely on the grounds that a practice has been passed on through generations. Thus the forms of arguing about the legitimacy and permissibility of the practice would also be determined by this traditional character. However, the colonial forms of interpreting the practice of Sati were founded on the scriptural truth of the practice and could not comprehend the form in which Vidyalkar, and indeed many other pundits attached to colonial courts, responded to colonial questions on the scriptural status of Sati within the Hindu religion.

By viewing the practice of Sati as the true religious law of the Hindus the colonial government drew a reflexive relationship of truth between the practice of Sati and the religious laws of the Hindus. The reflexive relationship of truth was not restricted to the practice of Sati. The annual reports submitted to parliament since record keeping on Sati

²⁸² Jatindra Kumar Majumdar, ed., "The Petition of the orthodox Hindu community of Calcutta against the Suttee Regulation," in *Raja Rammohun Roy and progressive movements in India, a selection from records, 1775-1845* (Calcutta: Art Press, 1941), 156.

²⁸³ Mani, *Contentious traditions*, 54-55.

began in 1815 makes for fascinating reading on the centrality of scriptural truth in the determination of the manner in which Indian practices came to be considered as fit for toleration.

Thus a Muslim man who buried alive his leprosy afflicted mother-in-law was convicted for committing a homicide; however, the courts suggested that the same decision would not apply to Hindus because “in the case of the Hindoos it is countenanced and enjoined by their religion.”²⁸⁴ Similarly in the case of human sacrifice made to the river Ganges, it was held that the practice could not be stopped among the aged and the infirm, since it was considered by the Hindus to be part of their religious books.²⁸⁵ However, where the victim was a child it was to be considered to be a criminal act and an 1802 law declared all persons who committed or assisted such acts guilty of murder.²⁸⁶ The logic of colonial toleration was so clearly driven by the search for scriptural foundation that even a custom of long standing was not accepted as a good reason for toleration. For instance in a case of women belonging to the Jogee caste who buried themselves along with their dead husbands, colonial judges took the opinion that the practice ought to be stopped as it was not permitted by the scripture despite recognising this to be a practice of long standing among the Jogees.²⁸⁷ Colonial toleration was therefore a curious disposition of the colonial

²⁸⁴ “Extract from the Report of the Criminal Cases adjudged by the Court of Nizamut Adawlut, in the year 1810”; “Extract Bengal Judicial Consultations, 7th February 1805,” in “Papers relating to East India affairs: viz. Hindoo widows, and voluntary immolations,” 24-26.

²⁸⁵ Decision of the court of directors of the Company saying that “in the case of all rites or ceremonies involving the destruction of life, it is the duty of a paternal Government to interpose for their prevention; and therefore recommends to the Honourable Court of Directors, to transmit such Instructions to India, as that Court may deem most expedient for accomplishing this object, *consistently with all practicable attention to the feelings of the Natives*; (emphasis added) James Peggs, *India’s cries to British humanity: relative to suttee, infanticide, British connection with idolatry, ghaut murders, and slavery in India* □ : to which are added humane hints for the melioration of the state of society in British India (Seely and Son, 1830), 208.

²⁸⁶ “Minute of Mr. G. L. Prendergast,” in “Papers relating to East India affairs: viz. Hindoo widows, and voluntary immolations,” 246-47.

²⁸⁷ “Letter from Searman Bird, senior judge and J. Rattray, 2d judge at Dacca to M. H. Turnbull, esq. Register to the Nizamut Adawlut, Fort William, dated 19th August 1816,” in *Ibid.*, 101.

government that was not only based on the pragmatism and prudence. On the contrary the disposition to tolerate native practices only on the demonstration that such practices were founded in the truth of Hindu religious law suggests the normative character of colonial toleration.

In contemporary scholarship the scripturalisation of practices like Sati has been understood by scholars like Mani to be significant because it points to the ‘modernity’ of tradition.²⁸⁸ That is, it points to the manner in which conceptions of traditions are produced by very contemporary renderings and mistranslations of ‘traditional’ practices. However, most of these accounts on the modernity of tradition often proceed to reduce their insights on the contemporary transformation of tradition as an effect of domination, often of imperial domination. By doing so these accounts are unable to specify the precise manner in which their conceptions of domination structure contemporary understandings of tradition. It is in this context that I have argued that colonial toleration posits a reflexive relationship of truth between Hindu religious practices and Hindu religious laws which in turn has transformed the representation of these religious traditions.

To conclude this section I also suggest that the colonial response to Sati constitutes a model that has played a determining role in all subsequent debates on the reform of Hindu society. That is, the official reformulation of Indian traditions as embodiments of a true Hindu law has been an important aspect of the social reform process ever since it took this shape in the legal debates on Sati.²⁸⁹ Though this broader claim about the will to truth in colonial

²⁸⁸ For similar accounts see T. O. Ranger and E. J. Hobsbawm, *The invention of tradition* (Cambridge: Cambridge University Press, 1992); Mahmood Mamdani, *Citizen and Subject: Contemporary Africa and the Legacy of Late Colonialism*, Princeton studies in culture/power/history (Princeton, N.J: Princeton University Press, 1996). The work of Bernard Cohn which I have cited previously also takes a similar position in relation to the very modern conceptions of traditions produced by colonial government. Cohn, *Colonialism and its forms of knowledge*; Cohn, “The Census, Social Structure and Objectification in South Asia.”

²⁸⁹ From the available scholarship it is also possible to make the further claim that the colonial discourse on Indian traditions, continued to inform subsequent debate on contentious issues around aspects of Indian traditions throughout the 19th century. Thus debates on widow remarriage, the marriage debates of the

toleration is only suggestive, I buttress the claim by demonstrating a similar colonial reformulation or misrecognition of the ethical-legal tradition contained in the *dharma shastra*, as positivist and religiously revealed laws on which the colonial administration believed Hindu traditions like Sati were founded. To do so I first outline the emergence of the personal law system in British India and of Hindu law as one of its constituent parts.

4.3. Colonial Toleration and the making of Hindu Law

The span of British rule in India extended from 1757 when the East India Company defeated the Nawab of Bengal to 1947 when the Government of Great Britain relinquished control over all its Indian territories to the independent nation States of India and Pakistan. During this period the East India Company governed India till the revolt of 1857 under the authority of the British parliament. After the revolt the Crown assumed direct control of British India. The judicial landscape right through the period of Company rule was extremely complex and varied and included charters and acts of Parliament, Indian legislation, Company Regulations, English Common Law and Ecclesiastical and Admiralty law, Hindu Law, Muslim Law and customary law. However, right through this period the Company and later the Imperial government gradually increased its judicial footprint and clarified its legal authority in India, resolving all interstitial disputes through the maxim ‘justice, equity and good conscience’.²⁹⁰

After the charter of 1833 the Company government in India began an overtly stated process of reform or modernisation of the Indian legal system. This followed from the appointment

1880s, as well as the debates over the Age of Consent Bill in 1891 were all conducted in the reformed language of the true Hindu scripture. See Isvarachandra Vidyasagar, *Marriage of Hindu Widows* (Calcutta: Bagchi, 1976); Sudhir Chandra, *Enslaved daughters: colonialism, law and women's rights* (Delhi: Oxford University Press, 1998); Tanika Sarkar, *Hindu wife, Hindu nation: community, religion and cultural nationalism* (New Delhi: Permanent Black, 2001).

²⁹⁰ Derrett refers to this as a source of law “recognised by civil lawyers of the European world, trained in Roman and Canon laws, which act as residual sources of law in default of written law and custom.” J. Duncan M Derrett, “Justice Equity and Good Conscience in India,” in *Essays in Classical and Modern Hindu Law*, vol. 4 (Leiden: E J Brill, 1977), 8-28.

of a series of Indian Law Commissions which explored the possibility of systematising, simplifying and codifying large parts of the existing law.²⁹¹ However, the actual process of codification of Indian law commenced only after the Crown assumed the government of India in 1858. In the period stretching from 1860 to the early part of the 1880s large parts of the commercial, criminal and procedural law were codified on the basis of British and largely utilitarian legal principles. The only areas of law that were exempted were the personal or religious laws of various communities. As I have mentioned earlier in this chapter, in this domain of law dealing with matters of Inheritance, Marriage, Caste, and other religious usages or institutions, the law applicable was not territorial but the personal or religious laws of the relevant communities.²⁹²

It could be argued that codification and modernisation of Indian law in the 19th century emphasised the distinction between a public sphere where the colonial State asserted its absolute authority and a sphere in which it permitted personal laws as the private practices of religious communities. However, though the colonial legal system attempted to carve out a zone of toleration for personal laws, these laws were incorporated as a constituent part of the larger colonial legal system. Consequently the broader intellectual currents of colonial modernisation and reform impacted on these laws as well. Thus it is the reformed manner in which the personal laws were tolerated and incorporated into the legal system of British India that I explore and emphasise in the discussion that follows in this chapter.

The first explicit step incorporating Indian personal law regimes into the colonial legal system is attributed to the policy of government toleration for native laws contained in Warren Hastings' judicial plan for Bengal in 1772. Commenting on this plan, Robert Travers notes that it inaugurated a radically new conception of sovereign government in India. The earlier Moghul system permitted a plurality of legal authority and was at ease with the State courts being one among other options in a wide variety of disputes. However, once approached, plurality was not countenanced within the Moghul court system. The

²⁹¹ Jain, *Outlines of Indian legal history*, 469-74.

²⁹² See note 261.

British colonial legal order differed from the Moghul legal scheme in that it incorporated indigenous legal forms into one common sovereign system of law and government.²⁹³

Though the process of incorporating indigenous religio-legal forms into the colonial legal system was structured by the language of toleration, I demonstrate in this chapter that indigenous legal forms were not tolerated on their own terms but were reformulated as the true religious foundation of native practices. As with Sati, this ‘will to truth’ in the colonial legal system demonstrates its mis-recognition of indigenous legal forms. Such a mis-recognition lies at the heart of what is involved in the reformulation of these traditions as foundational truths and religious dogma. Though the search for the true scriptural foundations must have marked the making of all the major religio-legal traditions in India,²⁹⁴ in this chapter I focus only on the attempts to uncover the foundations of the Hindu religious law.²⁹⁵

The early attempts to uncover the foundations of Indian religio-legal forms were undertaken by an extensive codification of Indian religious laws. This early codification of Indian religio-legal traditions was different from the efforts carried out in the latter part of

²⁹³ Robert Travers, *Ideology and Empire in Eighteenth-century India: The British in Bengal* (Cambridge, UK: Cambridge University Press, 2007), 115-25. Drawing on Max Weber, Marc Galanter calls this process the expropriation of law allowing government the monopoly to find, declare and apply the law. Marc Galanter, “The Displacement of Traditional Law in Modern India,” in *Law and Society in Modern India* (Delhi: Oxford University Press, 1997), 17-18.

²⁹⁴ That is, it must have left its mark on all Indian personal law traditions. Viz. the Hindu, Muslim, Parsi, and Christian personal law systems.

²⁹⁵ The search for true foundations has also been explained in terms of the colonial legal systems need for certainty. I suggest that certainty is by itself not an explanation and it is in this context that I believe that normative toleration is a powerful explanation for why true foundations were demanded of religious laws. For the literature suggesting that certainty drove the search for true foundation of religious laws See Bernard S. Cohn, “Law and the Colonial State in India,” in *Colonialism and its forms of knowledge: the British in India* (Princeton, N.J: Princeton University Press, 1996), 57-75; Richard W. Lariviere, “Justices and Panditas: Some Ironies in Contemporary Readings of the Hindu Legal Past,” *The Journal of Asian Studies* 48, no. 4 (November 1989): 757-769.

the 19th century in that the former was purportedly based on indigenous (in this case Hindu) legal traditions. Duncan Derrett describes this process as one through which the British emerged as patrons of a “flourishing, but not assertive or brilliant tradition of sastric learning available both for intellectual exercise and for the direction of the Hindu public.”²⁹⁶ The conceptual contours within which early codification was developed is attributed to the work of three scholar administrators of the Company – Nathaniel Halhed, William Jones and H.T. Colebrooke. All three viewed the toleration of native laws to be an important aspect of colonial governance and importantly each of them viewed this task as involving the determination of the true foundations of Hindu religious law.

Having associated the foundations of Hindu Law with *Dharma Sastric* learning, the British had to make sense of this tradition whose ideas of law and justice were most unlike their own. Responding to this challenge, Warren Hastings began a process of codifying and consolidating the texts of the Sastric tradition to facilitate the administration of those areas of law reserved to be governed by the laws of the Hindus under his judicial plan of 1772. To codify Hindu law on marriage, inheritance and religious usages, eleven pundits were persuaded to compile a legal digest of these areas from the available Hindu legal literature. The results of this exercise, a Sanskrit text called the *Vivadarnanva Setu* or bridge across the ocean of litigation, was the first law code commissioned under the watch of the Company government. This text was later translated from its original Sanskrit to Persian and then from Persian it was translated to English by Nathaniel Halhed a civil servant with the Company.

On finding Halhed’s Code insufficient as a definitive guide to deal with the disputes that the Company had to address, William Jones undertook the next major exercise of codifying Hindu legal authorities, especially on contracts and inheritance, into one comprehensive digest. However, Jones died before he could complete the digest and that task was completed by H.T. Colebrooke. This new Sanskrit text was titled *Vivadabhangarnava* or ‘a break wave on the ocean of disputes’. Besides completing Jones’ digest Colebrooke is also

²⁹⁶ J. Duncan M. Derrett, “Definitions,” in *Religion, law and the state in India* (Delhi: Oxford University Press, 1999), 231.

credited with organising the *dharma shastras*, the supposed Hindu legal texts, in the manner in which they are understood by the Indian legal system up to the present day. In this chapter I am particularly concerned with what these colonial administrators made of the texts that they designated the religio-legal foundation of the Hindu religious tradition.

Prefacing his Code on Hindu Law, Nathaniel Halhed argued for its toleration, saying that

... materials may be collected towards the legal accomplishment of a new system of government in Bengal, wherein the British laws may, in some degree, be softened and tempered by a moderate attention to the peculiar and national prejudices of the Hindoo; some of whose institutes, however fanciful and injudicious, may perhaps be preferable to any which could be substituted in their room. They are interwoven with the religion of the country, and are therefore revered as of the highest authority; They are the conditions by which they hold their rank in society. Long usage has persuaded them of their Equity, and they will always gladly embrace the permission to obey them;²⁹⁷

That is, he viewed the laws of the Hindus as worthy of toleration because they are interwoven with the religion of the country and are therefore held to be of the ‘highest authority’.

Similarly, prefacing his translation of *Culluca's* rendition of the commentary on Hindu Law attributed to the Hindu jurist Manu, William Jones says that

(i)t is a maxim in the science of legislation and government, that Laws ... unless they were congenial to the disposition and habits, to the religious prejudices, and approved immemorial usages of the people for whom they were enacted; *especially if that people universally and sincerely believed that all their ancient usages and established rules of conduct had the function of an actual revelation from heaven:* the legislature of Britain having shown, in compliance with this maxim, an intention to leave the natives of these Indian provinces in possession of their own Laws, at

²⁹⁷ Halhed, *A Code of Gentoo Laws, or Ordinations of the Pundits, from a Persian Translation Made from the Original, Written in the Shanscrit Language. [Translated and Edited by N. B. Halhed.]*, xv.

least on the titles of contracts and inheritances, we may humbly presume, that all future provisions, for the administration of justice and government in India, will be conformable, as far as the natives are affected them, to the manners and opinions of the natives themselves;²⁹⁸ (emphasis added)

Similarly H. T. Colebrooke also designated Hindu law as tied to the sacred laws of the Hindus and therefore worthy of toleration. However, as the process of uncovering the nature and features of Hindu law gathered pace, the question was not so much whether Hindu law was tied to the sacred laws of the Hindus but the manner in which the large body of Hindu sacred texts would be organised into a body of law which could be judicially administered.

To get a better sense of what Colebrooke and his predecessors attempted to do it is perhaps useful to make a small detour into the classification of Hindu religio-legal texts from a contemporary perspective. At the broadest level Hindu legal texts were concerned with upholding *dharma* or the eternal laws that maintain right order in the world.²⁹⁹ Robert Lingat mentions that in a juridical sense *Dharma* can be derived from three sources – the *Veda*, Tradition, and Good Custom, of which each preceding source is understood to be more authoritative than the other. Early colonial reflection on the classification of legal texts primarily referred to the textual traditions of the *Veda* and ‘Tradition’ when they attempted to decipher and classify these sources of dharma from the perspective of colonial legal requirements. The *Veda* and Tradition as sources of dharma are also differentiated as the *Sruti* or the revealed or heard texts and the *Smriti* or the remembered or inspired texts.³⁰⁰

²⁹⁸ Jones, *Institutes of Hindu Law, or, The Ordinances of Menu, According to the Gloss of Cullúca, Comprising the Indian System of Duties, Religious and Civil*, iii.

²⁹⁹ According to Lingat, this is a conception of the world that Indians share with the Iranians in which the world is an objective order inherent in the very nature of things and that even the gods are only the guardians of dharma. He notes that it is a conception of right or righteous order guiding human action in which the idea of law backed by authority is not internal to its sustenance. Robert Lingat, *The Classical Law of India*, New edition. (Delhi: Oxford University Press, 1998), x-xiii, 3.

³⁰⁰ Jagannātha Tarkapañchānana, *A Digest of Hindu Law on Contracts and Successions, with a Commentary [the Whole Called Vivadabhangarava]*, trans. H. T Colebrooke (Calcutta, 1798), x.

Collectively called the Vedic texts the *Sruti* included a range of texts that are associated with various Sages and are considered to be amongst the earliest texts in the classical Hindu tradition.³⁰¹ In one understanding of these texts they are understood to consist of traditions of understanding and interpreting the four principal Vedas – The *Rig Veda*, *Sama Veda*, the *Yajur Veda* and the *Atharva Veda*.³⁰² However the Vedas are also understood to be the font of all knowledge and the source of all justification in the Hindu tradition. In this sense the Veda is understood as the totality of all knowledge and exceeds the Vedic text. Thus as Lingat mentions if a rule of dharma has no evident source in the Vedic texts then it is to be assumed that such rules rests upon parts of the *Vedas* which is either lost or hidden from view.³⁰³

The *Smriti* or remembered texts on the other hand are attributed to a later period in Indian history. At the broadest level the *smriti* consists of the six *Vedangas*, the epics (the *Mahabharata* and the *Ramayana*) and the *Puranas*.³⁰⁴ Though all these texts deal with various aspects of *dharma* the task of expounding dharma is more specifically tied to the *vedangas*. These texts themselves are divided into various classes of treatises dealing with phonetics, metres, linguistic analysis and grammar, astronomy, etymology and ritual. Of these the texts that deal with ritual or the *kalpa sutras* are the most important from the perspective of determining dharma. The *kalpa sutras* themselves are divided into to three classes – the *srauta sutras* that deal with large sacrifices, the *grhya sutras* that deal with

³⁰¹ Lingat, *The Classical Law of India*; Ludo Rocher, *Jimutavahana's Dayabhaga: The Hindu Law of Inheritance in Bengal* (Oxford University Press, USA, 2002).

³⁰² Each of these interpretative traditions consisted of a 'liturgical' texts called the *Samhitas*, ceremonial texts called the *Brahmanas* and were often accompanied by speculative and philosophical texts called the *Upanishads* and the *Aranyakas*.

³⁰³ Conceiving the Vedas in these broad terms raised the importance of interpretation of Vedas in general as well as for those aspects of the Vedas that dealt with rules of conduct in particular. This technique of interpretation of the Vedas and related texts was called the Mimamsa. Lingat, *The Classical Law of India*, 8-9.

³⁰⁴ *Ibid.*, 10.

domestic ritual and the *dharma sutras* which deal with the rules of and rituals associated with member of a community.³⁰⁵

Of the *kalpa sutra* texts the *dharma sutras* developed into an independent science of Dharma or the *dharma shastras*. As with the *dharma sutras* the *dharma shastra* texts also deal with questions that approximate the modern conception of law and justice. These texts are attributed to various Sages of whom the text attributed to Manu is the most widely and highly regarded. Ludo Rocher distinguishes between the *dharma sutras* and the *dharma shastras* by pointing out that the former is written as aphorisms while the latter is more systematic elaboration of Vedic conceptions of law and customs.³⁰⁶ From the 7th century A.D onwards these *Dharma Sastra* texts were the subject of extensive commentaries and digests. Commentaries explore and discuss the intricacies of specific *dharma shastra* texts in considerable detail while digests discuss legal issues across the *dharma shastra* texts by drawing from a range of texts.

The task the colonial administrators set themselves was to distil a Hindu Personal Law from these supposedly sacred texts of the Hindus. Having identified Hindu law as a *personal law*, codification was an attempt to organise the sources of Hindu law and the manner in which they would be interpreted under that label.³⁰⁷ The challenge of interpreting Hindu legal texts was the large number of texts that could be brought to bear on a legal question and the relative unimportance of following precedent in the traditions of interpreting these texts. In this context the first colonial code, the *Vivadarnanva Setu*, was absorbed by the pandits attached to the company courts as yet another of the numerous texts they used to provide opinions on the legal questions that were posed to them by the colonial courts.³⁰⁸ However, deciding that this form of interpreting Hindu textual sources

³⁰⁵ Ibid.

³⁰⁶ Rocher, *Jimutavahana's Dayabhaga*, 4.

³⁰⁷ Derrett comments that restricting Hindu law to those subjects reserved for personal law was already a departure from the manner in which Hindu law was conventionally arranged. Derrett, "Definitions," 239.

³⁰⁸ Ibid., 241.

permitted too much ambiguity on the applicable law, William Jones initiated the task of compiling the digest that would fix the permissible band within which pundits could interpret the applicable law.

Digesting the available legal authorities on Hindu law, Jones wrote of the project in the following terms:

I would begin with giving them a plan divided into Books, Chapters, and Sections; and would order them to collect the most approved texts under each head, with the names of the Authors, and their Works, and with the chapters and verses of them. When this compilation was fairly, and accurately transcribed, I would write the Translation on the opposite pages, and after all inspect the formation of a perfect index. The materials would be these; Six or Seven Law Books believed to be divine with a commentary on each of nearly equal authority; these are analogous to our Littleton, and Coke.³⁰⁹

It is said that Jones saw himself as an Indian Tribonian who would give Indians “security for the due administration of justice among them, similar to that which Justinian gave to his Greek and Roman subjects.”³¹⁰ Though Jones completed a substantial part of this project, he died before his digest, the *Vivadabhangarnava*, could be translated into English.

The task of completing the *Vivadabhangarnava* was taken up Colebrooke who in the course of his work on Hindu law in India also organised the vast list of authorities into a scheme that took root in the colonial legal system. Jones’ digest was a vast collection of legal opinions by various Hindu legal authorities which Colebrooke found unsatisfactory because of the

... author’s method of discussing together the discordant opinions maintained by the lawyers of the several schools, without distinguishing in an intelligible manner which of them is the received doctrine of each school, but on the contrary leaving it uncertain whether any of the opinions stated by him do actually prevail, or which

³⁰⁹ Cited in Cohn, “Colonialism and its forms of knowledge,” 70.

³¹⁰ Cited in Ibid.

doctrine must now be considered to be in force and which obsolete, renders his work of little utility to persons conversant with the law, and of still less service to those who are not versed in Indian jurisprudence; especially to the English reader, for whose use, through the medium of translation, the work was particularly intended.³¹¹

Thus to make sense of the large and discordant body of legal Indian materials Colebrooke introduced the idea of schools of Hindu law thereby subjecting the field of *dharma* to his own scheme of classification.

Colebrooke suggested that these commentaries and digests were tied to traditions or schools of interpretation which were localised to particular regions of India. He argued that in each region a particular commentary or digest occupied the place as the most authoritative exposition of the position of that particular school. Thus Colebrooke divided the *dharma shastra* tradition into two main schools located at Bengal and Banaras. The Bengal School was said to follow the Sanskrit text *Daya Bhaga* written by *Jimutu Vahana* while the Banaras school followed *Vijnanesvara's* commentary, the *Mitaksara*. The *Mitaksara* was also said to be followed in most other parts of the country though supplemented by other texts in specific regions.

Colebrooke suggested that the authentic or the most authoritative doctrine of each school could be accessed by establishing a chronology of texts and fixing the authoritative position of each school with the oldest available text.³¹² However, as scholars like Lingat have noted, “the most insurmountable obstacles stand in the way of any solution being given to the chronological problem. They force it to depend on deductions which are bound always to have a purely hypothetical character”.³¹³ Lingat notes that these texts display an

³¹¹ Jimutu Vahana, *Dáya Bhága of Jimutu Vahana Translated by H. T. Colebrooke. A New Edition with an Appendix Containing a Collection of Precedents Bearing Upon the Subjects Treated by the Author by Girish Chundra Turkalankar*, trans. H. T. Colebrooke (Calcutta: Sreenauth Banerjee and Brothers, 1868), ii-iii.

³¹² Cohn, “Colonialism and its forms of knowledge,” 74.

³¹³ Lingat, *The Classical Law of India*, 123.

astonishing ability to dissimulate the epoch at which they wrote and the circumstances which motivated their writing. Thus he mentions the fact that these texts borrow extensively from each other, often contain interpolations not present in the original texts, are attributed to mythical personages and so on, as reasons why it is impossible to establish historical dating of these texts with any degree of certainty.³¹⁴

The difficulties in dating texts meant that the chronology that Colebrooke desired could not conclusively be established and eventually resulted in British judges increasingly relying on their own precedents to decide issues in Hindu law. Over the early half of the 19th century these precedents were systematised into texts that could be used by the judicial process through the work of scholar-administrators like Francis Macnaughten, William Macnaughten and Thomas Strange and others.³¹⁵ Furthermore, in 1864 with the reorganisation of the British court system in India, pundits attached to the courts to assist with the interpretation of the Hindu legal texts were dispensed with. Under this new dispensation, the British judge took over sole charge of the interpretation of what has since come to be known as Anglo-Hindu law, thereby completing the influence of precedent in determining the shape and contours of the *dharma shastra* tradition.

Scholars like Derrett, Cohn, Larivierre and Menski point out that the introduction of the principle of *stare decisis* to deal with Hindu Law distorted and dislocated the manner in which the *dharma shastra* texts were read and interpreted. They consider it ironical that this should have happened even though British judges resorted to Hindu law in the name of tolerating Indian religio-legal traditions. I have tried to build on this line of argument by arguing that the structure of colonial toleration which viewed these texts as the embodiment

³¹⁴ Ibid., 123-32.

³¹⁵ Francis Workman Macnaughten, *Considerations on the Hindoo Law, as It Is Current in Bengal* (Serampore, : Mission Press, 1824); William Hay Macnaughten, *Principles of Hindu and Mohammadan law, republished from the Principles and Precedents of the same; 1793-1841* (London: Williams and Norgate, 1868); Thomas Andrew Lumisden Strange, *Elements of Hindu Law*, vol. 2, 2 vols. (London: Payne and Foss, Pall Mall and Butterworth and Son, Fleet Street, 1825); Thomas Andrew Lumisden Strange, *Elements of Hindu Law*, vol. 1, 2 vols., 1825.

of Hindu religious truth plays a determining role in the dislocation of these texts. In the next section I try to demonstrate the specific manner in which colonial toleration reformed or distorted Hindu law and to what effect.

4.4. The Colonial Misrecognition of Hindu Law

Commenting on the manner in which Supreme Courts and the Company Courts³¹⁶ dealt with Indian law Henry Maine identifies an interesting problem arising out of the toleration of these native legal forms. Maine observes:

At the touch of the Judge of the Supreme Court, who had been trained in the English school of special pleading, and had probably come to the East in the maturity of life, the rule of native law dissolved and, with or without his intention, was to a great extent replaced by rules having their origin in English law-books. Under the hand of the judges of the Sudder Courts, who had lived since their boyhood among the people of the country, the native rules hardened and contracted a rigidity which they never had in real native practice.³¹⁷

This raises the question – why the colonial legal regime committed to the toleration of indigenous legal forms ended up transforming or distorting these laws in the image of English laws or rigidifying them in a manner unknown to the practice of native law? I argue that this distortion was produced by the manner in which these texts were viewed and tolerated by the colonial legal framework.

There are many levels at which the issue of reformulation or distortion of Hindu legal traditions can be addressed. For instance it can be addressed at the level of State interests and power as in the argument that the Anglo-Hindu law was a product of the British need for legal certainty.³¹⁸ Though an important way of thinking about Anglo-Hindu Law, I do

³¹⁶ The courts system in British India was divided into the crown courts whose jurisdiction extended to the Presidency Towns or the centres of British power and Company Courts which administered justice in the mofussil or the remaining areas outside the presidency towns.

³¹⁷ Cited in Galanter, Galanter, “The Displacement of Traditional Law in Modern India,” 22.

³¹⁸ As I have already mentioned earlier in this chapter the work of Bernard Cohn is a good example of this

not emphasise this kind of argument and focus instead on the conceptual schemes within which particular interests were made possible. Even at the conceptual level there are various levels of specialisation at which the issue of the distortion of Hindu legal traditions can be addressed. I posit that all of these are subsets of the problems involved in translating words and concepts across cultural frameworks of understanding.

4.4.1. The Making of a ‘Religious’ Law

In the case of Hindu law an important aspect of its reform arose from the semantic slippage involved in the process of translation of Hindu legal texts from Sanskrit to English so that they could be comprehended by the British judges. In an early attempt to deal with this question Theodore Goldstucker poses the issue in terms of the right of the Hindus to ‘question whether the present English translations of the law books can be implicitly relied upon as an equivalent for the originals.’³¹⁹ As scholars like Goldstucker have demonstrated, the slippages arising from semantic translation resulted in profound transformation in the colonial appreciation of Hindu Law. However, I do not address the issue at this level of detail and specialisation partly because I do not have the expertise to deal with linguistic problems but more importantly because I pitch the issue of the transformation at a far more fundamental level of translation – viz. *the mistaken religious identity that is attributed to Hindu Law*.

In an important comment on the distortion of Hindu Law Werner Menski draws attention to scholarship on Hindu Law that suggests that Hindu law derives from divine legislation in the same manner as Muslim law.³²⁰ Opposing these positions Menski asserts that Hindu

form of reasoning about the manner in which the colonial state interpreted Indian legal traditions. Cohn, “Colonialism and its forms of knowledge.”

³¹⁹ Theodor Goldstucker, *On the Deficiencies in the Present Administration of Hindu Law: Being a Paper Read at the Meeting of the East India Association on the 8th of June, 1870* (London: Trubner and Co, 1871), 10.

³²⁰ In this context Menski cites the work of the following authors. Paras Diwan and Peeyushi Diwan, *Modern Hindu law, codified and uncodified*, 8th ed. (Allahabad: Allahabad Law Agency, 1990); John Dawson Mayne, *Mayne’s treatise on Hindu law and usage*, ed. Alladi Kuppaswami, 12th ed. (New Delhi: Bharat

Law is

(n)either premised on a monotheistic core belief nor on the resultant systematic need to obey God's law to the letter. Islamization of the law, as a forensic process of seeking to ascertain what God meant ... may be a political strategy as much as a religious need. For Hindu law, such a systematic need never arose, since the religiously elevated position of the Vedas was not seriously transposed into processes of Hinduization.³²¹

The equation of Hindu Law with Semitic traditions is an important aspect of the distortion of Hindu Law and I follow Menski's suggestion by considering what is implied in the treatment of Hindu law as apiece with the Semitic conception of law and religion.

Menski views the equation of Hindu law with the legal traditions of Semitic cultures as caused by the colonial construction of Anglo-Hindu law and suggests that there are three aspects to this comparison. First, the suggestion that Hindu law is based on divine revelation though it is not clear what kind of divine entity is responsible for such revelation or even what such revelation entails for Hindu Law. Second, it is presumed that the Hindu textual tradition derives from social facts in the same untenable manner as the suggestion that the Western legal tradition is founded on the Bible. Lastly, and most significantly, the British architects of Anglo-Hindu law equated the traditions of reflecting on *dharma* with a positivist conception of law. Menski argues that the equation of *dharma* with the positive law of the Hindus was perhaps the most significant distortion of a tradition of ethical reflection that made up the *dharma* based approach of Hindu law.³²² I illustrate some of the important issues involved in the transformation of the *dharma shastra* tradition into the religious laws of the Hindus through the judicial career of James Henry Nelson.

Law House, 1986); Dinshah Fardunji Mulla, *Principles of Hindu law*, ed. Satyajeet A Desai, 17th ed. (New Delhi: Butterworths, 1998).

³²¹ Werner Menski, *Hindu Law: Beyond Tradition and Modernity* (Delhi: Oxford University Press, 2003), 46.

³²² *Ibid.*, 74-75.

4.4.2. Nelson's Comment on Hindu Law

Nelson came to India in 1862 as a judge in the Madras civil service. As Derrett observes the highest position that he could aspire to in his chosen calling was a seat on the bench of the Madras High court. However, few civil servants were known to rise through the ranks in this manner and therefore to facilitate his case he had to demonstrate judicial distinction beyond his regular professional activities, and publication was a recognised form of distinction. Nelson sensed the need to establish merit and started his career with two well received publications – one an anthropological and administrative manual on the Madura District and the other a Commentary on the Code of Criminal Procedure. These ensured early promotions, eventually leading to an appointment as District and Sessions Judge, Cuddapah in 1876. Derrett mentions that Nelson was justified up to this point in expecting to become a judge of the Madras High Court in due course. However, additional publication would be required to strengthen his chances.³²³

Nelson fatefully decided to write on the state of the Administration of Hindu law in the province of Madras.³²⁴ Though his three books on the subject were an honest critique of the administration of Hindu Law, they were unfortunately not well received by the judicial administration at Madras and consequently sealed his chances of being promoted to the Madras High Court.³²⁵ However, as a judge overseeing the administration of Hindu Law almost a hundred years after the first efforts to codify Hindu law, Nelson brought to notice many of the problems regarding its administration that continue to exercise contemporary

³²³ J. Duncan M Derrett, "J. H. Nelson: A Forgotten Administrator-Historian of India," in *Essays in Classical and Modern Hindu Law Vol.2. Consequences* (Leiden: E J Brill, 1977), 354-58.

³²⁴ The most important of these are the following – J. H Nelson, *A View of the Hindu Law as Administered by the High Court of Judicature at Madras* (Madras, Calcutta, Bombay, Negapatam [printed], 1877); J. H Nelson, *A Prospectus of the Scientific Study of the Hindu Law* (London: Kegan Paul & Co, 1881); J. H Nelson, *Indian Usage and Judge Made Law in Madras* (London: Kegan Paul & Co, 1887).

³²⁵ Refuting his critique Justice Innes of the Madras implored the government to reject his suggestions. Derrett notes that Justice Innes response was "marred by misrepresentation of Nelson's views and by some shocking discourtesies and damaging calumnies." L. C Innes, *Examination of Mr. Nelson's Views of Hindu Law, in a Letter to the Right Hon. Mountstuart Elphinstone Grant Duff, Governor of Madras* (Madras: Higginbotham & Co, 1882).

scholars like Menski.

Nelson devoted his books on Hindu law to “call attention to the absurdity and injustice of applying what is styled the ‘*Hindu Law*’ to the great bulk of the population of the Madras Province ...”.³²⁶ The problem Nelson raised about the administration of Hindu law at Madras was polemically posed in the following terms:

Has such a thing as *Hindu Law* at any time existed in the world? Or is it that *Hindu Law* is a mere phantom of the brain, imagined by Sanskritists without law and lawyers without Sanskrit? For myself, I have always been unable to bring myself to believe that the innumerable non-Muhamedan tribes and castes of India have at any time agreed to accept, or have been compelled to guide themselves by, an aggregate of positive laws or rules set to them by a sovereign or other person having power over them. In other words looking at *law* from Austin’s point of view, I have always been unable to bring myself to believe that law has at any time been known to the so called Hindu population of India.³²⁷

In other words Nelson asserted that Hindu Law as it was administered to the Indians by the British had nothing to do with their own laws, customs and usages. In turn this meant that the British did not abide by their promise to tolerate native usages and customs and to found rule on native usage.³²⁸

Nelson raised the issue of tolerating native laws and customs at two levels. First the competence of the Colonial judicial system to interpret and administer the Sanskrit texts they designated to make up Hindu Law, thereby resulting in numerous linguistic slippages in the appreciation of these texts. Second, problems arising from the wrongful application of Hindu Law to non-Muslim inhabitants of British India who Nelson claimed had nothing

³²⁶ Nelson, *A View of the Hindu Law as Administered by the High Court of Judicature at Madras*, iii.

³²⁷ *Ibid.*, 2-3.

³²⁸ Nelson traces this commitment to toleration to authorities ranging from charter of the Supreme Court, the Madras Regulation of 1802, the Madras Civil Courts Act, 1873 as well as the Queen’s proclamation of 1858 after the Indian revolt. *Ibid.*, 2; Nelson, *Indian Usage and Judge Made Law in Madras*, 7-8.

to do with these laws. He elaborated these problems by positing a set of 15 false principles on the basis of which Hindu Law was built in the province of Madras.

Three of these 15 false principles are particularly relevant to the present discussion. These are:

- i. That there exist or formerly existed, in India certain “Schools of Hindu law”: and that such schools have authority in certain imaginary parts of India such as the *Karnataka* Kingdom, the *Andhra* country, the *Dravida* country, ...
- ii. That the so called “*Hindu Law*” is applicable to all persons vulgarly styled *Hindus* and to their descendants however remote and whether pure or not pure
- iii. That a custom which has never been “*judicially recognized*” cannot be permitted to prevail against distinct authority.³²⁹

Of the remaining 12 principles, many dealt with specific issues in the interpretation of Hindu law which lie beyond the scope of the present discussion. Rather, I emphasise the gap that Nelson noticed between Hindu Law and the customs and usages of the peoples of Madras.

Derrett notes that the gulf that Nelson brought to attention between the Brahmins and Non Brahmins while working on his manual on the district of Madura had played an important role in determining his approach towards Hindu law.³³⁰ Drawing on this sociological understanding of the Madras province, Nelson attacked the practice of Hindu law by asserting that most of the people of Madras were governed by their specific usages and had no knowledge whatsoever of Anglo-Hindu law.³³¹ Nonetheless he had to account for the

³²⁹ Nelson, *A View of the Hindu Law as Administered by the High Court of Judicature at Madras*, 18.

³³⁰ Derrett, “J. H. Nelson: A Forgotten Administrator-Historian of India,” 363.

³³¹ In his cutting style he asserts that

...with the exception of a few pleaders and others acquainted with the ways of the High Court, not a soul the Madras Province had even referred to or heard of the *Mitaxara* as a treatise on law.

... the conduct of an ordinary *Chetti*, or *Maravan* or *Reddi* of the Madras Province, unless indeed he

presence of the *dharma shastra* tradition which he did by pushing back to the supposed Aryan history of the *Vedic* people.

Nelson's history of the *dharma shastra* tradition is tied to the Aryan Invasion theory in which Indo Aryan peoples were supposed to have invaded parts of north India and brought with them their religio-cultural traditions. The Brahmans of south India as he observed them were racially very different from those of the North and had their own local customs which also seemed to have nothing to do with the *Shastric* tradition. Nonetheless since Aryan groups could have migrated to the south, the only groups to whom these texts could possibly apply were the Brahmins if they were found to have accepted the authority of the *Smriti* texts. Thus he asserts that the resonance or the relevance of these texts, if at all they were relevant, were limited to the Brahmins who accepted their authority and not to the 'Hindu' community in general.³³²

Nelson's history of the Aryan people to whom Hindu law applied is perhaps questionable. However, his sociological refutation of the relevance of Hindu law is particularly important against the weight of the colonial legal framework which asserted its scriptural significance for all the territories they controlled. Thus in the place of Hindu law he argued that the Madras government was

... strictly obliged, to preserve unbroken the customs and usages of the various tribes and castes subject to its rule. Adequate efforts must be made to ascertain what are the customs and usages of the same; and once ascertained, the High Court must be compelled by law to judicially recognize them.³³³

That is, he tried to displace the legal significance of the *dharma shastra* tradition for colonial law by arguing for a detailed assessment and determination of the sociological role

happens to come into our courts as a litigant, is no more affected by precepts contained in the *Mitaxara* than it is by precepts contained in the Psalms of David." Nelson, *A View of the Hindu Law as Administered by the High Court of Judicature at Madras*, 26.

³³² *Ibid.*, 8-9, 133-36.

³³³ *Ibid.*, 153-54.

that customs played in the governance of the various communities in Madras.

4.4.3. Hindu Law as Custom

Subsequent scholarship has by and large vindicated Nelson's assessment of the importance of custom and his suggestion that the *dharma shastra* tradition is not the positive law of India's Hindus. However, as many scholars suggest, Nelson perhaps overstated his case on the irrelevance of the *dharma shastras* for Indian conceptions of legality and for customs and usages generally.³³⁴ Even while conceding Nelson's point on the significance of custom, scholars have asserted the significance of Hindu Law and that the sociological precedence of custom was entirely compatible with the *shastric* tradition.³³⁵ In other words 'Hindu' conceptions of law could be empirically marked by customary practices and yet braided by the force of *dharma shastric* reasoning. Thus it is against the background of this intellectual tradition that Menski suggests that the equation of *dharma* with positive law distorts the Indian conceptions of law and legality.³³⁶

³³⁴ For critiques from Nelson's contemporaries it is perhaps important to note those of John Dawson Mayne and Auguste Barth. Lingat, *The Classical Law of India*, 135-42; John Dawson Mayne, *A treatise on Hindu law and usage*, 7th ed. (Madras: Higginbotham & Co, 1906). Menski and Derrett are more recent instances for the defence of the Importance of Hindu law and its principles for thinking about law, legality and justice in contemporary India. Menski, *Hindu Law*; J. Duncan M. Derrett, "Custom and Law in Ancient India," in *Religion, law and the state in India* (Delhi: Oxford University Press, 1999), 148-70.

³³⁵ Derrett, "J. H. Nelson: A Forgotten Administrator-Historian of India," 360-61.

³³⁶ Nandini Bhattacharya-Panda notes the colonial emphasis on codification of the *dharma shastra* tradition sapped this tradition of its vitality. She notes that this resulted in the tradition of writing original treatises on Hindu Law going extinct after the consolidation of colonial rule. Nandini Bhattacharya-Panda, *Appropriation and Invention of Tradition: The East India Company and Hindu Law in Early Colonial Bengal* (Delhi: Oxford University Press, 2008), 18. Though I cannot expand on this any further in this chapter it is perhaps useful way to think about the *dharma shastra* conception of law as being similar to European scholars like Hayek or even Oakeshott who do not see law as a human contrivance but as the accumulated wisdom of the ages. A good example of this vision can be found in F.A. Hayek, *Law, Legislation and Liberty: A New Statement of the Liberal Principles of Justice and Political Economy*, 1st ed. (Routledge, 1982); Michael Oakeshott, *Rationalism in politics, and other essays* (London: Methuen, 1962).

Menski demonstrates that conceptions of the State and its law are not alien to Hindu Law but they are always charged with upholding an order subordinated to *Dharma*. Though Menski leaves questions such as ‘what is *dharmā*?’ or ‘who is a Hindu?’ unsatisfactorily unsettled, his work is heuristically productive because it points to a gap between Hindu Law as understood within the tradition of the *dharmā shastras* and Hindu law as conceived within the colonial legal framework. Menski himself points out that insufficient work has been carried out to concretely determine the precise conceptual contours of the term *dharmā* and how it might be productively compared to a positivist conception of law.

Scholars like Menski do however suggest the possible import of conceiving the *dharmā shastras* tradition as distinct from positive law. That is, as a way of ethically reflecting on problems it was primarily an opinion of the *dharmā shastris* and was to that extent distinct from the sovereign expression of judicial will.³³⁷ Further, these opinions were often personal and private opinions, which could, though did not necessarily, have practical consequences for dispute resolution in a formal legal process.³³⁸ Additionally, as a science of righteousness, opinions on *dharmā* applied to all situations and did not apply solely to situations involving personal law as was the case in the scheme of Anglo-Hindu law.

It could also be argued that Hindu Law wove together diverse customary systems within the framework of a *dharmā* and was an approach towards disputes and conflict which was entirely distinct from one marked by sovereign State control. Thus as an approach to regulation it could apply to all groups who adopted and inherited the forms of Hindu law. Tahir Mahmood expresses this aptly:

At present the law described as Hindu Law is applicable, or may be applied, to a heterogeneous section of the Indian citizenry, many groups in which are not ‘Hindu’ by religion. So Hindu law is not the law of the Hindus. Hindus are only one of those

³³⁷ J. Duncan M Derrett, “The Concept of Duty in Ancient Indian Jurisprudence: The Problem of Ascertainment,” in *The Concept of duty in South Asia*, ed. Wendy Doniger and John Duncan Martin Derrett (Vikas Pub. House, 1978), 55.

³³⁸ Julius Jolly, *Hindu law and custom* (Bharatiya Pub. House, 1975), 97.

communities who are governed by this law³³⁹

Derrett states this differently and perhaps more accurately by saying that a Hindu is one to whom Hindu law applies,³⁴⁰ which has historically even included Muslim communities like the *Khojas* and *Mappilas*.

In the latter part of the 19th century the colonial legal system did recognise this aspect of Hindu law to some extent when it granted that local custom was perhaps the most important source of Indian law and allowed the recognition of custom if long usage could be demonstrated. For instance the State of Punjab, which was acquired towards the latter part of the Company rule in India, had fashioned a system of administration that explicitly relied on custom and usage. However, as demonstrated in the work of Neeladri Bhattacharya, the determination of custom in the Punjab was navigated through practical manuals which drew on textual sources which included the Shastric legal texts translated by William Jones, T. A. Strange, W. Macnaughten and H.T. Colebrooke. Thus its customary practices were perhaps also rationalised in a manner very similar to that by which the texts and codes were given scriptural foundations and made the positive law of the Hindus.³⁴¹

Thus Bhattacharya notes that the movement towards custom in Punjab “did not make colonial law any closer to ‘tradition’, it did not preserve the practices of the community uncontaminated. Understanding and codifying custom was as problematic as translating and interpreting ancient texts. Both in different ways, subjected tradition to transformative processes.”³⁴² Additionally, the reorganisation of the colonial legal system in 1864 did away

³³⁹ Syed Tahir Mahmood, *Hindu law* (Law Book Co., 1981), xxxviii.

³⁴⁰ J. Duncan M. Derrett, “Definitions,” in *Religion, law and the state in India* (Delhi: Oxford University Press, 1999).

³⁴¹ Neeladri Bhattacharya, “Remaking Custom: The Discourse and Practice of Colonial Codification,” in *Tradition, dissent and ideology: essays in honour of Romila Thapar*, ed. Radha Champakalakshmi and Sarvepalli Gopal (Oxford University Press, 1996), 25-26.

³⁴² *Ibid.*, 48-49. See also Praveena Kodoth, “Framing Custom, Directing Practices: Authority Property and Matriliney under Colonial Law in Nineteenth-century Malabar,” in *Muslims, Dalits, and the Fabrications of History*, ed. Mayaram Shail, M.S.S. Pandian, and Ajay Skaria (Delhi: Permanent Black, 2005), 188-

with the office of the pundits attached to colonial courts. This brought to an end the officially recognised practice of the *dharma shastra* and its reflection on the customs and usages of different communities.

Though the application of the *dharma shastric* tradition was not conceived as one based on religious identity, I will argue that this perspective on this tradition began to acquire official and broader intelligibility because it was drawn into the developing language of liberal politics and of the modern Indian nation. I develop this idea in the next chapter. That is, that the traditions of Hindu law and its reflections on Indian customary practices were eventually reformed and incorporated into the colonial legal system as a religious law applicable to the adherents of a supposed Hindu religion.

4.5. Conclusion

In this chapter I have demonstrated the emergence, significance and reforming effects of normative toleration at a micro and at a macro level. At the micro level I have argued that the eventual proscription of Sati in 1829 was born out of the colonial policy of normative toleration which transformed the representation of local social norms into religious *truth* embodied in the religious laws of the Hindus. At the macro level I have demonstrated that specific practices like Sati were set in a broader debate in which the ethical framework of the *Dharma Shastra* tradition was reformed in government discourse as the positivist legal injunctions of the Hindus. As a synoptic comment on an emerging reforming framework of religious freedom in India this chapter is presented as an explanatory account tracing the genealogical roots of reform as it influences contemporary Indian constitutional law. In the next chapter (i.e. Chapter 5) I hope to show that this is an account that is intellectually productive by demonstrating the manner in which the process of social reform acquires intelligibility because it is tied to a similar project of reform in the making of modern Indian politics and nationhood.

5. Community and the Making of Constitutional Politics

In the previous chapter I outlined a synoptic genealogy of an important aspect of the Indian secular State. I argued that the colonial project of toleration was committed to the production of scripturally founded religious law, the effect of which was the reformulation of Indian social categories. Though I outlined this reform argument through the making of Hindu law, there is evidence to suggest that a similar reform project also shaped the making of contemporary Muslim legal identity in India.³⁴³ However, if this is indeed the case then I have to explain how these reformed religious categories are presented as plausible accounts of community in India even though they are wrenched out of the contexts that gave them socio-cultural significance and intelligibility. I do so by suggesting that the religious reform instituted by colonial toleration was incorporated and rolled into Indian political institutions. That is, reformed religio-legal identities were made constituent elements of a ‘social’ sphere in relation to which the ‘political’ project of colonial government was fashioned.

5.1. Sovereign Trust and the Birth of Colonial Politics

In this section I argue that conceptions of Indian society were tied to the emergence of a coherent project of government in colonial India. Fashioning government *for* India was a crucial step in providing colonial rule with the clarity and confidence that is captured in the phrases ‘civilising mission’, ‘white man's burden’ and perhaps even ‘modernity’. However, the mission of government was anything but clear in the early period of British rule in Bengal following Robert Clive’s defeat of the Nawab of Bengal. Writing about early colonial government in an essay on Warren Hastings, T. B. Macaulay speaks of the

³⁴³ For instance Amrita Shodhan points to the manner in which the colonial law consolidated Muslim identity by identifying communities like the Khojas who could not easily be slotted either as Hindu or Muslim as Muslim because they had more Muslim traits than Hindu. Amrita Shodhan, *A Question of Community: Religious Groups and Colonial Law* (Samya, 2001), 82-117. Similarly speaking of Muslim Law in an introductory history to South Asia, Bose and Jalal comment that “by injecting English procedural practices, such as precedence, into their rulings based on the sharia, the Company’s judicial officials transformed what Muslim law officers generally treated as a flexible set of moral injunctions into a strictly laid down legal code.” Saugata Bose and Ayesha Jalal, *Modern South Asia* (Routledge, 1998), 77.

confusing attitudes that colonial officials and administrators in London displayed when giving instructions on the government of India. Thus speaking of the directors of the Company in London, Macaulay notes that “... whoever examines their letters ... will find there many just and humane sentiments ... an admirable code of political ethics. ... Now these instructions, being interpreted, mean simply, “Be the father and the oppressor of the people; be just and unjust, moderate and rapacious.””³⁴⁴ Though these instructions might sound confused, I argue in this section that these sentiments were part of a process through which the colonial government clarified its purpose of rule in India and in the process generated the idea of an Indian people under its trust.

Mithi Mukherjee characterises British Rule in India as marked by two “competing but also collaborating discourses: the discourse of the ‘colonial’ and the discourse of the ‘imperial’.” While the ‘colonial’ discourse was driven by ideas of territorial conquest and domination, the ‘imperial’ discourse was based on “a supranational de-territorialized discourse of justice under natural law, and was critical and censorial towards the arbitrary exercise of power by the colonial government ...”³⁴⁵ An early iconic moment in colonial history that illustrates the tension between these discourses was the impeachment trial of Warren Hastings led by Edmund Burke. Following this distinction that Mukherjee draws I also elaborate on aspects of the trial to demonstrate the manner in which it served to interrogate and question the role of colonial government and its bonds with its Indian subjects.

The tension between the imperial and colonial discourses that Mukherjee notes is significant because it illustrates the manner in which differing accounts of British sovereignty in India were braided into a coherent conception of colonial governance. Providing a detailed account of the manner in which the tensions between the ‘colonial’ and ‘imperial’ discourse contributed to the concrete historical shifts that marked the development of British rule in India is beyond the scope of this chapter. However, by extensively excerpting from the arguments of Burke and Hastings I outline the implications

³⁴⁴ Thomas Babington Macaulay, *Warren Hastings* (Longman, 1851), 20-21.

³⁴⁵ Mithi Mukherjee, *India in the Shadows of Empire: A Legal and Political History* (Oxford University Press, 2010), xv-xvi.

of their contending positions for conceptions of an Indian nation or ‘people’ as subjects of government. Systematic and coherent formulations on the character of the Indian nation and its ‘people’ only emerge in the latter part of the 19th century and in this chapter I will outline its development only from the Morley-Minto reforms of 1909. Nonetheless as Mukherjee persuasively demonstrates, a crucial aspect of its pre-history draws from a vigorous debate in the earliest history of British India that grappled with the nature of the sovereignty exercised by the East India Company.

At his impeachment trial Hastings defended himself against various charges of breach of trust, treaty violations, prosecution of illegal war and other illegal acts of a similar nature by relying on the politically degenerate conditions in which his actions were located.

Defending his allegedly arbitrary and illegal actions Hastings asserted that

(e)very part of Hindostan has been constantly exposed to these and similar disadvantages ever since the Mahomedan conquests. The Hindoos, who never incorporated with their conquerors, were kept in order only by the strong hand of power. The constant necessity of similar exertions would increase at once their energy and extent; so that rebellion itself is the parent and promoter of despotism. Sovereignty in India implies nothing else. For I know not how we can form an estimate of its powers, but from its visible effects; and those are everywhere the same, from Cabool to Assam. *The whole history of Asia is nothing more than precedents to prove the invariable exercise of arbitrary power....*

To be robbed, violated, oppressed, is their privilege. Let the constitution of their country answer for it. I did not make it for them. Slaves I found them, and as slaves I have treated them. I was a despotic prince. Despotic governments are jealous, and the subjects prone to rebellion. This very proneness of the subject to shake off his allegiance exposes him to continual danger from his sovereign’s jealousy, and this is consequent on the political state of Hindostanic governments³⁴⁶ (emphasis added)

³⁴⁶ Edmund Burke, *The Works of the Right Honourable Edmund Burke*, vol. 9, 12 vols. (Project Gutenberg, 2005), <http://www.gutenberg.org/ebooks/13968>. (accessed 22/5/2010)

Thus speaking of the Mogul State in which his actions were located, he admitted to despotic rule but justified his actions through a dubious sociology and history that cast India in a state of pre-political anarchy. In other words, he cast the basis of sovereign authority in India as governed by necessity and therefore marked by the absence of legal and constitutional restraint.

Burke on the other hand challenged Hastings' formulation of British sovereignty in India at two levels. First he challenged the sociological and historical assumption that India knew no law and was governed by arbitrary despots. Speaking of the advanced legal order of India he says that

(t)hose people lived under the Law, which was formed even whilst we, I may say, were in the Forest, before we knew what Jurisprudence was ... It is a refined, enlightened, curious, elaborate, technical Jurisprudence under which they lived, and by which their property was secured which yields neither to the Jurisprudence of the Roman Law nor the Jurisprudence of this Kingdom³⁴⁷

In addition and more importantly he also attacked the constitutional grounds on which Hastings justified arbitrary rule in India.

Expounding the source of legal authority in India, Burke argued that

(t)he East India Company itself acts under two very dissimilar sorts of powers, derived from two sources very remote from each other. The first source of its power is under charters which the crown of Great Britain was authorized by act of Parliament to grant; the other is from several charters derived from the Emperor of the Moguls, the person in whose dominions they were chiefly conversant,- particularly that great charter by which, in the year 1765, they acquired the high-stewardship of the kingdoms of Bengal, Bahar, and Orissa. Under those two bodies of charters, the East India Company, and all their servants, are authorized to act.

³⁴⁷ Mukherjee, *India in the Shadows of Empire*, 20.

As to those of the first description, *it is from the British charters that they derive the capacity by which they are considered as a public body, or at all capable of any public function.* It is from thence they acquire the capacity to take from any power whatsoever any other charter, to acquire any other offices, or to hold any other possessions. ... In delegating great power to the East India Company, this kingdom has not released its sovereignty; on the contrary, the responsibility of the Company is increased by the greatness and sacredness of the powers that have been entrusted to it. Attempts have been made abroad to circulate a notion that the acts of the East India Company and their servants are not cognizable here. I hope on this occasion your Lordships will show that this nation never did give a power without annexing to it a proportionable degree of responsibility.³⁴⁸ (emphasis added)

Thus Burke held the company to account by arguing that they derived their power in India from both the British crown and the grant of the Moghul emperor. The joint derivation of the company sovereignty was important because the company sought to present their authority as merely deriving from the *Diwani* or the right to collect taxes in Bengal which they received from Mogul emperor in 1765. However, as Burke sought to argue, the root of their 'public powers' arose from the British charters from which they could not escape responsibility.

During Hastings' governorship Mogul power had long declined and was hardly able to exercise authority over the company who were the *de facto* rulers of Bengal. Therefore Burke also had to explain how the company was to be tied to Mogul authority under such circumstances. To address this challenge Burke argued that flowing from the various charters they received from the Moguls, the British

... bound themselves (and bound inclusively all their servants) to perform all the duties belonging to that new office, and to be held by all the ties belonging to that new relation. If the Mogul empire had existed in its vigor, they would have been bound, under that responsibility, to observe the laws, rights, usages, and customs of the natives, and to pursue their benefit in all things: for this duty was inherent in the

³⁴⁸ S.V. Desika Char, ed., *Readings in the Constitutional History of India 1757-1947* (Delhi: Oxford University Press, 1983), 42-43; Burke, *The Works of the Right Honourable Edmund Burke*, 9:.

nature, institution, and purpose of the office which they received. If the power of the sovereign from whom they derived these powers should by any revolution in human affairs be annihilated or suspended, their duty to the people below them, which was created under the Mogul charter, is not annihilated, is not even suspended; and for their responsibility in the performance of that duty, they are thrown back upon that country (thank God, not annihilated) from whence their original power, and all subsequent derivative powers, have flowed. When the Company acquired that high office in India, an English corporation became an integral part of the Mogul empire. When Great Britain virtually assented to that grant of office, and afterwards took advantage of it, Great Britain guaranteed the performance of all its duties. *Great Britain entered into a virtual act of union with that country, by which we bound ourselves as securities to preserve the people in all the rights, laws, and liberties which their natural, original sovereign was bound to support, if he had been in condition to support them.* By the disposition of events, the two duties, flowing from two different sources, are now united in one.³⁴⁹ (emphasis added)

That is, he argues that Great Britain was bound defend the rights and liberties of the Indian people as Mogul rule would have done if it was in full vigour. However, by committing himself to the protection of the ‘rights, laws and liberties’ of the Indian people he also distinguished his case from what he called a morality tied to Geography. According to him, he was defending a conception of sovereignty which was tied to a universal morality which was the same everywhere.³⁵⁰

³⁴⁹ Burke, *The Works of the Right Honourable Edmund Burke*, 9:.

³⁵⁰ “And having stated at large what he means by saying that the same actions have not the same qualities in Asia and in Europe, we are to let your Lordships know that these gentlemen have formed a plan of geographical morality, by which the duties of men, in public and in private situations, are not to be governed by their relation to the great Governor of the Universe, or by their relation to mankind, but by climates, degrees of longitude, parallels, not of life, but of latitudes: as if, when you have crossed the equinoctial, all the virtues die, as they say some insects die when they cross the line; as if there were a kind of baptism, like that practised by seamen, by which they unbaptize themselves of all that they learned in Europe, and after which a new order and system of things commenced. Ibid.; Mukherjee, *India in the Shadows of Empire*, 22.

Mithi Mukherjee identifies Burke's allusion to universal morality as the defence of natural law which had been a key aspect of European debates of the time, especially of the laws of war and relations between nations. I do not explore Burke's defence of natural law in much detail except to note that it played an important role in transcending the purely 'colonial' justification of rule as defended by Hastings. Hastings's model of British rule painted India as a private fiefdom that the East Indian Company acquired through the grant of the *diwani* in 1765. In addition he also characterised Mogul rule as an arbitrary order maintained over and against an anarchic society. On the other hand Burke's 'imperial' argumentative framework challenged both these lines of argument. Legally and constitutionally, Burke's account subordinated Company government to parliament and to the notional Mogul constitution. Historically and sociologically he denied Indian anarchy in favour of a tradition of laws underpinned by natural law or universal norms. My extended discussion of this debate was primarily intended to demonstrate the framework within which Burke rejected claims suggesting the absence of organised society in India and consequently his necessary commitment to explore the idea of India as a nation or a 'people'.

While debating Indian nationhood it is important to note that Burke's framework was not necessarily committed to ideas of government as they sociologically existed in India. Instead, his recognition of these institutions was premised on their subordination to the standards and principles of natural law. Nonetheless I argue that conceiving of India as a 'people' subordinated to universal principles Burke brought purpose to British rule, enabling it to transcend the merely interest based considerations entailed by the despotic and 'colonial' model of sovereignty defended by Hastings.

Drawing on colonial officials with widely differing political opinions, Reginald Coupland notes that an overwhelming majority of them were united by the sense of purpose that Burke's thought brought to their consideration of the Indian problem. Thus Coupland notes that

Englishman who have thought about India seem never to have supposed that its subjection to British rule, however long it might last, was a permanent dispensation. The ultimate enfranchisement of India was implicit in Burke's doctrine of

trusteeship, since the guardian's duty ends once his ward comes of age.³⁵¹

Coupland therefore casts the 'imperial' project of British government in India as one of tutelage and trust. As Coupland himself suggests, by the end of the 19th century the most significant political goal the British government identified for their Indian wards was the eventual realisation of representative government in India.³⁵²

Even if the project of political education was the dominant influence on the question of government in India it was obviously not a universal position. Thus in contrast to the Burkean position James Fitzjames Stephen argues that

(t)he first steps in the political education essential to take change in the foundations of the British Government cannot be taken without incurring the risk of furious civil war. A barrel of gun powder may be harmless or may explode, but you cannot educate it into household fuel by exploding bits of it. How can you possibly teach great masses of people that they ought to be rather dissatisfied with a foreign ruler, but not much; that they should express their discontent in words and in votes, but not in acts; that they should ask from him this and that reform (which they neither understand nor care for), but should on no account rise in insurrection against him.³⁵³

In hindsight it is possible to argue that opinions like those of Stephen only inflected the trajectory of political education but did not influence it sufficiently to block the development of representative institutions in India. The dominant opinion which was shared by the likes of Macaulay and John Stuart Mill was that representative government

³⁵¹ Reginald Coupland, *Report on the constitutional problem in India: The Indian problem, 1833-1935* (Oxford University press, 1943), 18.

³⁵² I have drawn a great deal from the work of Sufiya Pathan in framing issues related to the problem of political education. Her work has also played an important role in helping me frame the broader problem of this chapter. Sufiya Pathan, "A Historical and Theoretical Investigation into Communalism" (Manipal University, 2009).

³⁵³ Cited in Uday Singh Mehta, *Liberalism and Empire: India in British Liberal Thought* (New Delhi: Oxford University Press, 1999), 29.

could take root in India once native ‘political will’ had sufficiently matured.³⁵⁴

In this chapter I argue that the possibility of a mature political will was the common ground on which the discussion on representative government in India was conducted at least since the latter part of the 19th century. Even though nationalist opinion challenged the colonial charge of an underdeveloped political will they were particularly opposed to positions like those of Stephen which argued that it was not feasible for colonial rule to mentor civil political institutions in India. Thus despite reservations about the form in which the language of pedagogy was presented to them, Indian nationalism did not fundamentally undermine the language of political pedagogy and did not at any point fundamentally question the superiority of the British political institutions.³⁵⁵ That is, the question of government was not one that sought to reconstruct or develop sociologically available native political forms but accepted the goal of forming a nation that could represent a developing Indian political will. In the rest of this chapter I will outline the gradual development of representative government in India, the manner in which it relied on reformed conceptions of community, and most importantly suggest the ways in which this history is relevant for the problem of constitutional secularism in India I have outlined in previous chapters.

5.2. The Beginnings of Pedagogy in Indian Constitutional Politics

The vision of Macaulay, Mill, Munro and others inspired by Burke’s legacy of trusteeship was only gradually instituted as an aspect of government.³⁵⁶ Thus discussing the

³⁵⁴ J.S Mill, *Considerations on Representative Government* (London: Longmans Green and Co., 1867), 130-41.

³⁵⁵ Gandhi was perhaps the most important exception to this position arguing for a fundamentally different approach to society and government. M. K. Gandhi, *Hind swaraj and other writings*, ed. Anthony Parel, Cambridge texts in modern politics (Cambridge: Cambridge University Press, 1997).

³⁵⁶ Government in India was divided between territories directly governed by the British called British India and the territories governed by native rulers over whom the British exercised suzerainty in the areas of external affairs, defence and communications. This chapter outlines the development of government in British India, though it could be argued that many aspects of rule in British India was also adopted in the

parliamentary discussions on the charter of 1833 Macaulay explicitly stated that India was not ready for European institutions. However, as he noted

... by good government we may educate our subjects into a capacity for better government; that, having become instructed in European knowledge, they may, in some future age, demand European institutions. Whether such a day will ever come I know not. But never will I attempt to avert or to retard it. Whenever it comes, it will be the proudest day in English history. To have found a great people sunk in the lowest depths of slavery and superstition, to have so ruled them as to have made them desirous and capable of all the privileges of citizens, would indeed be a title to glory all our own.³⁵⁷ (Emphasis added)

The process of actualising Indian political will was therefore seen as the gradual progress of political education. The first significant step towards including Indians in the administration of colonial government was brought about by the revolt of 1857 which forced the government to enact the Indian Councils Act, 1861.

The Act of 1861 mandated a legislative council that would expand both the Governor Generals Council and the council of the Governors in the provinces. Of these legislative councils half the members had to be Indians chosen from outside the Indian civil services. However, non official members of the legislative councils were not elected but were

native or Princely states. From 1773 onwards Parliament controlled Indian affairs through the office of a Secretary of State for India. However, it actually administered India through the office of a Governor General who governed India with the assistance of an executive council. The Governor General who was the head of the government at Bengal exercised notional control over all other British Indian provinces. Thus the British parliament stood at the head of Indian government and laid out the broad policy framework within which subordinate layers of the government of India was conducted. Nonetheless, within this centralised framework the Governor General of India and the Governors and Lieutenant Governors of various provinces administered government with a fair degree of independence. For detailed accounts of the evolution of these institutions of government are available in any standard text on Indian legal history. For example Coupland, *Report on the constitutional problem in India*; Jain, *Outlines of Indian legal history*.

³⁵⁷ Thomas Babington Macaulay, *Miscellaneous Writings and Speeches*, vol. 4, 4 vols. (Project Gutenberg, 2008), <http://www.gutenberg.org/ebooks/2170>. (accessed 22/5/2010)

government nominees and had extremely limited oversight over the executive actions and financial dealings of the government of India. Thus set in the context of the revolt, the Act was primarily intended as a safety valve and a channel of communication that ‘alerted the government to native discontent before it became disaffection.’³⁵⁸ Between 1861 and 1909 this was the model through which Indian voices were incorporated into the administration of Indian government. The Government of India and the Provinces during this period did not provide for significant native participation in the higher levels of government. However, efforts were made to increase native participation in government at the level of local and municipal bodies.³⁵⁹

The history of local self government in India is generally traced to the Government resolution of 1882 stewarded by Lord Rippon. This resolution is a particularly clear statement of the pedagogic mission of colonial government stating that

... the Governor General in Council must explain that, in advocating the extension of local self-government, and the adoption of this principle in the management of many branches of local affairs, he does not suppose that the work will be in that first instance better done than if it remained in the sole hands of the Government district officers. It is not, primarily, with a view to improvement in administration that this measure is put forward and supported. *It is chiefly desirable as an instrument of political and popular education.*³⁶⁰ (emphasis added)

This was perhaps the first systematic efforts of the colonial project seeking to facilitate the ‘political education’ of India. The importance of these efforts being based on what was called the ‘elective principle’ cannot be overstated especially because of the large numbers of the nationalist leaders who cut their political teeth fighting in the electoral politics of local bodies.³⁶¹ However, it is not relevant for present purposes to follow the development

³⁵⁸ Coupland, *Report on the constitutional problem in India*, 60.

³⁵⁹ To avoid confusion local government was a term also used to describe government of the provinces. In this context I refer to the municipal and equivalent levels of government.

³⁶⁰ Char, *Readings in the Constitutional History of India 1757-1947*, 369.

³⁶¹ Arkaja Singh, “Local Self Government in Colonial India: Self Government by Natives and the Development of Municipal Institutions” (Centre for Budget and Policy Studies, 2010). In this context it is

of representative politics at the level of local bodies. Therefore I only try to outline the manner in which the developing Indian political will was grafted onto the colonial administration at the level of the Government of India and the Provincial Governments. That is, I focus on the conception of an Indian ‘political will’ as it developed at the higher levels of Indian government.

5.3. Nation and Faction: Nurturing Political Interests

As an immature nation in need of political mentoring the problem with India was the absence of a unified political will. Thus speaking of the fragmented condition of Indian society while introducing the Indian Councils Act, 1892, Lord Lansdowne describes Indian society as “congeries of widely separated classes races and communities, with *divergences of interests and hereditary sentiments which for ages have precluded common sentiment or local unanimity.*”³⁶² (emphasis added) The curious aspect of British government in India was the effort to graft this conception of society onto the task of fashioning constitutional government. That is, British efforts at introducing native participation in government in India was focussed on organising these diverging interests so that they could be incorporated into the very structure of government.

Though fledgling efforts to represent Indian communities in government along the lines of interest groups and communities trace back to the Indian Councils Act of 1892, these constitutional measures found their feet only with the passing of the Indian Councils Act, 1909, also referred to as the Morley-Minto reforms. Stewarded by the Secretary of State for

perhaps useful to note that the early histories of the Indian National Congress are particularly illuminating of the manner in which its objectives dovetailed with the pedagogic mission of the colonial state. Thus the prospectus of the first meeting of the Indian National Congress in 1885 spoke of the congress as ‘the germ of a Native Parliament, and, if properly conducted, will constitute in a few years an unanswerable reply to the assertion that India is still wholly unfit for any form of representative institutions’ Verney Lovett, *A History of the Indian Nationalist Movement* (London: John Murray, 1920), 35.

³⁶² *East India (advisory and legislative councils, &c.). Vol. I. Proposals of the government of India and despatch of the Secretary of State.*, 1908, 2, http://gateway.proquest.com/openurl?url_ver=Z39.88-2004&res_dat=xri:hcpp&rft_dat=xri:hcpp:rec:1908-010247 (accessed 23/4/2010).

India, Viscount Morley, and the Viceroy of British India, Lord Minto, the 1909 statute brought about constitutional reforms that sought to dramatically increase the presence of Indian voices in both executive and legislative arms of the government of British India.

The defining feature of the 1909 statute was the scale on which it sought to expand the size of the legislative councils and increase their powers. On average the size of the legislative council doubled both in the provinces and in the imperial legislative council. Though a majority of the members of the legislatures were to be government officials and nominated members, there was a significantly increased representation for elected members.³⁶³ However, the most significant aspect of all was the special electorates that it sought to provide for groups like Muslims, landholders, and representatives of commerce in the Imperial Legislative Assembly. In itself the special electorates granted to these groups was not novel as provincial assemblies did provide for some manner of selecting candidates representing special interests even before 1909.³⁶⁴ However, special electorates did not determine election to the imperial assembly and, further, no special electorates for Muslims existed previously.

There is a tendency in the nationalist literature to view the scheme of the 1909 statute as an attempt to divide Hindus and Muslims and hinder an emerging nationalism.³⁶⁵ However, this cannot be entirely accurate because representation on the lines of interest and community did not begin with the Morley-Minto scheme and more importantly Muslims were not the only group granted special electorates by the 1909 statute. Most importantly,

³⁶³ As Keith points out the number of elected members in assemblies across India rose from 39 to 135 after the Morley-Minto scheme. Arthur Berriedale Keith, *A Constitutional History of India, 1600-1935* (London: Methuen & co. Ltd, 1936), 229.

³⁶⁴ For example under the Indian Councils Act, 1892 the legislative council of Bombay had members selected from Commercial groups, the Sardars of Deccan and the Zamindars of Sindh. *East India (advisory and legislative councils, &c.). Vol. I. Proposals of the government of India and despatch of the Secretary of State.*, 18.

³⁶⁵ Even non nationalist historians like Sumit Sarkar seem to read British policy in terms of 'divide and rule' Sarkar, *Modern India, 1885-1947*.

within a political scheme conceived on the basis of fragmented and irreconcilable interests it was perhaps not possible for government to unify these interests. Thus it is important to emphasise that the Morley Minto scheme was the product of a *conception of politics and society* in India rather than a merely conniving contrivance of the British Government to divide Indian people among themselves.

As both Morley and Minto stressed, their reforms only envisaged an ordered increase in the presence of Indian voices in government and were not an attempt to introduce representative government styled on European lines.³⁶⁶ In Minto's justification of these reforms he explicitly mentioned that he was no 'advocate of representative government for India in the Western sense of the term' as it was alien to the instinct of the people of India. Quoting Sir Courtney Ilbert with approval he says that

British authority in India may be traced historically to a two-fold source: it is derived partly from the British Crown, partly from the Great Moghul and other Native Rulers of India. These are the two sources of our authority and they involve important consequences. As heirs to a long series of Indian Rulers we are bound to reserve to ourselves the ultimate control over all executive action and the final decision in matters of legislation; as trustees of British principles and traditions we are equally bound to consult the wishes of the people and to *provide machinery by which their views may be expressed as far as they are articulate*³⁶⁷

Speaking more particularly about the reforms of 1909 he asks:

Can we fuse these two principles into a definite system of government, into what may be called a 'constitutional autocracy' and thus give to our administration a definite and permanent shape? There is all the difference in the world between the arbitrary autocracy of the Asiatic despotism and the constitutional autocracy which

³⁶⁶ Both Secretary of State Morley and Minto stressed that their measures were not to be viewed as an attempt to institute a parliamentary democracy in India. Mary Caroline Elliot Murray Minto, ed., *India, Minto and Morley, 1905-1910:: compiled from the correspondence between the viceroy and the secretary of state* (Macmillan & Co., 1934), 110-11; John Morley, *Indian speeches (1907-1909)* (Macmillan, 1909), 91-92.

³⁶⁷ Minto, *India, Minto and Morley, 1905-1910: compiled from the correspondence between the viceroy and the secretary of state*, 110.

binds itself to govern by rule, which admits and *invites to its councils representatives of all the interests which are capable of being represented*, and which merely reserves to itself, in the form of a narrow majority, the predominant and absolute power which it can only abdicate at the risk of bringing back the chaos to which our rule put an end.³⁶⁸ (emphasis added)

Thus Minto locates the British role in the government of India against the background of a divided people and their diverging interests. By implication his position also entirely ruled out the possibility that the divergent interests that the British held together could mature into a unified political will. Therefore to include native opinion in government, “representation by classes and interests is the only practicable method of embodying the elective principle in the constitution of the Indian Legislative Councils”.³⁶⁹

The Minto-Morley scheme clearly did not envision Indian political maturity or its facilitation, and representative government in the European sense. However, it is significant to my account of political pedagogy for two important reasons. First, because of the scale on which it increased native political participation across British India. Second, by inviting the participation of native interests the reforms actually did facilitate a form of political pedagogy – viz. learning to articulate ‘political interests’, which was to have a significant effect on subsequent constitutional developments in India.

Though the colonial State identified numerous conflicting interest groups,³⁷⁰ the cleavage between the Hindus and Muslims was understood to be a particularly important division that any conception of Indian politics would have to mediate.³⁷¹ However, it is important to emphasise that the idea of an India divided amongst its factions and interests is not an

³⁶⁸ Ibid.

³⁶⁹ *East India (advisory and legislative councils, &c.). Vol. I. Proposals of the government of India and despatch of the Secretary of State.*, 8.

³⁷⁰ Other interests including large landholders, business and commercial interests, caste groups and such like. I will discuss caste in more detail later in the chapter.

³⁷¹ Coupland, *Report on the constitutional problem in India*, 28-36.

empirical or sociologically derived proposition but a British conception of community in India. Nonetheless, organising government along the axes of diverging interests was an invitation by the colonial government to different Indian social groups to learn to present themselves as such divided identities. I demonstrate the divergence of the British conception of divided interests from Indian conceptions of their social milieu through a few anecdotal examples.

First, though the government speaks of an India irreconcilably divided among itself, this conception was made possible only through active British support. Thus it is important to note in this context that the provincial government at Bombay admitted that one of the principal 'nations' within India, the Muslims, did not form an organised group and would have to be transformed into one through fostering associations among them. Similarly, for reasons not fully explained in his submissions, the lieutenant governor of Punjab considered it impossible to form Muslim electorates in the Punjab.³⁷²

Second, a cursory review of numerous submissions to responses solicited by the government on the Morley-Minto reforms suggests a measure of incomprehension of the narrative of irreconcilable difference of social interests. In this context the nature of the opposition expressed by Honourable Rai Sundar Lal Bahadur to the proposal suggesting separate electorates for Muslims is particularly illuminating and quoting him at some length is useful to explain my argument. According to Bahadur,

Muhammadans, like other minorities, should be represented by nomination made by the Government as hitherto, if not already returned by election in sufficient number. It is of course desirable that the Muhammadan community should be fully represented in the council, and there is no objection to four or even a larger number of seats being assigned to them. Under the scheme proposed Muhammadans get three special advantages over other members of the Indian communities, viz.-

(a) a reservation of four seats in addition to any to which they may be otherwise

³⁷² *East India (advisory and legislative councils, &c.). Vol. I. Proposals of the government of India and despatch of the Secretary of State.*, 14.

elected;

(b) election by their own co-religionists, whereas others will have to depend for their election upon the votes of their own co-religionists as well as others ;

(c) they obtain a very large electorate of landholders and all persons having an annual income exceeding Rs. 1,000 and in which all graduates of certain standing will be represented.

These privileges will be possessed by no other community. A Hindu, Parsi, or Christian graduate will have no franchise as such which his more lucky Muhammadan brother will enjoy. This is by no means a small advantage and I have no doubt that *if it is granted to Muhammadans, every other community in India will vigorously claim it*. It will be a matter of considerable practicable difficulty to adjust these claims on a Satisfactory basis. In these days of caste, class and religious conferences much will be made of this apparent disparity of treatment. The best interests of the Government, I believe, require that if the Muhammadans are given the proposed special electorate, a similar special electorate on exactly the same lines should be given to other communities.

The selection of the representatives of a class, by members of that class alone, is necessary where the differences between it and other classes of the community are such as will render the nomination or election of a representative futile by the ordinary method. This does not, so far as my experience goes, exist in the case of Muhammadans. *I have not come across one legislative measure in which the interests of the Hindus and Muhammadans were not common. Differences no doubt exist, but they are mainly in the question of the distribution of official patronage and honours, in which the candidates themselves are very often the more interested persons.*³⁷³ (emphasis added)

³⁷³ *East India (advisory and legislative councils, &c.). Vol. II.--Part I. Replies of the local governments, &c. Enclosures I. to XX. To letter from the government of India, no. 21, dated 1st October, 1908., 1908, 773, http://gateway.proquest.com/openurl?url_ver=Z39.88-2004&res_dat=xri:hcpp&rft_dat=xri:hcpp:rec:1908-010256 (accessed 24/4/2010).*

Rai Sundar Lal Bahadur's position was similar to that of the non Muslim political groups like the Indian National Congress who opposed the proposal for separate electorates. However it is crucial to note that he did not cast this opposition as the irresolvable social divisions or diverging interests of communities but merely a case of competition for the same interest – viz. government patronage.³⁷⁴

Third, it is perhaps possible to dismiss opinions like that of Rai Sundar Lal Bahadur as motivated against the special electorates granted to Muslims. However, even dominant Muslim positions seem to suggest similar conclusions. From the contemporary Indian nationalist perspective, the Muslim League is singled out as having punctured the idea of a unified nation by wholeheartedly accepting the British conception of India as a set of irreconcilable nations. However, as Sufiya Pathan's excellent analysis of representative politics in colonial India demonstrates, the League's difference with the Congress was over the nature of politics rather than over the character of the social. Thus Sir Syed Ahmed Khan, the founder of the Muslim League, speaks of his opposition to the Indian National Congress' conception of nation in the following manner:

Those questions on which Hindus and Mohammedans can unite, and on which they ought to unite, and concerning which it is my earnest desire that they should unite, are social questions. We are both desirous that peace should reign in the country, that we two nations should live in a brotherly manner, that we should help and sympathise with one another, that we should bring pressure to bear, each on his own people, to prevent the arising of religious quarrels, that we should improve our social condition, and that we should try to remove that animosity which is every day increasing between the two communities. The questions on which we can agree are purely social. If the Congress had been made for these objects, then I would myself have been its President ... But the Congress is a political Congress, and there is no one of its fundamental principles, and especially that one for which it was in reality

³⁷⁴ Sufiya Pathan undertakes a far more detailed account of the native response to the colonial goal of representative government than I have been able to do here. For details See Pathan, "A Historical and Theoretical Investigation into Communalism," 249-304.

founded, to which Mohammedans are not opposed.³⁷⁵ (emphasis added)

It is crucial to note Sir Syed viewed the *social* interests of both Hindus and Muslims in India as identical or at least not irreconcilably at odds with each other. It was the perceived dangers of representative politics which led him to oppose the nationalism of the Indian National Congress. That is, the possibility that politics might swamp Muslim interests through the force of sheer numbers.

By raising the question of the distinct ‘political’ interest of the Muslims it might seem that Sir Syed endorses the British conception of an India divided among its different interests. However, as Pathan demonstrates, this charge has to be set in the context of Sir Syed’s deep suspicion of representative politics and his suggestion that the interests of participation in governance was best served by nomination rather than election. As Pathan points out, his conception of citizenship itself seemed unconnected to representative democracy and was tied to the notion of reform and betterment of individuals. However, when this conception of politics was later translated into the Morley-Minto scheme, the unique ‘political’ interests of the Muslims could only be safeguarded by participation in the scheme of separate electorates.

Situated at the intersection of colonial conceptions of politics and native responses to it, separate electorates must be viewed not as a vindication of colonial political sociology, but as a way in which different groups and especially the Muslims were taught or invited to represent their distinct ‘interests’ within colonial government. As this section has shown, there were gaps in the manner in which the colonial government and their subjects conceived politics. However, since there was no fundamental challenge to the conception of politics contained in the Morley-Minto scheme, it was the only avenue open to the natives to participate in the higher levels of colonial government. It is in this context that the modes of separate electorates and representation of sectional interests gained considerable traction among various Indian social groups. I demonstrate its significance by placing it alongside a slightly different conception of political society as envisioned by the next tranche of

³⁷⁵ Cited in *Ibid.*, 283.

political reforms in India, the Montagu-Chelmsford Reforms of 1919.

5.4. A Nation of Minorities: The Journey Towards Political Maturity

The Government of India Act 1919 was the next major constitutional reform of the constitutional scheme fashioned by the Morley-Minto reforms.³⁷⁶ Based on a report by Secretary of State Edwin Montagu and Viceroy Lord Chelmsford, these reforms sought to deepen the participation of Indians in government and thereby move towards representative democracy. As signalled by Montagu in August 1917, the British Government sought to increase the “association of Indians in every branch of the administration and the gradual development of self-governing institutions with a view to the progressive realization of responsible government in India as an integral part of the British Empire”.³⁷⁷ Eight months later the document entitled *The Report on Indian Constitutional Reform* (the Montagu-Chelmsford Report) was produced and was the basis of the Government of India Act 1919, which in turn was brought into force in 1921.³⁷⁸

The Act explicitly sought to move Indian government away from the ‘constitutional autocracy’ of the Minto-Morley scheme towards the path of ‘responsible self-government’ within the framework of empire. The thrust of the report was a scheme that sought to devolve executive power to Indians. Also termed ‘dyarchy’, the new scheme of government proposed an executive divided into two parts in the provinces. The Governor in Council

³⁷⁶ The Morley-Minto scheme was a response to the unrest that followed the partition of Bengal. The Montagu-Chelmsford followed enthusiastic support for the British war effort in the First World War and responds to Indian disappointment with the restrictions on civil liberties in the infamous Rowlatt Act and deep resentment over the massacre at Jullianwala Bagh that followed their war effort. In addition, all political reforms of the 20th century had to increasingly factor in the growing influence of major political bodies like the Muslim League and the Indian National Congress among others. As my account primarily tries to capture the specifically colonial nature of political education, the broader discussion that I have just indicated would make this chapter far too unwieldy. Therefore I only deal with these historical contexts and forces as they impinge on my account.

³⁷⁷ Char, *Readings in the Constitutional History of India 1757-1947*, 457.

³⁷⁸ See also Keith, *A Constitutional History of India, 1600-1935*.

would have exclusive powers over certain ‘reserved’ subjects while Indian ministers chosen from the provincial legislatures would have power over a list of ‘transferred’ subjects.³⁷⁹ On the legislative side, government civil servants were now reduced to a minority and a majority of the representatives to the provincial and central legislatures were to be either nominated or elected. At the level of the central government the statute constituted two legislative houses – an upper house called the Council of State and a lower house called the Legislative Assembly. However, dyarchy was not intended to work at the level of the Central Government where the Governor General was primarily responsible to the Secretary of State for India in London.

Significantly the statute continued with separate electorates for Muslims, extended this also to the Sikhs, and through the course of the working of the new dispensation included nominated representatives of other groups like the Depressed Classes, Christians, Europeans, Factory Workers and so on. It is this aspect of the statute, its conception of Indian society, and its different orientation towards political education that I examine in this section.

The Montagu-Chelmsford scheme was quite different from the Morley-Minto system of government in that it was actively concerned with fostering a sense of citizenship among the Indians so that representative government would take root in India. Thus this scheme could not hold to the same conception of Indian society as divided by diverging interests. In a section titled ‘the conditions of the problem’ the Montagu-Chelmsford report mentions the difficulty that government based on the ‘electoral principle and a respect for rights’ would face in India:

Two dominating conditions will be quickly apparent to anyone who turns to the records and reports. One is that the immense masses of the people are poor, ignorant, and helpless far beyond the standards of Europe ; and the other is that

³⁷⁹ Transferred and reserved subjects were administered by devolution rules to the 1919 Act. Among the reserved subjects were law and order, land-revenue administration, and famine relief while transferred subjects included education, health, and agriculture. Char, *Readings in the Constitutional History of India 1757-1947*, 739.

*there runs through Indian society a series of cleavages - of religion, race, and caste which constantly threaten its solidarity, and of which any wise political scheme must take serious heed.*³⁸⁰ (emphasis added)

This would seem like a reiteration of the Morley-Minto scheme. However, there is a critical difference. That is, the irremediably divided social condition of India has now become an opportunity for citizenship. As the report goes on to say

(w)e have to bring about the most radical revolution in the people's traditional ideas of the relations between ruler and ruled, and it will be a difficult, and even a dangerous business, for it is neither safe nor easy to meddle with traditional ideas in India. Unless the political changes now in contemplation are accompanied by an educational campaign directed to awaking in all classes alike, ... a sense of citizenship, disaster will certainly result.³⁸¹

Thus the report believed that India continued to be divided among its various communities which inhibited the development of citizenship. However, the report claimed that it was possible and in fact the duty of government to educate Indians to see past their narrow identities towards their journey to citizenship and nationhood within the empire. These were the first conscious and tangible steps taken by the colonial government towards the realisation of the earlier stated pedagogic commitments of Macaulay, Mill and others.

Having declared national consciousness or citizen identities as the pedagogic goal for Indian communities, the Report had to address the rights of various social groups, especially the Muslims, as they existed under the Morley-Minto scheme. Addressing the question of communal electorates as it had developed up to that point, the report made it clear that these separate electorates were "a very serious hindrance to the development of the self-governing principle." However in relation to Muslims it went on to say that

(t)he Muhammadans regard separate representation and communal electorates as their only adequate safeguards. But apart from a pledge which we must honour until we are released from it, we are bound to see that the community secures proper

³⁸⁰ *Report on Indian Constitutional Reform* (Calcutta: Superintendent Government of India Press, 1918), 85.

³⁸¹ *Ibid.*, 88.

representation in the new councils. How can we say to them that we regard the decision of 1909 as mistaken, that its retention is incompatible with progress towards responsible government, that its reversal will eventually be to their benefit; and that for these reasons we have decided to go back on it? Much as we regret the necessity, we are convinced that so far as the Muhammadans at all events are concerned the present system must be maintained until conditions alter, even at the price of slower progress towards the realization of a common citizenship.³⁸²

The decision to permit continuation of separate electorates for the Muslims compelled the government to consider the claims of many other communities for special representation. Of these the government acceded only to the claims of the Sikhs in Punjab whom they argued were “a distinct and important people; they supply a gallant and valuable element to the Indian Army; but they are everywhere in a minority, and experience has shown that they go virtually unrepresented.”³⁸³ All other groups were to be represented by nomination which the report reasoned was a better way of extending class or communal representation since they could be abolished more easily when their task was accomplished.

It might perhaps seem that by recognising and granting political rights to many new social groups the government was just extending the Morley Minto framework of divergent interests. However, this new scheme introduced an important difference in terminology to understand these differences. Unlike the Morley Minto scheme where the interests of the Muslims were understood to be irreconcilably at odds with those of Hindu, the Montagu Chelmsford report cast this relationship in terms of Minority and Majority. Thus in the quest for unified nationhood, minorities and majorities would now have to learn to go beyond their particular interests and represent the interests of the collective or national political will. I cannot explore the question of whether Indians actually learned this new political goal of national unity as it is not an immediate concern for the present chapter. However, the partition of British India in India and Pakistan on the grounds of religion suggests that the project was less than successful.³⁸⁴ On the other hand as with the

³⁸² Ibid., 149.

³⁸³ Ibid., 150.

³⁸⁴ The Muddiman Committee report which was invited to review the working of the 1919 statute documents

conception of an India divided on grounds of interests, the new framework of majority and minority was as much a British conception of Indian society than an empirically grounded reflection on the nature of community in India. That is, the very intelligibility of these terms was difficult to determine and sustain.

Recounting an exchange in the Legislative Assembly³⁸⁵ at Delhi, Pathan illustrates some of the confusions produced by the new terminology of majority and minority. Replying to a query on how the government understood the terms majority and minority and how it proposed to be equal and fair between them, the government replied that the terms were not easy to define and that their meaning was to be grasped from the circumstance.³⁸⁶

(w)hen in March last Mian Mohammad Shah Nawaz asked for an interpretation of the terms ‘Minority and Majority Communities’ and ‘inequality of communal representation’ we felt it would be dangerous to commit ourselves to any definition of a ‘minority community’ until the whole matter had been carefully examined in the light of the local Governments’ replies. The local Governments were, I understand, asked how they defined the term and their replies, which have been received, are under separate examination. I have not seen the file yet, but I understand from the Assistant Secretary that the replies do not help. Some Governments have merely sent up the information contained in the Census tables, others have just stated what communities are generally regarded as minority communities and so on.

A “minority community” is a perfectly well-understood term and does not, I suggest, stand in need of a definition. It would not serve any useful purpose, and it

the disappointment of colonial officials on finding that Indian opinion could only express itself in communal terms. *East India (constitutional reforms). Report of the Reforms Enquiry Committee, 1924*, 1924, 2-15, http://gateway.proquest.com/openurl?url_ver=Z39.88-2004&res_dat=xri:hcpp&rft_dat=xri:hcpp:rec:1924-027479 (accessed 25/4/2010).

³⁸⁵ The Legislative Assembly was one of two legislative houses brought into being by the 1919 Act. The other being the 'Council of the States'.

³⁸⁶ Pathan, “A Historical and Theoretical Investigation into Communalism,” 297.

may be dangerous to attempt to attach to it too precise a meaning. The difficulties in the way of a strict definition are enormous. As Sir Malcolm Hailey explained in the debate on Mr. Nayar's motion on 10th March, 1923, for representation of classes and communities not well represented in the Services, though the *main criteria for determining the existence of a community are religion, language or caste and tribe, we have by no means arrived at a solution when we have determined communities on these criteria*. For example, the Hindus are all one community on the criterion of religion but in Madras, Brahmins and non-Brahmins want to be treated as separate communities; in Bombay, the Lingayats, who are Hindus, want to be treated as a separate community for franchise and other purposes; Rajputs and Mahrattas would claim recognition on a tribal or national basis and reject any discrimination based on language. As Sir Malcolm pointed out, a common language would not unite the Lingayats and Mahrattas, still less the Sikhs and the Punjab Moslems, while a difference of language does not keep apart the different sections of non-Brahmins in Madras. *The reason is that according as caste, tribal or national consciousness develops, the emphasis is changed from one to another and at a particular moment it is difficult to say on what element emphasis should be placed.* (Secretary will remember the protests we received when Bedi was nominated to the I.C.S because some Sikh organisations disowned him on the ground that he is not a 'Keshadhari' Sikh).

So far as the position of the Legislature on this matter is concerned, we accepted an agreed resolution in the Assembly in 1923 laying down the principle that in making new recruitment for the Services under the control of the Central Government steps should be taken to secure that the Services are not unduly overweighted with representatives of one community or province and that, as far as possible, claims of all communities and provinces should be considered. The resolution thus adopted provided for prevention of the over-representation of a particular community and was thus, in effect, a re-affirmation of the policy which the Government of India had been following which was not to seek to represent minority communities but to attempt to prevent a preponderance of any one class or community in our

Services³⁸⁷

Through this rather long extract I hope I have illustrated some of the difficulties of identifying a minority in this new dispensation under the 1919 statute.

The government had no criteria to determine what a minority was. It could range from religious, caste, tribal and linguistic groups and most importantly there were no identifiable constraints on the proliferation of these categories. A British commentator reflects on the absurd possibilities that this could produce in the following manner:

The facts of the communal position will support any view you take. For example, the 'minorities' if we include the Depressed Classes as non-Hindus, outnumber the Hindu 'majority'. You may regard this as a reason for putting the Hindu community (on democratic grounds) in a subordinate place at the Centre, in Legislature and Cabinet; or as a reason for championing their extreme claims, as those of a 'minority', against any other minority, especially the Moslems³⁸⁸

There was however no way of dealing with this problem because the very idea of a minority was just a carryover from, and modification of, the earlier conception of India as divided by interests. The only difference from the earlier conception of community was the added constraint that a divided nation should and could find a way to move beyond its differences. The acuteness of the problem was made salient by the next batch of constitutional reforms in India where there was a further proliferation of the demand for and the consequent government recognition of minority status to many new interest groups.

5.5. On the Political Sociology of Modern Indian Constitutional Practice

The Government of India Act 1935 was the last of the major constitutional revamps undertaken by the British government before the transfer of power to the States of India and Pakistan. Unlike the earlier constitutional reforms, the making of this statute was drawn out

³⁸⁷ *Question in the Legislative Assembly regarding the date of introduction of the division into majority and minority communities in the services under the crown in India and the definition of the term 'communal inequality' 1929: 5-8 cited in Ibid., 297-99.*

³⁸⁸ Edward John Thompson, *The Reconstruction of India*, (Faber & Faber, 1930), 314.

over 7 years and set in the context of the enormously increased political clout of the Indian National Congress.³⁸⁹ The legal trajectory leading up to the Act was set off by a sunset clause in the 1919 Act which mandated that the statute be comprehensively reviewed at the end of ten years so that the project of Indian political education could be evaluated and advanced.³⁹⁰ This review process however commenced two years in advance of schedule in 1927 by the Indian Statutory Commission led by Sir John Simon, whose report which was submitted in 1930 was the basis of round table discussions in London. These round table discussions were consolidated into a 'white paper' which was then subjected to the scrutiny of a parliamentary committee chaired by Lord Linlithgow and after a Parliamentary vote received the Royal Assent in August 1935, and was brought into operation in 1937.³⁹¹

The Government of India Act 1935 replaced the system of dyarchy under the Montagu Chelmsford scheme and instituted a system of full responsible government in the provinces. Legislative powers were divided into federal, provincial and concurrent lists which survives right up to the present constitution.³⁹² However, even though the Act prescribed that the Governor of the province was to be advised by a council of ministers it also permitted the

³⁸⁹ Describing colonial impressions Pandey notes that by the end of the 1930s the Congress was no longer considered a 'class of self seeking *babus*' but a coterie capable of 'deluding the masses' and more importantly that 'Gandhi had achieved the miracle of extending the movement to the masses'. Gyanendra Pandey, "The Ascendancy of Congress in Uttar Pradesh," in *The Gyanendra Pandey Omnibus* (New Delhi: Oxford University Press, 2008), 1-2.

³⁹⁰ Coupland, *Report on the constitutional problem in India*, 78.

³⁹¹ The round table discussions Ibid., 132-33.

³⁹² The federal list included subjects such as defence, external affairs, the regulation of the railways and so on; while the provinces were granted legislative powers over subjects like public order, public health, education, agriculture. Finally the concurrent list dealt with issues such as criminal law, bankruptcy and labour. This is detailed in schedule 7 of the Act. Keith, *A Constitutional History of India, 1600-1935*, 365-76.

Governor to ‘act in his discretion’³⁹³ in certain matters and to ‘exercise individual judgment’ on certain other matters.³⁹⁴ These powers of the Governor were derived from the ‘Governors’ instructions’ which were to be presented to Parliament and formed an important part of the working of government under the 1935 Act. Thus despite the substantial powers being transferred in the provinces to the elected ministers the Governors continued to exercise considerable power that was not accountable to elected legislatures.³⁹⁵

Most importantly for the discussion in the present chapter, the 1935 Act also continued with the policy of separate electorates for Muslims. In the Simon commission this was justified by noting that “in the absence of a new agreement between Hindus and Muhammadans, we are unanimous in holding that communal representation for the Muhammadans of a province must be continued, and that Muhammadan voters could not be deprived of this special protection ... without doing such violence to Muhammadan sentiment as could not be justified either on grounds of policy or on grounds of equity”.³⁹⁶ That is, as with the

³⁹³ The Governor is permitted to ‘act in his discretion’ regarding the summoning of the legislature, the appointment of Ministers, the giving or withholding assent to bills or their reservation, and the administration of ‘backward areas excluded from ministerial control. As Coupland notes on these matters the Ministers are not entitled to tender advice though the Governor could ask them for it in case necessary. Coupland, *Report on the constitutional problem in India*, 134-35.

³⁹⁴ The Governor is expected to ‘exercise his individual judgment’ regarding the following responsibilities: (1) ‘The prevention of any grave menace to the peace or tranquility of the Province or any part thereof.’ (2) ‘The safeguarding of the legitimate interests of minorities.’ (3) The protection of the rights of civil servants under the Act. (4) The prevention of administrative discrimination against British commercial interests. (5) The good government of backward areas excluded from the normal administration. (6) The protection of the rights of the States and their rulers. (7) The execution of orders from the Governor-General with regard to certain Federal interests. *Ibid.*, 135.

³⁹⁵ Dyarchy was however continued at the level of the central government in relation to the reserved subjects of defence and foreign affairs. All other subjects were transferred to the ministers though in relation to these subjects the Governor General enjoyed powers similar to those granted to the Governors as detailed in notes 139 and 140 above.

³⁹⁶ *Indian Statutory Commission. Volume II. Report of the Indian Statutory Commission. Volume II-- recommendations*, 1929, 60, http://gateway.proquest.com/openurl?url_ver=Z39.88-2004&res_dat=xri:hcpp&rft_dat=xri:hcpp:rec:1929-030491. (accessed 20/1/2011)

Montagu Chelmsford scheme the Simon Commission also set universal citizenship as the pedagogic goal for Indian communities but one that could not be easily achieved because of divided nature of Indian society and the assurances granted to the Muslim minority under the Minto Morley scheme that they would be granted separate electorates.

As in the Montagu Chelmsford Scheme the inability to resolve the tension inherent in the modelling of Indian society as defined by minorities who were supposed to be fundamentally at odds with each other only led to a further proliferation of minority claims. Thus speaking of communal electorates the report of the Indian Central Committee notes the difficulty of dealing with demands for communal electorates made by all kinds of communities across the country who asserted that “only by separate electorates or special representation ... can the different interests of each community be safeguarded.”³⁹⁷ The minority question was not satisfactorily resolved even by the round table discussions that followed the submission of the Simon Commission report.³⁹⁸ Thus the Government of India Act 1935 was compelled to extend recognition to a very large number of minorities.³⁹⁹ Perhaps the most significant controversy produced by the Act was the proposal to grant separate electorates for the Scheduled Castes. I therefore end this chapter by discussing the issue of caste and the manner in which the model of ‘competing interests’ elaborated in the Morley Minto scheme could not be effectively removed from subsequent attempts to model Indian in terms of an integrated nation of minorities.

³⁹⁷ Most shades of Indian political opinion boycotted the Simon Commission because it was unilaterally constituted and consisted solely of British Parliamentarians. However the Upper Chamber of the Indian Central Legislature decided to constitute a commission which would work alongside and supplement the efforts of the Simon Commission. This report was a product of their labours. *East India (constitutional reforms). Report of the Indian Central Committee, 1928-29.*, 1929, 40, http://gateway.proquest.com/openurl?url_ver=Z39.88-2004&res_dat=xri:hcpp&rft_dat=xri:hcpp:rec:1929-030361. (accessed 20/1/2011)

³⁹⁸ Coupland, *Report on the constitutional problem in India*, 113-31.

³⁹⁹ Under the 1935 Act seats in the legislatures were reserved for Scheduled Castes, representatives of backward areas and tribes, Sikhs, Muslims, Anglo-Indians, Europeans, Indian Christians, representatives of Industry Mining and Planting, Landholders, Representatives of Universities, Labour and Women. Of these groups there were separate electorates for Sikhs, Muslims, Anglo-Indians, Europeans, and Indian Christians. I have drawn this Scheduled 5 and 6 of the Government of India Act 1935.

5.5.1. Salvaging the Nation from Caste Identity?

Marc Galanter identifies the nationalisation and politicisation of caste by the Indian nationalist movement as being roughly co-terminous with the passing of the Indian Councils Act, 1909. He illustrates this through contrasting conceptions of caste before and after the 1909 statute. Drawing from Dadabhai Naoroji's response to objectionable caste practices in an address to the Indian National Congress in 1886, Galanter shows that Naoroji resisted incorporating the issue of caste into the Congress national program by asking:

What do any of us know of the internal home life, of the customs, traditions, feelings, prejudices of any class but our own? *How could a ... cosmopolitan gathering like this, discuss to any purpose the reform needed in any one class?* Only the members of that class can effectively deal with the reforms therein needed. A National Congress must confine itself to questions in which the entire nation has a direct participation, and it must leave the adjustment of social reforms and other class questions to class Congresses.⁴⁰⁰ (emphasis added)

However, by the early part of the 20th century Indian nationalism no longer viewed the question of caste reform within the bounds of caste autonomy and in fact increasingly regarded it as an obstacle to the development of a national consciousness.⁴⁰¹

The passage of the 1909 Minto Morley statute highlighted the significance of the untouchable castes or depressed classes in the new conception of the Indian nation and different strands of politics tried to appropriate the depressed classes within the possibilities provided by colonial government. As early as the negotiations for the 1909 statute a delegation of Muslims argued with Secretary of State Morley to exclude the depressed

⁴⁰⁰ Cited in Galanter, *Competing Equality*, 21.

⁴⁰¹ Galanter traces the nationalisation of the caste question to the grouping of lower castes under the rubric of untouchability and identifies the first pan national use of the term untouchable to the Maharajah of Baroda's address to the Bombay Depressed Classes Mission in 1909. *Ibid.*, 24.

classes from the Hindu community.⁴⁰² In a sign of its changing policy the Congress passed a resolution in 1917 urging the people of India to take note of the “necessity, justice and righteousness of removing all disabilities imposed by custom upon the depressed classes the disabilities being of a most vexatious and oppressive character, subjecting those classes to considerable hardship and inconvenience”⁴⁰³

However, Galanter suggests that it was the various non brahmin political parties of the Bombay and Madras Presidencies that made the most of taking forward the caste agenda through government measures that provided preferences for the depressed classes in educational institutions and government posts. All these latter measures were made possible through the Government of India Act, 1919 as revised in 1924 by the Muddiman Committee Report.⁴⁰⁴ However, on the issue of political representation the depressed classes were the only recognised minority entitled to special representation through nomination by the 1919 statute. This position however came up for review with the next round of constitution change in India, a process that began with the Indian Statutory Commission which began its work in 1927.

In its report the Simon Commission considered the possibility that separate electorates now reserved only for Muslims and Sikhs as a matter of right be extended to depressed classes as well. Though it went on to reject the demand that separate electorates be granted to the depressed classes,⁴⁰⁵ the demand was brought up again by depressed caste leaders like B R. Ambedkar during the round table discussions in London. The Congress was entirely

⁴⁰² Morley mentions that Ameer Ali, as part of a delegation of Muslims who met him in regard to the 1909 reforms, petitioned him to exclude large numbers of the lower castes from being counted as Hindus. Morley, *Indian speeches (1907-1909)*, 102. Galanter similarly points out Muslim support for the 1911 census commissioner who suggested that the untouchables or the depressed classes be enumerated separately from the Hindus.

⁴⁰³ Galanter, *Competing Equality*, 26-27.

⁴⁰⁴ *East India (constitutional reforms). Report of the Reforms Enquiry Committee, 1924*, 54-56.

⁴⁰⁵ *Indian Statutory Commission. Volume II. Report of the Indian Statutory Commission. Volume II-- recommendations*, 64-66.

opposed to this demand as it considered itself a representative of all Indians and not merely of Hindus alone as the minority groups chose to portray it. Thus in the round table discussions the Congress and the various minority 'interests' groups opposed to its position on separate electorates could not broker a compromise on the issue. As no agreement was possible the government eventually had to come up with a plan protecting the rights of the minorities.⁴⁰⁶ Consequently the government of Ramsay MacDonald devised what was called the 'communal award' which granted separate electorates to the depressed classes in addition to other groups like the Muslims.

Gandhi was vehemently opposed to the communal award and went on a fast finally forcing the famous Poona pact between the Congress and depressed classes that would reserve seats for them in the legislature and other related measures but under the framework of a single joint 'Hindu' electorate.⁴⁰⁷ Gandhi was however unsuccessful in dismantling the framework within which 'interests' were represented in government and all that his efforts could secure was a reversion to the scheme envisaged under the previous 1919 statute. As this scheme was not entirely free of a conception of India in terms of contending interests, the contending politics of the Congress and the Muslim League eventually lead to the partition of British India into the States of India and Pakistan on the supposed grounds of an irreconcilable difference of religious interests.

⁴⁰⁶ Prime Minister Ramsay MacDonald had warned that this would be the only available option if Indian opinion could not come to an acceptable compromise on the issue of minority rights. *Indian Round Table Conference (second session) 7th September, 1931-1st December, 1931 proceedings*, 32 1931, 418, http://gateway.proquest.com/openurl?url_ver=Z39.88-2004&res_dat=xri:hcpp&rft_dat=xri:hcpp:rec:1931-031623. (20/1/2011)

⁴⁰⁷ Gandhi who was in prison at this time proposed an alternative plan in which the number of seats reserved for the Depressed Classes would be considerably more than what was provided in the Communal Award. The principle of separate electorates would be applicable but only at a preliminary stage of the elections where the voters of the Depressed Class would elect a panel of candidates from which members of the legislature would be elected by the general body of Hindu voters, including those of the Depressed Classes. Char, *Readings in the Constitutional History of India 1757-1947*, 560-63; Coupland, *Report on the constitutional problem in India*, 128.

The Constitution of independent India tried to do away with the scheme of contending interests as it has developed in the British constitutions since 1909. Most notably the Constitution did away with the system of Separate electorates. Further, by reorienting the discussion of the rights granted to the erstwhile minorities in terms of ‘backwardness’ the Constitution did make a serious attempt to steer away from the colonial scheme of interests. However, as my discussion in chapter 2 has shown, in important ways the group rights granted by the Constitution continues to be tied to colonial model of contending interests. Especially the manner in which the grant of group rights in the Indian Constitution is dependent on a reformed or monolithic conception of the Hindu (majority) community. That is, despite the sincere efforts of the constitution makers, the contemporary constitution continues to labour under the conception of Indian society as fundamentally divided among its various irreconcilably contending interest groups.

5.6. Concluding Note

To summarise the discussion in this chapter, I have argued that contemporary constitutional identities like caste and religion replay and entrench the British conception of political community in India. As I have repeatedly stressed through the last two chapters, these models of community are not drawn from communities as they empirically obtain in India. In other words, colonial toleration and colonial politics produce reformulated conceptions of social and political community that screen off Indian experience from these debates. In the next and final chapter I explore the implications of the argument that I have sketched up to this point – that the character of the Indian secular State is founded on the reformulation of Indian society on the lines of colonial conceptions of politics and community.

6. Rethinking the Ayodhya Case: On the Semantics of Secular Reform

In the course of this thesis I have argued that the reforming scheme of the secular State in India operates as a conceptual and theoretical veneer that screens or blocks off Indian social transactions from being made available to comprehend and respond to contemporary constitutional problems. In this chapter I revisit this claim and subject it to greater scrutiny by exploring the manner in which the High Court at Allahabad resolved one of the longest standing religious disputes in independent India between Hindus and Muslims over a monument located at the temple town at Ayodhya. Through my study of this case I illustrate the gap between the semantic structure of secular reform and the institutional practices through which problems associated with the secular State are resolved. Doing so I highlight once again the problem that this thesis has demarcated and outline some issues that require further study.

6.1. The Background

In September 2010 the Lucknow Bench of the Allahabad High Court delivered judgment in a set of civil suits grouped together in a case titled *Gopal Singh Visharad and Others v. Zahoor Ahmad and Others*⁴⁰⁸ (Hereafter, *Ayodhya*). The decision dealt with a dispute almost as old as the Indian republic and whose political significance continues to resonate in contemporary Indian politics. At its core this case is a property dispute between various Hindu and Muslim groups over a 16th century religious structure which stood in the north-Indian temple town of Ayodhya. On the one hand the Hindu parties asserted their rights to the property on the grounds of its association with the birthplace of the Hindu deity Rama. The Muslim parties on the other hand claimed that the structure was built as a mosque by Babur, the first of the Mogul Emperors and, that its ownership should vest with those charged with the management of the property for the benefit of the faithful of the community. The dispute has produced deep social and political divisions causing some of the worst instances of communal rioting, especially after the temple-mosque was demolished by ‘Hindu’ mobs in 1991. Apart from the human tragedy that followed the

⁴⁰⁸ <http://tjbm.nic.in/> (accessed 15/10/2010)

demolition, the event also challenged many of the political certitudes that had held sway till that point. The most important of these was the nature and extent of the Indian commitment to the secular State, the central concern of this thesis.

The earliest legal dispute in relation to the disputed structure at Ayodhya however traces back to 1885 when the Sub-Judge of the trial court at Faizabad decided a case brought before him by the Mahant or priest at the *Ram Chabutra*, a Hindu shrine within the premises of the disputed property. The Mahant petitioned the court to grant him permission to build a permanent structure over the *Ram Chabutra* to provide shelter while ministering to and paying respects to the deity. However, Mohammad Ashgar, who claimed to be the *Mutawalli* or caretaker of the mosque at the property, argued that permission to construct a temple ought not to be granted. He contended that as owners of the property the Muslim parties had granted Hindu devotees permission to use the property, but that this was not to be construed as the right of ownership or possession.

The court found that the disputed property contained a Mosque and a Hindu temple which were divided by a grilled wall. The wall was said to have been erected in 1855 after a violent dispute between Hindus and Muslims, to allow both communities to perform their religious rites in well demarcated zones. Information from local gazettes suggested that before 1855 the disputed site was used by members of both communities to perform their respective religious rites.

Even after 1855 the court found that the *chabutra* was in the possession of the Hindus who were performing their traditional rites at the structure. However, in its decision the court made the rather strange observation that

(t)his place is not like other places where the owner has got the right to construct any building as he likes ... The prayer for permission to construct the temple is at such a place where there is only one passage for the temple as well as for the mosque. The place where the Hindus worship is in their possession from of old and their ownership cannot be questioned and around it there is the wall of the mosque

and the word Allah is inscribed on it. If a temple is constructed on the Chabutra at such a place then there will be sounds of bells of the temple and *shankh* ... and if permission is given to Hindus for constructing a temple then one day or the other a criminal case will be started and thousands of people will be killed. For this reason of breach of law and order the officers have restrained the parties from making any new construction. So this court also considers it to be proper that *awarding permission to construct the temple at this juncture is to lay the foundation of riot and murder ... between Hindus and Muslims.*⁴⁰⁹ (emphasis added)

Perhaps there was legitimate nervousness on the part of the colonial administration to permit an arrangement that would allow communities to carry on their practices in such close proximity to each other, especially because there were known instances of past violence. However, preventing the Hindus from exercising their property rights as regards the *chabutra* on grounds of potential communal riots was odd.

The District Judge, rephrased the lower court judgment on appeal and stated that in the circumstances of the case it was redundant to assert that the ‘ownership and possession’ of the chabutra was with the Hindus. However, he also found that there was evidence to suggest that one portion of the building was used by the Muslims and that the *Ram Chabutra* was occupied by the Hindus. Significantly he also described the religious structure as representing the divisions between Hindus and Muslims, especially the historical injustice committed by a Muslim emperor on his Hindu subjects: “*it is most unfortunate that a masjid should have been built on land specially held sacred by the Hindus*, but as that event occurred 356 years ago it is too late now to remedy the grievance. All that can be done is to maintain the parties in status quo.”⁴¹⁰ (emphasis added)

In the court of second appeal the judge seemed to suggest that the disputed property was in the joint use of both Hindus and Muslims. However, it held that there was insufficient

⁴⁰⁹ Abdul Gafoor Abdul Majeed Noorani, *The Babri Masjid question, 1528-2003: “a matter of national honour”*, vol. 1 (Tulika Books, 2004), 181.

⁴¹⁰ As per Justice Khan, p.20, <http://rjbm.nic.in/> (accessed 15/10/2010); See also *Ibid.*, 1:182-84.

evidence to support the *proprietary* claims of the Hindus. As in the lower court, the appeal court also represented the disputed structure as a mark of historic injustice suffered by the Hindus. Thus Justice W. Young, Judicial Commissioner, Oudh, observed that:

The matter is simply that the Hindus of Ayodhya want to create a new temple or marble baldacchino over the supposed holy spot in Ayodhya said to be the birthplace of Shri Ram Chandar. *Now this spot is situated within the precinct of the grounds surrounding a mosque erected some 350 years ago owing to the bigotry and tyranny of the Emperor Babur*, who purposely chose this holy spot according to Hindu legend as the site of his mosque.

The Executive authorities have persistently refused these encroachments and absolutely forbid any alteration of the 'status quo'. I think this is a very wise and proper procedure on their part and I am further of the opinion that the Civil Courts have properly dismissed the Plaintiff's claim."⁴¹¹

This *status quo* was maintained until December 1949 when at the cusp of the transition to the government of the Indian republic, 'Hindu' miscreants broke into the disputed property and installed a set of idols under the central dome of the Mosque. This event triggered off the contemporary Ayodhya case.

6.2. The Contours and Challenges of the Contemporary Dispute

The installation of idols and the occupation of the disputed site by Hindus resulted in the provincial state government passing orders attaching the disputed property and handing it over to a government appointed receiver. Since that time the Muslims have not been able to use the mosque. However, the conditions of the attachment permitted the performance of various Hindu religious rites to the idols installed at the disputed structure. The attachment gave rise to a set of civil suits which were the basis of the present case. Of the five suits filed in the case, one was withdrawn and the other four divide into three sets of claims for title and possession of the disputed property.

⁴¹¹ Ibid., 1:186-188.

The Muslim parties claimed that the disputed structure was a mosque constructed by the Mogul emperor Babur upon either barren land or, in the alternative, on the ruins of a temple. As it had been dedicated to the public, they claimed that they were in possession of the property till 1949, when they were dispossessed. However, they also admit the existence of a small *chabutra* in the outer courtyard at which Hindus were permitted to pray. The Hindu parties made one of two kinds of claim. On the one hand, the ‘Nirmohi Akhara’, a religious sect that managed the *chabutra* and other religious structures outside the mosque, claimed that the disputed structure was never a Mosque. Therefore, as the group traditionally associated with the management of structure, the Akhara argued that they should be given possession of the entire premises. Other Hindu groups contended that, even if the attached disputed property was a mosque, it ceased to be so when it was substantially damaged in a communal riot in the year 1934. All Hindu parties claim that after this date the property was not used as a mosque by Muslim parties and that they were in possession of the property which they believe to be the birthplace of Rama.

While these suits were pending, the attachment order was modified in 1986 to open the locks to the disputed property and permit all members of the Hindu public to offer respects to the idols installed in the disputed structure, which until this point were only performed in a restricted manner by specially appointed priests. This event is attributed to the machinations of the then ruling Congress party pandering to the demands of electoral politics, especially to what they believed to be Hindu interests. Justice Khan, one of three judges who decided the contemporary Ayodhya case, was scathing in his criticism of the legality of this order altering the terms of attachment of the disputed property. In his opinion this order opening the disputed structure to the general public, catapulted the problem onto the national stage and set off a chain of events that eventually led to the demolition of the disputed mosque in 1992.

The demolition, which had the tacit if not open support of many of the Hindu parties in the case, unleashed an orgy of communal violence across the country prompting the central government to enact the Acquisition of Certain Areas at Ayodhya Act, 1993. This statute

acquired the disputed property and abated all pending suits regarding the property. Separately the government initiated a presidential reference to the Supreme Court, asking the question “(w)hether a Hindu temple or any Hindu religious structure existed prior to the construction of the Ram Janma Bhumi-Babri Masjid (including the premises of the inner and outer courtyards of such structure) in the area on which the structure stood.” In *Ismail Faruqui v. Union of India*⁴¹² the Supreme Court refused to answer the presidential reference, struck down the provisions of the statute that abated all pending suits, and directed the central government to hold the disputed property as a receiver until the earlier suits which they had reinstated were decided. According, the Lucknow Bench delivered its decision in the revived suits of the *Ayodhya* case in September, 2010.

The judgment of the High Court divided the disputed property equally between the three main claimants. However, this decision has provoked a fiery debate on whether it is a solomonic resolution of an intractable problem or an instance of *panchayat* justice that violates canons of legal procedure and propriety.⁴¹³ The sense of unease expressed regarding the judgment stems from the perception that the court overlooked the role played by the Hindu parties in the demolition of the Mosque in 1992 and perhaps granted these groups rights they would otherwise not have secured. That is, it has been asserted by some commentators that the court violated the demands of India’s secular constitution obliging it to treat all communities equally and fairly.⁴¹⁴

Running over eight thousand pages, a detailed legal evaluation of the rights and wrongs of the *Ayodhya* judgment would form a study in itself and is not the objective of the present

⁴¹² MANU/SC/0126/1995

⁴¹³ For example see the different opinions of Pratap Mehta and Rajeev Dhavan. Pratap Bhanu Mehta, “The leap and the faith”, n.d., <http://www.indianexpress.com/news/the-leap-and-the-faith/690939/>; Rajeev Dhavan, “Ayodhya verdict is like a panchayati judgement”, n.d., <http://economictimes.indiatimes.com/opinion/et-debate/ayodhya-verdict-is-like-a-panchayati-judgment/articleshow/6703312.cms>. (accessed 25/1/2011)

⁴¹⁴ For example see Anupam Gupta, “Dissecting the Ayodhya Judgement,” *Economic and Political Weekly* 45, no. 50 (December 11, 2010): 33-41; P. A Sebastian, “Secularism and the Indian Judiciary,” *Economic and Political Weekly* 45, no. 50 (December 11, 2010): 42-45.

discussion. Thus for present purposes I only extract the problem that the judgment poses for the Indian secular State, especially the manner in which it legally renders what it views to be the challenge posed by religious freedom and religious conflict. From this perspective I argue that the significance of this decision lies not merely in the manner in which it has treated different religious communities but the fact that the solution that it has devised is almost entirely unconnected to the way in which important parts of the decision are justified.

6.3. Revisiting Essential Practices: Justifying the Rights of the Contending Litigants

The secular State in liberal democracies is charged with the task of protecting religious liberty, a task it performs through an institutional commitment to the toleration of different religious persuasions. Though the Indian constitution is committed to the protection of religious freedom, I have argued in this thesis that its practice in specific instances implies a commitment to the semantics of reform where traditional religions are recast as founded in doctrine. However, I have also suggested that reform is merely a conceptual and theoretical screen that prevents access to Indian religious traditions which continue to defy these reformed descriptions in very important respects. It is against this background that I revisit the claim that reform is merely screens off Indian social experience from being made available for institutional challenges through the example of the Ayodhya case.

In *Ayodhya* the social history of the disputed structure as recounted by the colonial courts had clearly demonstrated the existence of both religious conflict and cooperation. The cooperation witnessed at the site even implied that many religious groups performed their respective ritual observances at the disputed structure. However, the judicial history of the Ayodhya case also demonstrates that the colonial judges were extremely wary of such contiguous religious activity. Thus colonial courts repeatedly attempted to separate the Hindus from the Muslims to maintain what they believed to be the *status quo* and prevent situations that they felt would lead to a communal conflagration. Ironically, the colonial wariness of Indian social practices was part of the British legal regime that was deeply committed to religious toleration.

In the contemporary Ayodhya case the High Court was not noticeably constrained by what the colonial courts understood to be the problem of communal order. The decision to partition the disputed property equally between the three principal parties would suggest that this is the case. However, this is also the puzzle that the case poses because the decision to partition the property sits alongside and is almost entirely disjointed from the justifications advanced for this decision. In what follows in this section I elaborate the nature of this disjointedness.

In important respects the High Court's justification of the partitioning of the property was tied to the finding that the disputed site was part of the 'essential practices' of the religious traditions of the contending parties.⁴¹⁵ I illustrate this through two of the issues that the court addressed in the Ayodhya case.⁴¹⁶ First, whether the disputed property is the birthplace of Rama; second, whether the building at the disputed site was a valid mosque (according to the tenets of Islam). Discussing the court's treatment of these issues I argue that the manner in which the court justified its responses to these issues had no bearing on the decision that it delivered.

Answering the question whether Rama was born at the disputed site the three judges who decided the case took different positions. Justice Khan distinguished the 'spot of conception' from the 'geographical place of birth'. Doing so he expressed doubts about drawing conclusive links between the spot on which the mosque stood and the spot where Rama was conceived. That is, he held that it could at best be established that the mosque

⁴¹⁵ The manner in which the issues in the case, a property dispute, were framed as a question of religious freedom is not entirely clear but it was perhaps the only way in which Hindu parties could establish claims to the property as the matter had already been settled by the colonial courts in the 1880s. However, I do not explore this question any further for the present discussion and restrict myself to the manner in which the court elaborated the issue of the essential practices of the religious tradition of the respective parties to the conflict.

⁴¹⁶ The court framed almost thirty issues to be decided in these suits. My choice of issues are primarily intended to throw light on the peculiar manner in which the court considered the issue of religious freedom in the case.

was built at the birth place of Rama as opposed to the spot where Rama was conceived.⁴¹⁷ Therefore he argued that the demand for possession and title of the property on this ground would not succeed. Justice Agarwal and Sharma however differed from Justice Khan in their consideration of this issue.

Justice Agarwal reframed the issue of the birthplace of Rama in terms of popular Hindu religious sentiment. That is, he cast the issue as the question whether the disputed property was the birth place of Rama according to the tradition, belief and faith of the Hindus.⁴¹⁸ He answered the question by drawing on the ‘essential practices doctrine’, the principle of Indian constitutional adjudication on questions of religious freedom discussed in chapter 1. Relying on precedent, Justice Agarwal explained that “*what really constitutes an essential part of religion or religious practice has to be decided by the Courts with reference to the doctrine of a particular religion or practices regarded as parts of religion.*”⁴¹⁹ (emphasis added) Accordingly, he decided that the manner in which Hindu belief and practice converged on the disputed property was sufficient to establish that Hindus believed the site to be of essential significance to their faith. More importantly, the disputed site itself was held to be a deity and along with Hindu beliefs, was collectively protected by the fundamental right to religious freedom granted by the Indian constitution.⁴²⁰

Justice Sharma’s judgment is similar to that of Justice Agarwal. However, he audaciously historicised the issue of Rama’s birth at Ayodhya. That is, he held that the accounts of travellers, gazetteers and similar anthropological records on the habits and beliefs of the local people at Ayodhya actually established that Rama was born at the disputed site.⁴²¹ In his words

(i)t is manifestly established by public record, gazetteers, history accounts and oral

⁴¹⁷ Justice Khan, p.243

⁴¹⁸ Justice Agarwal, para 4157, <http://rjbm.nic.in/> (accessed 15/10/2010).

⁴¹⁹ *N. Adithayan v. Travancore Devaswom Board 2002 (8) SCC 106, 123* in Justice Agarwal, para 4416

⁴²⁰ *Ibid.*, paras 4414-18.

⁴²¹ Justice Sharma, p. 105, Vol. 4, <http://rjbm.nic.in/> (accessed 15/10/2010).

evidence that the premises, in dispute, is the place where Lord Ram was born as son of Emperor Dashrath of solar dynasty. According to the traditions and faith of devotees of Lord Ram, the place where He manifested Himself has ever been called as Sri Ram Janmbhumi by all and sundry through ages. Thus, the Asthan, Ram Janambhumi has been an object of worship as a deity by the devotees of Lord Ram as it personifies the spirit of divine ... Birth place is sacred place for Hindus and Lord Ram, who is said to be incarnation of God, was born at this place.

In other words the existence of a mythological or religious figure, Rama, was strangely justified in historical terms. Having held that Rama was born at the disputed property Justice Sharma also held that the property itself was believed to be a deity and that these beliefs formed an essential aspect of the Hindu religion.

A significant aspect of the reasoning advanced by Justices Sharma and Agarwal was the manner in which they tied their discussion on religious freedom of the Hindu parties in a civil suit dealing with a property dispute. That is, by arguing that the disputed property was a deity and part of the essential features of the Hindu religion, judicial relief was organised around the constitutional right to religious freedom. However, a similar form of reasoning was not extended to Muslim parties when the court considered the status of the mosque. Both Justice Agarwal and Justice Sharma relied on the decision in an earlier Supreme Court ruling in *Ismail Faruqui v. Union of India*⁴²², a decision in which the majority had held that it would have to be demonstrated by a petitioner that a particular mosque had an special place in the Islamic tradition for it to be essential to the Islamic faith.⁴²³

⁴²² MANU/SC/0126/1995

⁴²³ In addition Justice Sharma also held that the mosque itself was not constructed according to the tenets of Islam for the following reasons: (1) the mosque did not have minarets as mandated by Islamic tenets; (2) It was unusual and against Islamic tenets for a mosque to be surrounded by graveyards; (3) It was unusual for a mosque to be surrounded by Hindu religious structures; (4) The mosque did not have a bathing pool for devotees to wash themselves before worship; (5) There were images and idols on the walls of the disputed property; (6) Discussing the nature of Islamic public trusts or *wakfs* he said the property on which a mosque is constructed must belong to the person dedicating the *wakf* if such dedication was to be valid. As an invader he held that Babur could not have owned the disputed property and therefore the mosque was not validly constructed according to the tenets of Islam; (7) Lastly, and strangely, Justice Sharma even

The essential practices doctrine was thus applied asymmetrically to the Hindu and Muslim parties. In this regard it is important to note that *Ayodhya* could have been decided without considering the issue of essential aspects of the Hindu and Muslim religions. The suit could have been decided on the narrow grounds of the relevant property and endowment laws. Additionally, it has also been argued by commentators that it was inappropriate to decide the case on constitutional grounds because the essential practices doctrine was not intended to decide questions of religious freedom in cases of inter-religious conflict.⁴²⁴ However, I argue that the fact that it was decided on these grounds is significant because it highlights the disjuncture between this justification advanced to argue the rights of the Hindu parties and the partitioning of the disputed between all the three parties.

6.4. The Redundancy of Essential Practices

The disjunction that I refer to is best highlighted by contrasting the decision of the Allahabad High with those of the colonial courts. Apprehensive of communal discord the colonial court thought it best to keep apart the contending parties in this dispute. Though the decision of the colonial courts did not appreciate the terms on which social practices were jointly transacted on such sites by different religious traditions, it is possible to account for the colonial action. That is, in the light of the discussion in chapter 5 it possible to assert that it was directed at holding the peace, based on the courts understanding of Hindus and Muslims as possessing irreconcilably opposed religious interests.

On the other hand the decision of the Allahabad High Court to partition the property three ways between the parties is not so easily explained. That is, if the court held that the right

seems to hold that the demolition itself was a reason to assert that no mosque existed at the place and that no Islamic religious rites are followed at the site as a result. See Aparna Chandra, "Gopal Singh Visharad and Ors V. Zahoor Ahmad and Ors., O.S.Nos. 1/1989, 3/1989, 4/1989, 5/1989: A Summary of the Babri Masjid-Ram Janm Bhoomi Decision," *SSRN eLibrary* (October 11, 2010), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1690803.

⁴²⁴ Gupta, "Dissecting the Ayodhya Judgement."

of the Hindus stemmed from an understanding of the disputed property as forming part of the essential practices of their religion, then on what grounds were Muslims granted a third of the property if their religious claims to the property were denied by the court? Perhaps the Muslims were granted rights purely on grounds of the property rights claims they were able to advance before the court. However, if that was the case then the Hindu claims should also have been appreciated on similar grounds.⁴²⁵ Alternatively, the question that needs to be addressed is the role that ‘essential practices’ or the justification based on religious freedom plays, in arguing the claims of the Hindu parties.

In the *Ayodhya* decision I argue that that the best way to understand the court’s discussion of essential practices is that it played no significant role the decision of the court. Instead it has cast a veil over what the court has actually done in the case. That is, the court’s decision equitably divided the property between the contending parties thereby resolving an intractable problem that has defied solution for well over a century. However, the court has not been able to justify its decision satisfactorily because its use of doctrines like ‘essential practices’ that have little if no bearing on the decision to partition the disputed property. In other words, the influence that the essential practices test has exerted on the court has operated as a veil that has screened off the court’s engagement with the dispute thereby making it unavailable for legal and institutional processes of justification.

Ayodhya is therefore an analogy for the kind of problem that this thesis has tried to point towards. That is, the reforming disposition of the Indian secular State has operated as a discursive veil that has screened off Indian social transactions and the courts efforts to deal with them. I have pointed this out in my discussion of religious freedom in Chapter 1 and especially in my discussion of the *Satsangi* case. Similarly my discussion of Indian equality jurisprudence also demonstrated the difficulties that the reformed ‘Hindu’ identity posed for the determination of constitutional backwardness. In all these cases the ‘essential practices’

⁴²⁵ I am not suggesting that property rights arguments were not advanced by the Hindu parties. In fact a significant portion of this very large judgment addressed issues related to Hindu religious endowments and the property rights of deities. However, these could be argued quite independently of the religious freedom arguments.

doctrine or the effects of a reforming conception of religious freedom has acted as a semantic screen that has blocked off Indian social traditions and its associated problem solving practices.

Thus to conclude, in this thesis I have demonstrated the aspects of secular constitutionalism in India that have contributed to the occlusion of Indian social and political experience. In this chapter through the *Ayodhya* example I have suggested the ways in which the limitations imposed by secular constitutionalism can be overcome. That is, by pushing past the veil of secular constitutionalism and interrogating the practices through which Indian institutions resolve or fail to resolve the problems placed before it. Though I have not been able to undertake such a study in this thesis I believe I have cleared ground for future projects of this nature.

Conclusion

In this thesis I have examined the role of the secular State in the making of constitutional government in India. In the introductory chapter the problem of the thesis was set in the context of a general crisis posed by the by the resurgence of religion in the public sphere to liberal secular States across the world. Placing the Indian secular State against this background I have argued that the Indian practice of constitutional secularism is an unrealised pedagogical project whose goal is the transformation of Indian society and its politics.

Toleration is the core value defended by liberal the secular State and drawing on this liberal tradition the Indian constitution is no exception. Thus I began the thesis in chapter 1 by describing the manner in which toleration was incorporated into the practice of the Indian secular State. I demonstrated that the practice of toleration in the Indian constitutional scheme compels religious groups to reformulate their traditions into ‘essential truths’ or ‘doctrinal foundations’ to successfully claim religious freedom.

As numerous court decisions have shown, the demand for doctrinal foundation is an especially odd demand of non-Semitic traditions like Hinduism because even up the contemporary moment it continues to be difficult to cast these traditions in terms of doctrinal truths. The emphasis on doctrinal truth is often also a baffling demand on supposedly Semitic groups like the Chistiya Sufis, Ismailis and other such sects. Nonetheless all claimants for religious freedom have had to learn to reformulate their claims along the lines of doctrinal truth as demanded by the Indian model of constitutional toleration thereby occluding the description of important aspects of Indian social life.

In Chapter 2 I also demonstrated that the occlusion produced by the institutional form in which religious freedoms are protected is reinforced by the practice of Indian equality jurisprudence and the conceptions of community on which it is based. Thus elaborating the constitutional rights granted to the ‘scheduled castes’, ‘scheduled tribes’, ‘other backward

classes' and 'minorities', I demonstrated the significance of a reformulated doctrinal conception of the Hindu religion to maintain the intelligibility of each of these constitutional groups.

Noting in Chapter 3 that the existing scholarship and especially the normative approaches to the secular State did not provide a satisfactory explanation of the reforming disposition of the constitutional secularism in India I proceeded to outline a synoptic genealogy of this institutional scheme. In Chapter 4 I traced the genealogy of the secular State in India to the institution and operation of normative toleration in India by the British colonial government and their mischaracterisation of Indian religious traditions as founded in doctrines or creeds. I argue that this misunderstanding is at the roots of the process by which Indian religious traditions were reformulated as they passed through the institutions of government and argued my case through the case of the abolition of Sati and the making of Hindu Law.

In Chapter 5 I noted that the colonial history of toleration is closely related to the manner in which reformulated religious identities were incorporated into another and perhaps more explicitly stated project of reform – the making of modern Indian politics and nationhood whose institutional history traces back at least to the Morley-Minto reforms of 1909. This project envisioned that India would have to be tutored in the art of self government to overcome the supposed irreconcilable 'interests' that comprised Indian society. These irreconcilable interests, religion being one such interest, prevented the development of a unified national polity. The fragmented 'interests' of Indian society was later debated as the problem of 'minority rights' and formed the backdrop to the constitutional settlement in the independent Indian republic. Though the Indian Constitution reworked the politics of interests toward the amelioration of backwardness, I have argued that the rights granted to the Scheduled Castes, Other Backward Classes, and Minorities continue to mobilise these groups as reformulated religious identities with associated interests.

Thus I have argued in this thesis that the reforming or pedagogical character of the secular State in India is produced by the histories of toleration as it was drawn into the government of religious identities in modern Indian politics. However, even though the secular State

was envisioned a project of reform and pedagogy, I have argued that it functioned more like a discursive veil that screens off Indian social experience from the task of generating solutions to legal and institutional problems. The practice of equality jurisprudence in India and my description of the Ayodhya case are examples of this broader problem. Thus in Chapter 6 I have drawn from the Ayodhya case to suggest that the task awaiting future research on the Indian secular State in particular and of its constitutional theory in general is that of generating descriptions of Indian government that draw on Indian practices in ways that are not blinded by the perspective of secular reform.

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